Winter Vol. 75 No. 4 (2024)

NORTHERN IRELAND

LEGAL QUARTERLY

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ISSN 2514-4936 (online) 0029-3105 (print)

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NORTHERN IRELAND
LEGAL QUARTERLY

Winter Vol. 75 No. 4 (2024)

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Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 659–689
Articles DOI: 10.53386/nilq.v75i4.1129

Time for a reparations programme for those bereaved during the Troubles?

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ABSTRACT

Compensation schemes for criminal injuries have been practised in numerous countries for over 60 years. Northern Ireland in 1968 introduced a criminal injury compensation scheme to ensure that victims were not left with the burden of the harm and loss caused by criminal acts. However, with the onset of the 'Troubles' in 1969 and the deaths of thousands of people, the scheme was inadequate in responding to protracted violence that left many people unemployed or with multiple casualties in their family. This article outlines some of the findings of archival research on compensation claims during the height of the Troubles. It argues that basing the compensation scheme on income and dependence of a deceased loved one caused arbitrary amounts being paid to those killed in the same incident or in the same family. It also had sharp gender dimensions that discriminated against women and girls as both claimants and for their loved ones when they were killed. This article suggests that, to redress the inadequacies of the compensation scheme during the Troubles for those who were killed, a bereavement payment scheme needs to be established and it outlines some considerations on who would be eligible.

Keywords: bereavement; compensation; Northern Ireland; legacy; Troubles; reparations; complex victims.

INTRODUCTION

Twenty-five years on from the Good Friday Agreement, dealing with what happened, who was responsible, and how to tackle the consequences of the 'Troubles' continues to loom large in Northern Ireland. Despite the United Kingdom (UK) Government passing legislation to 'address the legacy of the Northern Ireland Troubles and promote reconciliation' through the establishment of an 'Independent Commission for Reconciliation and Information Recovery',[1] it has been fiercely opposed by victim groups and local politicians. It has been also

1 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, hereafter referred to as the 'Legacy Act'.

censured by leading human rights experts at the United Nations (UN) who, during the Act's progression through Parliament, said it will:

> thwart victims' right to truth and justice, undermine the country's rule of law, and place the United Kingdom in flagrant contravention of its international human rights obligations .... breach the Good Friday Agreement ... [this] can significantly undermine the Troubles-related peace process and set a damaging and concerning example for other countries coming out of conflict.[2]

The UK Government has stated that the Act will be compliant with the European Convention on Human Rights, given the discretion afforded states in investigating the past under the rubric of facilitating truth recovery and reconciliation.[3] Despite this, in January 2024 the Irish Government lodged an interstate application against the UK before the European Court of Human Rights (ECtHR) on the basis of the Legacy Act violating articles 2, 3, 6, 13 and 14 of the Convention.

Outside of these developments there has been a lack of any progress in providing reparations to those bereaved during the Troubles, despite a number of policy documents suggesting the need to reform the criminal injury compensation scheme and recognition of redress for those seriously injured.[4] Reparations are considered by the UN as one of the five key pillars of transitional justice in dealing with the past, yet they have been absent from debates on dealing with the past.[5] While there have been repeated efforts to secure consensus around the legacy of the Troubles, one of the most comprehensive – the Consultative Group on the Past – saw its final report being rejected outright over the recommendation of a £12,000 recognition payment. As such, reparations have their own toxic legacy that stymies any efforts to progress the issue of dealing with the past. It explains why subsequent efforts to deal with the past – Haas-O'Sullivan 2013, the Stormont House Agreement 2014 and the Legacy Act 2023– make no provision for them, addressing instead efforts to deal with truth and justice. Only the separate advocacy of injured victims for over 20 years saw the Victims' Payments Regulations 2020 established to provide them with a monthly compensatory pension, but nothing for other

2 'UK: flawed Northern Ireland "Troubles" Bill flagrantly contravenes rights obligations, say UN experts' (OHCHR 15 December 2022).

3 See 'Northern Ireland Troubles (Legacy and Reconciliation) Bill: European Convention on Human Rights Memorandum' (NIO 17 May 2022).

4 See Kenneth Bloomfield, *We Will Remember Them* (NIO 1998); and Kenneth Bloomfield et al, *Report of the Review of Criminal Injuries Compensation in Northern Ireland* (HMSO 1999).

5 Fabián Salvioli, 'International legal standards underpinning the pillars of transitional justice', Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/54/24, 10 July 2023.

victims, nor a wider engagement on reparations.[6] Before suggesting we need a reparation process for families bereaved during the Troubles, we first need to interrogate what went before and the extent to which it redressed victims' harm.

This journal in 1976 included a special issue on compensation for criminal injuries in Northern Ireland by Desmond Greer and Valerie Mitchell. It was a comprehensive analysis of the Criminal Injuries to Persons (Compensation) Act 1968 (1968 Act), which had been introduced to reflect legal developments in England, Wales and New Zealand to improve the economic plight of crime victims. While the 1968 Act was introduced before the onset of the worst period of violence, Greer and Mitchell found that their extensive examination was important as the scheme 'assum[ed] a role and an importance which was not envisaged when it was enacted' that would be of use to lawyers in the province and in other jurisdictions.[7] Others like David Miers also wrote in the *Quarterly* during this period of the Troubles on the issue of a victim contributing to their harm under the scheme and found that the scheme produced nonsensical and perhaps unethical outcomes to exclude individuals who got caught up in violence, even if they had experienced unlawful force, rather than their illegal acts excluding or reducing their compensation.[8] These commentators were looking from the outside-in on how compensation under the 1968 Act manifested through case law. This article takes a different approach, building on these analyses and having access to previously closed records, it paints a more comprehensive internal picture of how the scheme worked in practice.

Compensation has a long history on the island of Ireland, going back well over a thousand years as a means to resolve grievances.[9] Changes in the late 1960s sought to bring Northern Ireland more into line with emerging good practices of compensation for criminal injuries in New Zealand and England and Wales through state-funded statutory compensation schemes. However, with the onset of the Troubles, these rules soon became inadequate and were not fit for purpose for dealing with sustained and widespread political violence. Within the first few

6 See Paul Gallagher, *New Social Movement Theory and the Reparations Movement in Northern Ireland: The Case of the WAVE Injured Group and its Campaign for Recognition* (PhD thesis, Queen's University Belfast 2022); Luke Moffett, 'Struggling for reparations in Northern Ireland' in Clara Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2020) 678.

7 Desmond Greer and Valerie Mitchell, *Compensation for Criminal Injuries to Persons in Northern Ireland* (Northern Ireland Legal Quarterly 1976) vii.

8 David Miers, 'Compensation and the victim's contribution to his injury' (1973) 24(4) Northern Ireland Legal Quarterly 533–537.

9 See Desmond Greer, *Compensation for Criminal Injury* (SLS 1990).

years of the Troubles, the courts were inundated with claims, peaking at over 500 per week, leading to delays and overburdening the judicial system.[10] As a result, new laws were introduced in 1977 (amended in part in 1982) and 1988 to improve the scheme and deal with the volume of cases. A minimum bereaved payment was guaranteed to widows only in 1977,[11] and to parents of minors in 1988.[12] However, it was not until 2002, following Kenneth Bloomfield's critical review of compensation provision in Northern Ireland, that a bereavement support payment was introduced for relatives of all killed victims.[13] Importantly, all these provisions were for victims who died after these dates, so the finality of awards meant that families of most victims killed during the Troubles (1966–1976) were ineligible for a bereavement payment.

This article highlights some of the findings of our longer report on the issue,[14] but situates it in the legal analysis of the 1968 compensation scheme. This raises two issues in analysing the 1968 scheme: the passage of time; and compensation during ongoing violations. With the first of these, looking to the past to find solutions in the present has to be critically appraised in light of what Anne Orford finds: that lawyers 'turn to history' to find some evident truth to their own argument, assuming that historical accounts are neutral and objective.[15] Discussing compensation from effectively 50 years ago needs to avoid presentism, both in terms of the value of compensation awards and how harm was understood. Second, much of the literature on reparations for countries transitioning from violent regimes or conflict to democracy and peace focuses on new institutions and mechanisms established in the aftermath. Domestic reparation programmes are often established in transitional societies as a means to comprehensively address victims'

10 HIA/MS/3558. In comparison in 2021/2022 there were in total 3707 compensation cases (71 per week) and 4266 cases (82 per week average) in 2022/2023. See Department of Justice, Annual Report and Accounts for the Year Ending 31 March 2022, 136, and Annual Report and Accounts for the Year Ending 31 March 2023 Report 2023, 144.

11 Art 8 of the 1977 Order (amended in 1982 and 1988) included a discretionary payment for bereaved spouses and children of £5000 and £500 respectively for those who died before 10 December 1981, or £10,000 and £1000 for those who died after this date.

12 Arts 3(3)(b) and 9(3)(b), Criminal Injuries (Compensation) (Northern Ireland) Order 1988.

13 Art 4 (2)(c), Criminal Injuries Compensation (Northern Ireland) Order 2002, based on the recommendation of Bloomfield et al (n 4 above).

14 See Luke Moffett and Kevin Hearty, *More than a Number* (RRV Research Report 2023).

15 See Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

needs, rather than such claims inundating the legal system.[16] This reflects that during ongoing insecurity and conflict which characterised much of the period of the 1968 scheme's operation, reparations were often nominal amounts, with more comprehensive efforts at the end of hostilities. This is a broader gap in the field where there has been little analysis of redressing harm in the face of ongoing violence.[17]

This article begins with a background on the compensation scheme under the 1968 Act, before discussing in more depth the process of claiming compensation by bereaved families of those killed during the early years of the Troubles. The second section delves into the dataset by unpicking the practice of compensation for criminal injuries during the Troubles, looking in particular at how amounts were determined based on dependency and income, which in turn had a detrimental impact on women and girls who were killed. This gender dimension is also explored in relation to widows of service personnel and as women being the main claimants for the death of male loved ones. A final aspect considered in this section is the thorny issue of complex victims, that is those individuals who were responsible for victimising others, but were killed themselves. The final section looks at a way forward by suggesting a bereavement payment scheme and considering who would be eligible so as to complement the current injury compensation scheme for those disabled as a result of the Troubles.

THE CRIMINAL INJURIES TO PERSONS (COMPENSATION) ACT 1968

Compensation for injuries caused to persons at the outset of the Troubles/conflict in and around Northern Ireland was mainly dealt with through the 1968 Criminal Injuries (Compensation) Act. There was no special body created to address deaths and injuries related to the violence that became known as the Troubles. This sits in contrast to previous experiences. A special commission was established to deal with the war of independence and civil war in Ireland as well as special financial support to address the '1920–1922 Troubles' in Northern Ireland, given the scale of claims which overwhelmed county councils and the difficulties of judges to award compensation for deaths linked to insurrection and war, rather than crime.[18] In relation to the Irish

16 See Luke Moffett, *Reparations and War* (Oxford University Press 2023).

17 See Helga Binningsbø, Bård Drange and Cyanne Loyle, 'Justice now and later: how measures taken to address wrongdoings during armed conflict affect postconflict justice' (2023) 17(2) International Journal of Transitional Justice 212–232.

18 Greer and Mitchell (n 7 above) 19. See also Gemma Clark, *Everyday Violence in the Irish Civil War* (Cambridge University Press 2016) 23–24.

Republican Army (IRA) border campaign in the 1950s, new legislation was introduced through the Criminal Injuries (Northern Ireland) Acts 1956 and 1957 to address the cross-border nature of attacks and the need for Stormont funding through the Ministry of Home Affairs rather than county councils.[19] Thus, the exceptional nature of the violence required a special scheme or funding to be established to deal with such claims. However, with the Troubles no such exception was ever created, only modified laws, in particular for criminal damage.[20] As Cheryl Lawther has noted, the continuation of the use of ordinary justice mechanisms to deal with the extraordinary scale of political violence of the Troubles meant that the justice meted out was 'selective and incomplete', which in turn 'fed into hierarchal notions of victimhood'.[21] This is apparent with compensation, where the inadequate nature of payments is a continuing source of grievance.

As a means to modernise the criminal injuries scheme, the Northern Ireland Assembly introduced the 1968 Act. The 1968 Act followed on from the 1963 New Zealand Act[22] and a non-statutory scheme in 1964 in England and Wales. The New Zealand scheme was made up of a three-person tribunal and focused exclusively on personal injuries, given that property losses could be covered by insurance schemes.[23] The UK Government established the criminal injuries compensation scheme to ensure that compensation for criminal injuries no longer had to rely on a court claim or *ex gratia* payments but entitled victims to monetary redress.[24] Numerous other jurisdictions have established similar compensation schemes, on the basis of social solidarity with victims and recognition of the violation of their rights as citizens.[25]

In Northern Ireland, the Minister for Home Affairs William Craig introduced the Northern Irish Act as follows:

> It is sometimes complained of the law that it concerns itself more with the criminal than with his victim. Th[is] Bill ... goes some way to redress

19 Greer and Mitchell (n 7 above) 21.

20 See Desmond Greer and Valerie Mitchell, *Compensation for Criminal Damage* (SLS 1982); and Clive Walker, 'Compensation and financial redress for victims of terrorism' in Javier Argomaniz and Orla Lynch (eds), *International Perspectives on Terrorist Victimisation* (Palgrave Macmillan 2015) 101–123.

21 Cheryl Lawther, 'Criminal justice, truth recovery and dealing with the past in Northern Ireland' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart 2015).

22 Under the Criminal Injuries Compensation Act 1963.

23 See B J Cameron, 'The New Zealand Criminal Compensation Act, 1963' (1965) 16(1) University of Toronto Law Journal 177–180.

24 See Mary Baber, Criminal Injuries Compensation Research Paper 95/64 (House of Commons Library 22 May 1995); and Greer and Mitchell (n 7 above) 22.

25 See David Miers, 'Looking beyond Great Britain: the development of criminal injuries compensation' in S Walklate (ed), *Handbook of Victims and Victimology* (Routledge 2011) 337, 339–340.

> that balance ... Generally the intention is not that the State should be given the same liability for compensation as the offender but that the State should so far as is reasonable ensure that the victim does not suffer undue hardship.[26]

However, unlike the English scheme with its independent compensation body, the 1968 Act extended the jurisdiction of the courts to deal with a wider range of criminal injuries, given their long experience of dealing with such claims under previous Acts.[27] While the 1968 Act was established to deal with 'ordinary' crime in the relative peace of the 1960s in Northern Ireland, in practice it was soon confronted with being the main avenue for victims of the early years of the Troubles to claim compensation, causing it to 'operate in circumstances wholly different from those for which it was designed'.[28] As a result, claims went from £131,876 in 1969–1970, to £7,966,328 in 1975–1976.[29] Bereaved family members could also bring claims through other avenues, such as through civil litigation under the Fatal Accidents (Northern Ireland) Order 1977 (the 1977 Order), but this required the party to evidence that the death was the result of negligence or other tort of another party.[30]

In terms of the process of claiming compensation under the 1968 scheme, individuals who suffered loss as a result of violence caused during the Troubles would have to report it to a police constable or station within 48 hours, provide a notion of intention to the county court of bringing a claim, and make an application within three months of the commission of the crime that gave rise to the injury.[31] Claims for killed family members were primarily made by the victim's spouse on behalf of both themselves and any children as dependants, or where there was no spouse by the personal representatives of the deceased person's estate.[32] The court could only award pecuniary (economically assessable damages, ie income) losses and direct costs (such as funeral expenses) for spouses or dependent relatives of the deceased victim claiming compensation. Pecuniary damages were only available to spouses and dependants, which meant that, for those who were single, children or elderly killed, their compensation was often just funeral costs.

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26 Criminal Injuries to Persons (Compensation) Bill, Order for Second Reading, 31 January 1968, 625.

27 Ibid.

28 Greer and Mitchell (n 7 above) 23.

29 Ibid.

30 We came across cases in the archives where a person killed by an army vehicle was awarded £50,000, sums at the higher end of the criminal injuries compensation scheme as it worked off private law principles of quantification of loss.

31 1968 Act, s 1(3)(e) and s 2(1).

32 Ibid s 2(3).

Compensation was calculated as the annual income of the deceased victim.[33] In other words this placed a cap on the total amount that could be claimed by victims.[34] However, where an 'unlawful assembly' or 'unlawful association'[35] was involved in the injury that caused their death, then the amount of compensation was at the discretion of the judge. Compensation awards were also subject to deductions, where the court could take into account the deceased person's behaviour which 'contributed directly or indirectly, to the criminal injury', as well as pension or benefits paid to the dependants on the death of their loved one.[36] As Greer pointed out, compensation for death under the 1968 Act had to be based strictly on a pecuniary amount, with little to no room to quantify pain and suffering of those bereaved that would change the general rules of common law damages. This slowly changed with subsequent reforms in 1977 and 1988, with solatium amounts recognised on bereavement in a limited number of circumstances.[37]

The 1977 Order placed the court-based claims under the 1968 Act on an administrative footing, requiring all claims to be submitted to the Secretary of State (SoS) and adjudicated by the criminal injuries compensation scheme. One notable change is that the 1977 Order (amended in 1982 and 1988) included a discretionary payment for bereaved spouses and children of £5000 and £500 respectively for those who died before 10 December 1981, or £10,000 and £1000 for those who died after this date.[38] This meant that bereaved families whose compensation for a lost loved one had amounted to less than £5000, or £10,000 after deductions, received a fixed payment from the discretionary fund that brought them up to this level.[39] This discretionary scheme was introduced on 11 January 1977 to counter criticism of the lack of support to widows who were left impoverished.[40] The 1977 Order also sought to reduce the ability of people who witnessed violence to claim for nervous shock by raising the claim threshold to £1,000. Such claims account for over 4000 of the 9500 claims for personal injury in 1976, most for a few hundred pounds each.[41] While we focus on the first few years of the Troubles before the

33 For non-sectarian violence, this was limited to 104 times the weekly industrial earnings applicable at the time of the injury.

34 This claim ceiling was roughly around £2000 per annum in the 1970s.

35 1968 Act, s 4(7).

36 Ibid s 4(6).

37 Desmond Greer, 'The Criminal Injuries (Compensation) (Northern Ireland) Order 1988' (1988) 39(4) Northern Ireland Legal Quarterly 372–393, 383.

38 Art 8, 1977 Order as amended by 1982 NI 22 and 1988 NI 4.

39 In real terms this would amount to £24,500 or £45,000 today.

40 'Diary of events', *Fortnight* (141) (Belfast 4 February 1977).

41 'Claims crackdown!' *Belfast Newsletter* (Belfast 2 July 1977).

1977 Order came into force, subsequent compensation awards were not fundamentally changed. As the next section will discuss, the problem with the scheme rests with it awarding redress on the basis of income and dependency, meaning that many victims, such as those who were single and/or unemployed, received small sums of compensation.

THE PRACTICE OF CRIMINAL INJURY COMPENSATION AND SETTLEMENTS DURING THE EARLY YEARS OF THE TROUBLES

The data in this section is developed from data collected from the Public Records Office of Northern Ireland (PRONI), newspaper archives and the archive of the Compensation Services in the Department of Justice.[42] It followed from a series of interviews conducted with victims, former paramilitaries, government officials and civil society organisations as part of a larger project on reparations in post-conflict societies.[43] From these interviews, a common theme anecdotally emerged of the inadequate compensation paid to those who were bereaved as a result of the Troubles, which encouraged us to dig deeper into the issue. From the data we collected, we were able to identify 1000 cases of compensation awarded under the scheme or settled on its basis, reflecting around 55 per cent of all those killed during the Troubles.[44] In our sample of compensation awards (N=1000), the lowest award during the 1966–1976 period was £43 to cover the funeral costs of a female victim caught up in a bombing. The highest involved two separate incidents in which the families of two businessmen were awarded £100,000 and £103,000, respectively, for their deaths. Of the 1000 victims killed in our sample, the average amount awarded was £6917 and the median £2712.[45] In total, £6,896,699.94 was paid to 983 victims; 14 had their claims rejected and three abandoned their claims. Well over half of our sample (60%), equating to 603 victims, saw their families awarded less than £5000 for their death. Of that number, 363 received less than £1500, with 272 receiving between £3000 and £10,000 (27%), 166 receiving £10,000 to £25,000 (16%), and only 44 (4.4%) receiving more than £25,000. In all, 130 families (13%) received awards of less than £300, effectively to cover funeral expenses. What this means is that the value placed on a life lost was

42 For further details on methodology, see Moffett and Hearty (n 14 above) 9–13.

43 See Reparations, Responsibility and Victimhood in Transitional Societies.

44 As discussed in the final section, there were around 1800 individuals killed during the 1966–1976 period, but there are variations as to the exact amount based on different datasets.

45 Nine awards were of undisclosed amounts.

unequal, and a large proportion of victims were awarded a pittance. The rest of this section concentrates on three key themes that emerge from the analysis of this data: the impact of the income/dependency on similarly situated victims; gender; and complex victims.

Compensation based on income and dependency

Compensation offered during the earliest stages of the Troubles was based on income rather than need. As a result, many who were compensated in the 1970s have been left disadvantaged and deprived today.[46] This income-based approach, as opposed to a need- or harm-based approach, caused large variations in compensation paid per victim. Using income as a measure of compensation reflected the goals of the scheme to ensure that victims were not left economically worse off when the breadwinner of their home was killed, yet it left victims feeling that the amount they received was an 'insult' and 'disgusting'.[47] This dissatisfaction is rooted in the provisions of the criminal injury compensation schemes, which sought to alleviate only the economic loss suffered by a family, not the moral harm or loss of society that follows the death of a loved one. As former interim Commissioner for Victims and Survivors for Northern Ireland (CVSNI), Bertha McDougall noted that up until 1988 compensation was 'only for loss of earnings with no consideration of the emotional pain of bereavement'.[48] As such, this approach is insufficient to satisfy the legal obligation on the state to ensure an adequate remedy for extrajudicial killings during the Troubles. Importantly, under international human rights law, victims of extrajudicial killings have a right to a remedy which includes adequate compensation for both pecuniary (income/property) loss *and* non-pecuniary or moral harm,[49] that is, mental or physical suffering as a result of the violation, including the failure to adequately investigate, which was not provided under the 1968 scheme.

Under the 1968 scheme dependants could claim only for 'pecuniary' losses, that is, loss of income from the victim who died.[50] To illustrate

46 Marie Breen-Smyth, *The Needs of Individuals and their Families Injured as a Result of the Troubles in Northern Ireland* (WAVE Trauma Centre 2012) 177.

47 'Claim by army widow rejected' *Belfast Newsletter* (Belfast 19 May 1975).

48 Bertha McDougall, *Support for Victims and Survivors: Addressing the Human Legacy* (Commissioner for Victims and Survivors for Northern Ireland 2007 (CVSNI)) 48.

49 *Aksoy v Turkey*, App No 21987/93 (ECHR 18 December 1996) [113]; *Tagayeva and Others v Russia*, App No 26562/07 (ECHR 13 April 2017) [649]; *Mapiripán Massacre v Colombia*, Series C No 134 Judgment (IACHR 15 September 2005) [282]; and *Case of Members and Militants of the Patriotic Union v Colombia*, Judgment Series C No 455 (IACHR 27 July 2022) [625].

50 Non-pecuniary losses include grief or loss of society – in these cases the personal loss felt by next of kin due to the absence of the loved one in their lives.

how compensation for pecuniary damage was calculated, Greer and Mitchell refer to the case of William Staunton, a magistrate who was killed in an IRA bomb in 1975.[51] At the time of his death, he would have had an annual income of £11,750. Minus deductions of tax and national insurance contributions and personal expenses left his annual dependency amount at £4567, with £500 awarded to cover tax on the compensation interest; it was then multiplied by 13 (years to his retirement age), giving a total of £52,871.[52] The complex nature of the application process, and indeed of the 1968 Act itself, necessitated the use of solicitors by bereaved relatives bringing such claims, as substantial legal knowledge was required to navigate both the rules in the Act and the corresponding county court rules. Such expenses were paid by the relevant ministry or secretary of state in later compensation schemes.[53] The 1977 Order moved to an administrative scheme that did not require court litigation except on appeal, but the legal process remained complex and did not necessarily militate further victimisation for claimants.[54] Legal advice and experience with the scheme varied. One woman whose husband was shot walking home during a riot, accepted a settlement on the advice of her lawyer rather than risk going to court, fearing that she would receive nothing.[55] The use of settlements also created an unequal power relationship between victims, often coming from working-class backgrounds, whose deaths were caused by the security forces wherein government lawyers intentionally negotiated to reduce payments to a fraction of their worth that at the same time avoided public reputational damage to the armed forces and scrutiny by the courts.[56]

Basing compensation on income had a divisive impact among victims, with inconsistencies in the levels awarded leading to a certain degree of resentment among those who received less than others.[57] Differences in the perceived material worth of certain lives meant that material hierarchies of victims emerged. This experience was felt by those whose relatives were killed in the same incident, similar incidents, and even in incidents greatly separated in time, as in the case of one

51 *Staunton v Secretary of State for Northern Ireland*, Unreported Judgment 2 May 1975 in Greer and Mitchell (n 7 above) 105–106.

52 Ibid.

53 1968 Act, s 9,

54 Tom Hadden, 'Anyone for compensation?' *Fortnight* (142) (Belfast 18 February 1977) 7.

55 Robbie McKee, 'The father who will not be home to say happy birthday' *Belfast Newsletter* (Belfast 1 December 1976).

56 Northern Ireland Civil Litigation Policy, Ministry of Defence, D/C2/AD/1/4/1D 1975.

57 Susan McKay, *Bear in Mind these Dead* (Faber & Faber 2009) 268.

family which was awarded a few thousand pounds in compensation for the death of their father, but whose cousins received tens of thousands a decade later when their father was also killed

These variations stem from differences in the income of the deceased person, their rank or seniority in their work, and the number of their dependants. With regard to income, compensation was calculated on the basis of what the deceased person would likely earn in the future, with some leeway for inflation. This meant that in certain instances, such as bombings which caused multiple casualties, there were often clear discrepancies in the amount of compensation paid. For instance, in the case of one bombing that had multiple casualties, one victim's family was awarded £90 and another over £15,000.[58] In another bombing, one bereaved family was awarded £44.62, another £9000 and an injured victim £35,000.[59] In relation to the Narrow Water IRA bombing outside of Warrenpoint in 1979, in which 18 soldiers were killed, over £250,000 in compensation was paid out to five of the families, including those of high-ranking officers, after they refused the initial offer of compensation from the Northern Ireland Office (NIO).[60] In contrast, the families of three non-commissioned soldiers killed in a bombing a few years earlier were awarded £8000 in total, including premiums for two children.[61]

Similarly, the families of the nine civilians killed in a large-scale bombing were awarded only £45,000 in total, with two families receiving only £58 and £90 in compensation to cover funeral costs.[62] Likewise, only £51,000 was awarded to eight of the 10 families whose loved ones were killed in the Kingsmill massacre in 1976,[63] whereas the widow of a businessman, kidnapped and killed by the IRA in 1973, was awarded £100,000 by the NIO.[64] The widow of a married man in his twenties who was shot dead was awarded £12,800 (despite the efforts of the NIO to reduce her award to a fraction of this amount on the ground that her weekly expenditure was only £2 to £3 per week; in fact, it was £12 to £15). In the aftermath of that shooting, upon hearing the news of his son's death, the dead man's father had a heart attack and died; as he was retired, his widow was awarded £350. All these discrepancies stem from the valuation of a person's life based on their material worth rather than the emotional, moral and/or social cost of their death for their family. Those from working-class backgrounds

58 County court record LOND/6/3/1/8.
59 County court record LOND/6/3/3/5.
60 '£250,000 for families' *Belfast Telegraph* (Belfast 21 December 1982).
61 County court record TYR/6/5/12.
62 County court record LOND/6/3/1/8-6/3/1/9.
63 'Minibus massacre' *Evening Echo* (Cork 27 November 1976).
64 'Body now identified' *Irish Independent* (Dublin 15 March 1980).

were disadvantaged under an income-based approach, given that, as the Troubles continued, high unemployment ensued, making it difficult for the families of those killed to show that their loved one earned sufficient income to warrant a claim.[65] One interviewee commented that the compensation received by the families of the unemployed amounted to only 'a bit of help with the funeral and that would be about it'.[66]

Children, too, were seen as 'not economically active',[67] leading to offers for derisory amounts in these cases. The parents of three children killed in a high-profile incident in which an IRA getaway car ploughed into the family after the driver had been shot dead by the British Army, for example, were informed that they were only entitled to funeral expenses and not compensation for the deaths.[68] There are also a number of cases involving siblings who were killed in the same incident, but whose families received different amounts of compensation for each. In one shooting in which two brothers were killed, the widow of the one who was married with two young children received over £5000, whereas for his single brother the family received only £112 for his funeral costs.[69] In another case involving two single brothers who were shot dead by unknown assailants, their mother, with whom they were living at the time, received £2800 for both of them. Such cases demonstrate the very unequal and somewhat arbitrary nature of compensation for killings during the Troubles, when the value of life was determined by the deceased's income rather than need or suffering experienced by families from the loss of a loved one.

Under the 1968 Act and 1977 Order, claimants for compensation also had to show that they were dependent[70] on the income of the victim who died in order to be able to claim for losses. Those who were not dependants, such as siblings or parents, could claim only for costs that directly resulted from the victim's death. This meant that only funeral costs would be paid on bereavement of a loved one. For instance, in the case of a Queen's University student shot on the outskirts of Belfast on his way home in 1974, his family were initially awarded £1582, but the court reduced this to funeral costs of £82 only,

65 Interview NI02, April 2018.
66 Interview NI01, April 2018.
67 Ibid.
68 David McKittrick, 'Mother found dead' *Irish Times* (Dublin 22 January 1980).
69 *Belfast Newsletter* (Belfast 27 November 1976).
70 Defined as 'relatives of the victim as were wholly or substantially dependent upon his income at the time of his death', this included those children conceived prior to the death, but born after: art 2(2), 1977 Order; 1968 Act, s 2, primarily stipulates the spouse, with the county court rules allowing other dependants to claim.

on the basis that his parents were not dependent on his income.[71] One army widow was denied compensation on the basis of the judge not finding her sufficiently dependent after nine weeks of marriage, as she still lived with her parents.[72] Small amounts were paid to the next of kin of whole families that were killed in the same incident, such as the wife, husband and baby killed in a loyalist petrol bomb attack on their home, whose next of kin were paid £99 for each of the three, or the couple shot dead in their home in a case of mistaken identity, whose next of kin were paid £135 for them both. There were also substantial variations in family members killed in similar incidents. The family of one victim killed in a bombing in 1972 was awarded £464, another £2012, another £5500 and the fourth victim's family £28,000. Following the abduction and subsequent execution of two civilians suspected of being undercover military intelligence agents, the family of one was awarded £19,519 and the other £92. These differences on income and dependency are particularly acute when it comes to female victims who were killed, underscoring the gendered dimensions of the scheme.

Gender

A gender perspective is important to shed light both on how little value was placed on killed women and girls when awarding compensation and on their dominance as the main claimants, and the power dynamics therein. Catherine O'Rourke and Aisling Swaine found that the criminal injury compensation scheme gave 'less value to the loss of women's lives' due to gender inequalities in earnings.[73] Some women who received compensation for the death of a loved one noted that the amount was 'offensive' and that 'derisory payments had undercut the acknowledgement of loss that compensation was supposed to facilitate'.[74] Pablo de Greiff, the UN Special Rapporteur on Truth, Justice, Reparations and Non-Recurrence, noted in his 2016 report on Northern Ireland that in the aftermath of violence:

> the hardships faced by women, many of whom have raised their families single-handedly with limited resources, have been exacerbated [and] the State has not engaged in a thorough analysis or sustained effort to address the gender-related dimensions of violations and abuses.[75]

71 Chris Thornton, Seamus Kelters, Brian Feeney and David McKittrick, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream 2004) 454.

72 'Claim by army widow rejected' *Belfast Newsletter* (Belfast 19 May 1975).

73 Catherine O'Rourke and Aisling Swaine, 'Gender, violence and reparations in Northern Ireland: a story yet to be told' (2017) 21(9) International Journal of Human Rights 1302–1319, 1307.

74 *Workshop Report: Developing Gender Principles for Dealing with the Legacy of the Past* (Legacy Gender Integration Group 2015) 13–14.

75 A/HRC/34/62/Add 1, 17 November 2016, 78.

Deaths caused during the Troubles had a number of gender dimensions. The vast majority (90.9%) of those killed during the Troubles were male; only 9.1 per cent were female. During our period of study, 1966 to the end of 1976, 89.4 per cent (1611) of those killed were male and 10.6 per cent (191) were female. This imbalance is reflected in a tendency of women to be the main claimants of compensation for the loss of their loved ones. Although women account for just 8.8 per cent of victims killed in our sample, they represent 72 per cent (721) of recipients of compensation.[76] Most of these were widows with children, but some were mothers, sisters or daughters of those killed. Following the killing of a loved one, women were often forced to be the main breadwinners, carers and advocates for redress, often having to forego their own careers and aspirations to look after family members. In our sample, we identified 90 women and girls who were killed during the 1966–1976 period, this accounted for 47 per cent of all women (191) who died during this period of the Troubles. In terms of their status, 86 were civilians, two were members of the Ulster Defence Regiment (UDR), one was a police constable and one a member of Cumann na mBan. Twenty of the 90 females were under the age of 18 at the time of their death. In only 11 of these 90 cases did the families of the women killed receive more than £5000, with £13,000[77] and £25,000[78] being the highest amounts awarded. More than half of the 90 (58%, N=52) were awarded less than £1000, giving an average of £1742, less than a third of the average for all victims killed during the 1966–1976 period (£6917).

There were further gender dimensions in the compensation process. Women were often discriminated against in terms of both the process itself and the law. In some cases this was compounded by the insensitive attitude adopted by judges in compensation hearings. For instance, in one compensation hearing, a widowed mother of 12 children was told that, because her husband had been on sick benefit when he was killed, she was now actually one shilling a week better off on a widow's state pension. The woman was subsequently sent away with no payment.[79] One interviewee told us that the judge in

76 146 were the fathers, sons, brother or uncle as personal representatives of the deceased's estate. 133 were unknown.

77 The victim was in the UDR – the larger award reflects that £2000 was for her mother who depended in part on her, with the rest to her husband, who was present during the incident and her death shortly afterwards, so it is likely this amount reflected his personal harm. The victim's father died of a heart attack a few days later.

78 The victim had a well-paid office job.

79 Relatives for Justice, *Submission to Special Rapporteur of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo De Greiff November 2015* (2015) 39.

their case had told their mother that she now had 'one less mouth to feed' since the death of the interviewee's father, and therefore, in the eyes of the court, the family were 'financially no worse off'.[80] These deductions were viewed as justifiable under the law, which held that the state should 'not provide an income which is in effect higher than the victim (or his dependants) enjoyed before the injury' so as to prevent compensation from duplicating the cost to public funds.[81] This income-focused approach failed to compensate for the harm caused to families. The undervaluing of female victims was often compounded by the sexist approach taken by judges in compensation hearings involving widows. A notable example of this approach is that of a judge who, having told a claimant that she was a young, attractive woman who could marry again, awarded her a small amount in compensation.[82] There were few case decisions or transcripts in our data, but the awarding of small amounts in claims involving either women who were killed or those who were young widows is apparent, especially with war widows.

The sexism of individual judges was not the only source of the discrimination bereaved wives experienced. Consideration of a widow's prospects of remarriage was explicitly stipulated under the law when calculating compensation. Moreover, unless their husbands had been in the security forces, many women were unlikely to receive a widow's pension. For the families of unmarried or single mothers who were killed, they typically received very little in compensation. In one case the family of a single mother in her twenties who was killed in a bombing was only awarded funeral costs. In another case, involving a single mother who was tortured to death by female members of the Ulster Defence Association (UDA), the family only received £149. As her daughter explained years later, 'because I didn't apply for compensation at the time there is no requirement for the government to pay out. But I was only a child.'[83] In other cases for unmarried mothers, them being ineligible meant that they could only show that their child was a dependant of their deceased father, such as a 20-year-old man who was killed in a bombing of a bar in 1972, whose son was born four months after his death and was awarded only £1250.[84]

Common law spouses of those who were killed are another group of victims who were denied compensation until the 1988 Order. There are at least 20 cases of cohabiting partners and their children being denied

80 Interview NI05.

81 Desmond Greer, *Compensation for Criminal Injury* (SLS 1990) 177.

82 McKay (n 57 above) 69.

83 Ciarán Barnes, 'I heard mum beg for mercy' *Sunday Life* (Belfast 7 February 2010).

84 'Illegitimate child gets £1,250' *Irish Press* (Dublin 16 November 1973).

compensation because the 1968 Act and the 1977 Order stipulated that only married spouses could claim.[85] By way of example, the cohabiting partner of a victim who was shot dead by the UDA during the loyalist workers strike in 1977, who had lived with him for seven years and raised their children, had her claim for compensation denied because they were unmarried.[86] In another case, the NIO paid compensation to the two sons of a businessman who was shot by the IRA during a one-day visit to Northern Ireland, but not to his partner, on the grounds that, as a common law wife, she was not entitled to it, despite having lived with him for 11 years.[87] This was the position until the 1988 Order, which was expanded to include cohabitees.[88]

There is a perception that because members of the army fought for the state their widows would be well looked after, and from a civilian perspective, their war pension looked better compared to what little support civilians received. However, in reality the picture is more complex, with many war widows, particularly in the early years of the Troubles, being inadequately compensated for their loss. Although the 1968 Act introduced a provision intended to compensate Royal Ulster Constabulary (RUC) members injured in rioting, it was also open to widows of British soldiers.[89] This was one source of financial support available to widows of British soldiers killed in action, but often their awards were reduced due to their widow's pension,[90] or else they withdrew their claims on legal advice in anticipation of such an outcome. In terms of both their pension and any compensation to which they were entitled, the amount of money available to and paid out to widows of British soldiers depended on their husband's length of service and rank.[91] The introduction of the 1977 Order was intended in part to address how 'collateral benefits' impacted on the compensation awarded to the families of security force members and the perceived inadequacy of compensation payments in these cases.[92] It subsequently allowed for 'discretionary payments' to all spouses, whether civilian or security forces, that would 'top-up' the award otherwise payable under the Order.[93] In contrast to civilian victims, the plight of war widows was

85 'Their men, shot dead, women get no compensation' *Irish Independent* (Dublin 3 July 1975); 1968 Act, s 2(3); and 1977 Order, art 4.

86 Ibid.

87 '£80,000 for sons of victim' *Irish Independent* (Dublin 21 December 1982).

88 1968 Act, s 2(2).

89 1968 Act, s 11(1)(b).

90 Of the first 50 soldiers killed in Northern Ireland, only seven qualified for a pension as most were under the age of 28 when they died.

91 Christopher Sweeney, 'Few widows of soldiers get army pensions' 21 December 1972.

92 Greer and Mitchell (n 7 above) 58.

93 1977 Order, art 8.

often raised in Westminster by the families' MPs, including responses by ministers that such widows would be able to benefit from the new discretionary payment.[94]

Another difficulty was that police and army pensions normally ceased when the surviving spouse remarried, entered a civil partnership or began cohabiting as 'husband and wife'. This meant that bereaved spouses whose claims were assessed soon after the death of their husband or wife had their pension deducted from any compensation they were awarded,[95] while those who remarried lost their pension and received little or no compensation. The discretionary award established under the 1977 Order was intended to remedy this, by allowing dozens of police and army widows, particularly those who decided not to claim for compensation because their pension benefit would make it redundant, to apply for £5000. It was only in 2014 through an amendment to the Public Pension Bill that widows of police constables who died in service, who later lost their pension rights by remarrying, had those rights restored.[96] In November 2023, the War Widows Association for bereaved families of British Army personnel, which had campaigned on this issue since 1973, secured a recognition payment for bereaved spouses of up to £87,500 for any discounts applied because they remarried. This reflects both the benefit of having an organisation to advocate for such victims and their ability to tap into the media and politicians to obtain support and policy change.[97] The same cannot be said for those who were seen as undeserving of redress due to their association with armed non-state groups.

Complex victims

Complex victims are those who are responsible for causing harm to others, but also suffered harm themselves.[98] I have written previously in this journal about the challenges of complex victims around a

94 '£6,000 deal for soldier's widow' *Belfast Telegraph* (Belfast 12 July 1977).

95 See reg 32, Royal Ulster Constabulary Pensions Regulations (Northern Ireland) 1973.

96 Public Service Pensions Act (Northern Ireland) 2014, s 30(2). For civilian victims, their pension was not considered.

97 For instance, the *Sunday Times* ran a campaign in the mid-1970s for war widows of the Troubles to have the consideration of their support improved. 'No legal redress for "error killings"' *Belfast Newsletter* (Belfast 10 March 1975).

98 See Luke Moffett, 'Reparations for "guilty victims": navigating complex identities of victim–perpetrators in reparation mechanisms' (2016) 10(1) International Journal of Transitional Justice 146–167; and Kevin Hearty, 'Problematising symbolic reparation: "complex political victims", "dead body politics" and the right to remember' (2020) 29(3) Social and Legal Studies 334–354.

pension for those seriously injured during the Troubles.[99] While that scheme has now been established and such individuals are eligible to apply, subject to a review by a panel, we did not back then have a clear picture of compensation practices for such individuals during the Troubles. What is apparent from our dataset is that out of 276 deceased individuals who were members of a paramilitary group and were killed during the 1966–1976 period of the Troubles, 61 of them saw their families receive some form of compensation.[100] More than £200,000 was paid to the families of 56 individuals, who on average received £3392. The other five claims were dismissed or abandoned. Twenty-eight families were compensated less than £3000 and seven were compensated more than £10,000, with two families receiving £20,000 and £25,000 respectively. Both of these higher awards were made to the families of individuals who were killed either walking home or in their workplace and whose names were added to IRA rolls of honour only a few years later.

Under the 1968 Act, criminal injuries compensation schemes designated certain victims killed during the Troubles as 'uncompensable' by excluding them from the schemes or reducing their award.[101] From early in the Troubles, compensation was often reduced or withheld depending on the action and circumstances of the victim, including being a member of an associated proscribed organisation or near a riot at the time of their death or injury.[102] Judges were willing to reduce and refuse compensation in cases where state lawyers alleged that the victim was involved in riotous behaviour or political violence. For instance, in the *McDaid* case, the claimant was a spectator caught up in a riot in Derry in 1969 that resulted in him being shot in the back and seriously injured as he ran away. Judge McGonigle acknowledged that the shooting of the claimant was 'unlawful and criminal', but it was unclear who the shooter was and, although the claimant was caught up in the rioting, rather than being an active participant which would have refused the claim, he reduced

99 See Luke Moffett, 'A pension for injured victims of the Troubles: reparations or reifying victim hierarchy' (2015) 66 Northern Ireland Legal Quarterly 297–319.

100 Of these, 25 were members of the Provisional IRA, five were members of the Official IRA, two were members of the INLA, seven were members of the UVF and 22 were members of the UDA. In total there were 617 civilians: 80 members of the police, 173 British soldiers and 53 UDR, with 16 statuses contested or unknown.

101 Miers (n 25 above). The 1968 Act, s 1(2), allowed the court to 'have regard to all such circumstances as it considers relevant and, in particular, to any provocative or negligent behaviour of the victim which it is satisfied contributed, directly or indirectly, to his injury or death'.

102 Miers (n 8 above).

the award by a third.[103] Because the 1968 Act was aimed only at criminal offences, the families of those killed in accidents or through negligence had little recourse beyond going through the courts to seek a legal remedy.[104] This had implications for the compensation paid for victims of accidental shootings, such as the soldier accidentally shot by the RUC, whose widow was awarded only £1600.[105] One British soldier who was mistaken for a sniper by another soldier had his claim dismissed under the 1968 scheme.

Some of the deceased in these cases were involved in active gun battles, while others were killed outside their homes as part of feuds or assassination campaigns by other paramilitary groups. While the amounts awarded were lower than those awarded for civilian deaths, they were higher than simply funeral costs, which at the time were usually between £45 and £150. This would suggest that the compensation awarded to the families of killed paramilitary members was less than what their income would have been, but more than the expense of a funeral. This is consistent with the 1968 Act, which allowed compensation to be deducted on the basis of the victim's negligence or provocation.[106] One family was awarded only £75 in compensation for the loss of their husband and father who blew himself up while transporting a bomb. The father of a man involved in a riot, who was unarmed when he was shot at point-blank range by a soldier while trying to take a helmet that another soldier had dropped, was awarded £415. In reaching his decision, Justice Gibson placed 'blame equally between the victim and the soldier who shot him' on the grounds that the victim was responsible for contributory negligence.[107] Under human rights law, the use of lethal force to stop a person taking a helmet would be considered disproportionate.[108] Moreover, blaming the victim rather than critically challenging the way lethal force was governed and acknowledging the consequences for the victim and their family diminishes the value of the life lost.

The compensation scheme in the face of ongoing political violence was inadequate to redress the ripple effects on families and communities. In one case, a pregnant woman opened the door to an IRA gunman who shot her husband dead; a year later she killed herself after denying in court that he had been a member of a paramilitary group. A personal representative of the woman was later awarded

103 *McDaid v The Ministry of Home Affairs*, Unreported, High Court of Justice in Northern Ireland, 10 May 1973, McGonigle J.

104 Such as through the Fatal Accidents Act (NI) 1959 and the 1977 Order.

105 *Belfast Newsletter* (n 97 above).

106 See also 1977 Order, art 5(2).

107 *Lost Lives* (n 71 above) 75.

108 *Güleç v Turkey*, App No 21593/93, Judgment (ECtHR), 27 July 1998, [71].

£150 for her husband's death. In another case, a family whose mother was killed in a gun battle in 1972 saw her son shot dead in the feud between the Irish National Liberation Army (INLA)/Provisional IRA/Official IRA in 1975 and another son killed as part of the feud a few months later. The family was compensated £122 for the mother, nothing for the first son killed, and £1422 for the second son. By contrast, the families of two civilians killed by British Army gunfire in the same gun battle were awarded £7586.25 and £2700, respectively. When an uncle of the two deceased sons was killed in 1974, his family was awarded £20,000.

There were discrepancies in awards with judges using their discretion to determine whether or not they should compensate those killed, rather than have a strict standard of redress. In the case of an individual who was shot dead at a British Army checkpoint, the judge awarded £2500 to his mother after finding that the soldiers had failed to signal sufficiently that the car should stop, the force used was excessive and the unlawful behaviour of the victim was unconnected to the use of lethal force.[109] In one case, compensation was paid to families to cover the cost of funerals for those who blew themselves up,[110] while in another case a family was awarded £750 for an IRA member who died in a premature bomb explosion. This would go against the principle of *ex turpi causa* that Justice McGonigle highlighted in the *McDaid* case as a means to dismiss such claims. Even if such circumstances of the victim could be taken into account, not all those responsible for victimising others were convicted. The family of a leading loyalist leader who was shot dead outside his home by members of his own organisation was awarded £473; although he was never convicted, it was alleged that he was involved in a number of murders, including the Dublin and Monaghan bombings that killed 34 people and injured over 300 more.

There also were divergences between claims made under the 1968 Act and the 1977 Order. In one case the widow of a member of the UDA who was killed in a drunken loyalist fight was awarded £4750. The family of another UDA member who was shot after getting into a fight with members of the Ulster Volunteer Force (UVF) was awarded £700 because he was single. Similarly, the parents of a UDA member who was beaten to death by loyalists in Long Kesh internment camp were compensated £508 for his death. In another case, the family of a UDA member who was kidnapped, gagged and shot in the head by the IRA was awarded £14,000. This variation reflects differences in the victims' income, number of dependants and, in cases involving fights, the nature of the victim's involvement. However, compensation for

109 *Lost Lives* (n 71 above) 205.

110 One loyalist received £75.

these individuals was not reduced on the basis of their membership of the UDA, as it was not a proscribed terrorist organisation until 1992. The 1977 Order sought to prevent any further members of paramilitary groups from being awarded compensation by giving the SoS discretion to reduce or refuse an award. For instance, a widow whose husband, a member of the UDA/Ulster Freedom Fighters (UFF), was shot dead by the IRA, had her compensation reduced from £6000 to £5000 because he was a member of such an organisation, even though it was not then proscribed. The widow of another senior UDA/UFF commander who was shot dead by his own organisation was only awarded funeral costs of £135.[111] In some cases it was not until after compensation was awarded that the deceased person's membership in a paramilitary group became apparent. In one case an IRA commemoration was organised locally for a man whose widow had been awarded £20,000 a couple of years earlier, leading some local unionist politicians to question his compensation award.[112]

As a result of this condemnation of killed paramilitary members being included in the scheme, the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 expressly prohibited past or present members of proscribed organisations from receiving compensation, including their bereaved family members.[113] The provision gave the Northern Ireland SoS the discretionary power to reduce or refuse compensation to which an applicant was otherwise entitled.[114] The prohibition excluded anyone who had been involved in an illegal organisation 'at any time whatsoever' from receiving compensation. This meant that it disqualified anyone convicted of a schedule offence, even though they were unlawfully killed in circumstances not related to their paramilitary activity. By way of illustration, the family of a man shot dead by the IRA was refused compensation because the victim had previously been convicted of membership of Na Fianna Eireann – the

111 'UDA man's widow has award cut' *Irish Press* (Dublin 20 April 1977).

112 '£20,000 to murdered man's widow queried' *Fermanagh Herald* (Enniskillen 24 April 1976).

113 Greer and Mitchell (n 7 above) 96.

114 Art 6(3) of the 1977 Order prevents compensation for any person who has been engaged 'at any time whatsoever' in acts of 'terrorism' from obtaining compensation from a criminal injury, whether or not their membership or participation in 'terrorism' contributed to their injury. Art 8(4) gave the SoS discretion to pay compensation to such a person 'if he considers it to be in the public interest to do so'. Art 3(2)(d) further gave the SoS the power to withhold compensation where the victim did not fully cooperate with the police to help identify and apprehend the assailant. This would prove to be particularly problematic in a context of political violence where victims may not have had the requisite degree of trust in criminal justice agencies necessary for cooperation or where victims may have been threatened or otherwise intimidated into withholding cooperation.

IRA youth wing – when he was 16. Although the family maintained that the victim was not connected to any illegal organisation at the time of his death, the fact that he had been previously kneecapped in a punishment shooting by the IRA further worked against them.[115] This is the difficult nature of compensation in cases of complex victims, where the reliability of evidence used to deny compensation is questionable, given the harm suffered by their loved ones. This is further problematised by the use of internment and the unsafe nature of some convictions, which have been overturned in recent years through the Criminal Cases Review Commission. As Kenneth Bloomfield noted in his 1999 review, to exclude or reduce compensation in such cases would be to expose the dependants of any such victim to 'long-term economic hardship' through no fault of their own.[116] Denying compensation in cases where a victim had indeed been engaged in violence was, as David Miers suggested, fraught with the danger of penalising dependants for the 'sins of their fathers'.[117] This was a practice throughout the Troubles.

In recent news coverage, a woman whose husband was shot dead as part of an INLA feud in 1996 was left to raise her 11-month old twins alone. She was quoted as saying that it had had a 'profound' impact on her that had left her 'struggling' financially for many years and without a pension.[118] Indeed, the most recent Victims Commissioner, as his parting gift from office, released legal advice to advance a payment for those bereaved noting its 'contentious' nature and that:

> [t]here will be some who find it difficult to accept the idea that all bereaved families should be included, regardless of who their deceased loved one was. I fully understand this challenge, but I do see the value of a recognition payment to those suggested in this paper in promoting reconciliation.[119]

Jim Allister, Member of the Legislative Assembly, blithely derided the Victims Commissioner's recommendation of a payment to all those bereaved as a 'provo pay day for terrorist relatives',[120] reflecting that the politics of victimhood have not matured since the rejection of the Consultative Group on the Past's recognition payment in 2009. Such

115 'Family of murdered man denied compensation' *Fermanagh Herald* (Enniskillen 19 April 1980) 13.

116 Ibid.

117 Miers (n 8 above).

118 Allan Preston, 'Murdered INLA man's family call for victims' payment' *Irish News* (Belfast 4 January 2024).

119 'Advice to government on provision of a bereavement payment scheme and services for people bereaved as a result of the Troubles/conflict' (CVSNI December 2023) 3.

120 Preston (n 118 above).

kneejerk reactions only stymie all bereaved victims' rights for a few soundbites for the daily media cycle. While it may be justified to reduce the amount of compensation for someone for the harm they caused to others, for bereaved families the loss of a loved one should not deny them recognition for and redress of their loss. International human rights law recognises that, where a person suffers a gross violation of human rights, their character or background cannot justify they or their next-of-kin being discriminated against in being denied a right to reparations.[121]

Although the criminal injuries compensation scheme could reduce or deny compensation for bereaved family members, some victims made claims not only to provide them with some financial security or recompense of expenses, but as the only means to seek disclosure of the facts and to clear the name of their killed family member.[122] As a mechanism for responding to political violence it was a blunt tool in unpicking fact from fiction in what occurred and the circumstances of those killed, as with the large payments made to those who later turned out to be volunteers. While this oversight may seem to be unpalatable to some, compensation should have a fundamental value at its core in providing remedy to those who have had their rights violated. This is not to justify the actions of those who engaged in violence, but to reaffirm the value of human life and dignity that no one should be killed because of their association or background. This grounds what a reparation programme should look like for those bereaved that helps to navigate how a payment scheme for the bereaved would operate, to which we now turn.

A BEREAVEMENT PAYMENT SCHEME

The 2023 Legacy Act puts an end to any ongoing civil litigation upon commencement of the Bill and prevents any future claims, including private claims for injury arising from any conduct during the Troubles. Even where a judge can disapply the limitation period of an Act, it overrules such discretion.[123] Effectively, this means that no future civil litigation can be brought over deaths during the Troubles. Other countries have brought in such laws, but only after a new administrative compensation scheme has been put in place. For instance, Germany's forced labour compensation scheme that ended claims against the German Government and German companies for Nazi-era atrocities

121 Though the amount and form of reparations can differ from civilians – see Moffett (n 98 above).

122 As stated by one widow for her husband shot dead in 1973. '£1,500 for widow of shot man' *Belfast Newsletter* (Belfast 1 June 1979).

123 Legacy Act, s 43.

provided a few thousand euros to each victim who had suffered forced or slave labour.[124] The South African Constitutional Court ruled that a similar cessation of criminal and civil litigation was lawful on balance to facilitate the work of the Truth and Reconciliation Commission which included provisions for reparations to victims. Reflecting on these provisions, Justice Didcott held that the 1995 Promotion of National Unity and Reconciliation Act 'offers some quid pro quo for the loss and establishes the machinery for determining such alternative redress'.[125] The UK 2023 Legacy Act envisages a different approach to dealing with the past, with no redress scheme for bereaved victims. In other situations, the ECtHR has held that, while blanket amnesties are seen as unlawful in international law, conditional amnesties as proposed under the Legacy Act can be permissible if they are part of 'a reconciliation process and/or a form of compensation to the victims'.[126] The foreclosure of avenues to seek redress through civil litigation and the coronial inquest system is unlikely to be human-rights compliant if bereaved victims do not receive some form of compensation and clarification of facts. Any reform of the Legacy Act to make it compliant with the European Convention would likely have to include inquests, investigations and perhaps a bereaved payment scheme to allow recognition of those bereaved who may not benefit from further investigations.

A bereavement payment scheme to redress the inadequacy and discrimination faced by many victims who were bereaved during the Troubles is needed. While there are a number of options of how such a scheme could be achieved, such as increased bereavement payments from the Victims and Survivors Service (£500–£1000 currently), through the current injured scheme under the Victims Payment Board (VPB), or a new body could be established to deliver compensation to those bereaved during the Troubles.[127] The Commission for Victims and Survivors (CVS), based on our dataset and report, recommended that a statutory scheme be established to either award a lump sum or monthly payment to spouse/partner, parent, child and siblings

124 See Edda Kristjansdottir and Barbora Simerova, 'Processing claims for "other personal injury" under the German Forced Labour Compensation Programme' Permanent Court of Arbitration (ed), in *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges (*Oxford University Press 2006) 109–137.

125 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16, [65].

126 *Marguš v Croatia*, App No 4455/10, Judgment, 27 May 2014, [139].

127 For a fuller discussion on this issue, see Moffett and Hearty (n 14 above) 41–59.

bereaved.[128] The CVS has recommended that all those bereaved should receive a payment to acknowledge their loss. This would, according to the CVS, amount to between £129 million and £1.9 billion, depending on the scope of beneficiaries along with the amount and the recurrence of annual payments. The rest of this section discusses such eligibility for all victims.

Determining who is eligible for any reparations in the aftermath of mass violence is always a contested space. A key challenge of a bereavement payment scheme will be identifying those who died as a result of the Troubles. While there are lists of all those who died during the Troubles, the exact number ranges from 3400 to 4000 and the figures contain numerous 'inconsistencies', whether or not accidental and incidental deaths are included, such as traffic accidents.[129] Although these discrepancies make it difficult to identify a comprehensive list, in some ways a bereavement payment scheme would be easier to administer than a scheme for seriously injured victims, who have to provide evidence that their injury has produced a qualifying degree of disablement. In the vast majority of cases, the details of the people killed during the Troubles are well recorded, in comparison to those injured. There is no need to show that a claimant has been disabled or suffered physical or psychological injury; this is assumed based on their relationship with the deceased person. Nor would a claimant for a bereavement payment need to demonstrate that they were in the 'immediate aftermath' of an incident to benefit, as applicants for the Troubles-related disablement payment are required to do. Like compensation bodies in other jurisdictions, a bereavement payment scheme could develop its own registry of victims,[130] based on the open-source databases already mentioned to assist the application process.

Under the criminal injury compensation schemes, compensation was linked to an injury resulting from a criminal offence, an arrest or the prevention of crime. Given the political nature of the violence during the Troubles and violations committed by state actors, this would not be an appropriate standard for a bereavement payment scheme. The VPB links eligibility to a 'Troubles-related incident', which is defined as:

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128 CVSNI, *Advice to Government on Provision of a Bereavement Payment Scheme and Services for People Bereaved as a Result of the Troubles/Conflict* (December 2023).

129 Marie-Therese Fay, Mike Morrissey and Marie Smyth, *Northern Ireland's Troubles: The Human Costs* (Pluto Press 1999) 131. During the 1966–1977 period, McKeown's index finds there were 1750 deaths; Sutton Index includes 1799 deaths; and *Lost Lives* (n 71 above) has 1863 recorded.

130 Jairo Rivas, 'Official victims' registries: a tool for the recognition of human rights violations' (2016) 8(1) Journal of Human Rights Practice 116–127.

> an incident involving an act of violence or force carried out in Ireland, the United Kingdom or anywhere in Europe for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there.[131]

Whether an incident is Troubles-related is for the panel to decide, but the VPB Guidance Note on the issue indicates that such incidents involve an:

> act o[f] violence or force … related to one of three things:
>
> a) the constitutional status of Northern Ireland,
>
> b) political hostility between people in Northern Ireland, or
>
> c) sectarian hostility between people in Northern Ireland.[132]

With the aim of preventing future inquests, the Legacy Act defines a death which 'result[ed] directly from the Troubles' as one which was 'wholly caused by physical injuries or physical illness, or a combination of both, that resulted directly from an act of violence or force' which was itself 'conduct forming part of the Troubles'.[133] The VPB Guidance Note is more specific in this regard, but consideration will be needed as to whether paramilitary attacks styled as punishment for antisocial behaviour which resulted in the victim's death should be included. In such cases, a 'but for' test could be applied, in that the victim would not have been shot but for the existence of paramilitary groups, which exist because of the Troubles. There are also a number of cases in which individuals died indirectly as a result of a Troubles-related incident. There are reportedly 28 individuals who had heart attacks at the time or in the aftermath of a violent incident during the Troubles,[134] three of whom are included in our data. All died within three days of a bombing or shooting, and compensation of £350, £1000 and £1350 was paid to their families. Again the 'but for' test for causation could be relevant here, in the sense they would not have died but for them having been caught up in a violent Troubles-related incident. Relevant medical evidence could be drawn upon to determine the window of time in which this context would be relevant, or the extent to which the personal nature of the incident, such as finding a loved one injured or killed or having their home attacked, is a contributing factor.

131 Northern Ireland (Executive Formation etc) Act 2019, s 10(11).

132 Guidance Note (GN 04/21): Defining a Troubles Related Incident, August 2021.

133 Legacy Act, s 9(9).

134 CAIN archive gives details on 20 of these cases but there are as many as 28 and their families were awarded some compensation. In one case a person died of a heart attack the day after a bombing on their home and was awarded £1000; this case is not included in our sample. See Noel McAdam, 'New push to recognise tragic cases of "forgotten dead" of the Troubles' *Belfast Telegraph* (Belfast 18 July 2017).

In terms of the scope of eligible victims it is also worth considering the territorial reach of such a scheme. A number of individuals were killed outside the UK or were non-UK nationals. In other contexts, Spanish nationals who are victims of terrorist acts abroad are only entitled to economic compensation of 50 per cent if they reside in the country where the terrorist attack occurs or 40 per cent if they do not.[135] Moreover, the Spanish Government pays the difference if the country where the attacks takes place does not provide the victim compensation or at least pays the difference when the award obtained abroad is lower than the Spanish amount.[136]

Many reparations programmes do not require identification of a perpetrator or responsible actor in order for victims to bring claims.[137] Instead, they require victims to evidence that their harm was related to or was a consequence of the armed conflict or political violence. A difficult issue in this regard is the eligibility of those persons who blew themselves up, were lawfully killed in security operations or died on hunger strike. Human rights law provides some guidance on the use of lethal force, but a challenge here is that the use of lethal force strayed into armed-conflict military operations, where the use of ambush rather than a police arrest operation took place. Court cases and inquests have dealt with some of these killings, making determinations on the lawfulness of the force used.[138] Under the 1968 Act scheme, even the families of those who blew themselves up were deemed to have suffered loss and so were awarded some compensation. It is worth considering the purpose of a bereavement scheme in remedying suffering caused by loss during the Troubles and determining the extent to which all who died should be compensated, in particular with regard to complex victims.

Other reparation programmes use the term 'civilian' to distinguish payment made to those who did not take part directly in hostilities.[139]

135 Arts 6(3) and 22, Act on the Recognition and Comprehensive Protection of Victims of Terrorism, Ministerio del Interior, October 2014.

136 Ibid art 22(2).

137 Principle 9, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005, A/RES/60/147; and *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 14 October 2014, A/69/518, para 25.

138 See Conall Mallory, Sean Molloy and Colin Murray, 'Tort, truth recovery and the Northern Ireland Conflict' (2020) 3 European Human Rights Law Review 243-261.

139 Kosovo Law No 04/L-054 Article 3(1)(10) – died from enemy forces or as a 'consequence of the war' from unexploded ordnance; Balochistan Civilian Victims of Terrorism (Relief and Rehabilitation) Act 2014, s 2(b), as not a 'terrorist or a personnel of a law enforcement agency on duty'.

The difficulty with such terms is that the circumstances in which a person was killed remain disputed in a number of cases. There is further guidance in international law, which stipulates that only those who are directly participating in hostilities should be considered legitimate combatants or fighters who can be targeted.[140] That said, human rights law would point to the extrajudicial nature of killings as being unlawful and persons affected as victims of a violation of their substantive right to life, but again this would turn on the facts and circumstances reported and witnessed at the time.

Providing compensation to all bereaved victims does not resolve what some victims see as an injustice, that those who victimised and killed others are being treated as equivalent to innocent civilian victims. As one victim said:

> It's not about money, is right. Whilst I could tell you incidents where people lost their husbands through terrorist atrocities and the pitiful compensation they got for the loss of a life, it was pitiful. My aunt got £5,000 for the loss of her husband and five of a family and was fostering two others. That was it and yet we see terrorists getting 20 times more than that, you know? It's not about the money, it's about the fact of acknowledgment the wrong. But this thing about appeasing terrorism and giving terrorists everything they want …[141]

The potential exclusion of those engaged in rioting, political violence or otherwise injured 'by their own hand' continues to influence discussions around the issue of compensation in Northern Ireland today. While it has shaped the debate around a standard payment to all victims of the conflict as proposed by the Consultative Group on the Past[142] and the discussion around a 'Troubles pension' for the severely injured too,[143] it is clear from the above that the difficulty posed by the issue has long pre-dated these discussions. Through its review on the conviction and circumstances of their injury, the VPB offers a more balanced approach to tackling these issues for injured claimants.[144] The human-rights law position suggests that those not directly participating in hostilities at the time of their death or who were subjected to unlawful use of force should have some form of remedy to acknowledge the violation of their right to life, no matter their character or background.[145]

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140 This language in international humanitarian law is complicated in its application to Northern Ireland, as it did not reach the threshold of intensity for a non-international armed conflict and the UK did not cede to Additional Protocol II until 1998 (there was no territorial control by rebel groups either).

141 Interview NI18.

142 Bill Rolston, 'Dealing with the past in Northern Ireland: the current state of play' (2013) 8 Estudios Irelandes 143–149.

143 Moffett (n 99 above).

144 Reg 6, Victims' Payment Regulations 2020.

145 See Moffett (n 98 above).

The Consultative Group on the Past's recognition payment was scuppered because compensation was offered to all those bereaved. The recent recommendations by the Victims Commissioner for a bereavement payment have been rejected by unionists with the same arguments that it is effectively paying terrorists who intentionally harmed others. While there may be good reasons to distinguish between paying all victims and making reparations to those who have suffered unlawful harm caused by another,[146] in practice and over time it may be difficult to say with certainty that a person was killed while on active service, or while they were a member of a paramilitary organisation or that they were responsible for their own death. It is permissible under human rights law and civil law to make such distinctions, but it may undermine the purpose of such a scheme, which is to encourage reconciliation and acknowledge the human loss caused by the Troubles. A determination panel in a bereavement payment scheme could consider whether in the circumstances the individual was unlawfully killed as a result of a Troubles-related incident. Other discretionary considerations might include whether awarding a payment to the family of a deceased victim would bring the whole scheme into disrepute, for example, when the deceased was a notorious killer. Such an individual, case-by-case approach risks creating discrepancies, whereby the claims of some families may be accepted and those of others rejected based on the determination of a panel.

CONCLUSION

The 1968 Act was established with the good intentions of reducing the burden of crime on victims, but in the face of the political violence of the Troubles it only served to revictimise and degrade many bereaved families. While money can never quantify or fully remedy the harm caused by the killing of a loved one, the trifling amount offered to many victims was an affront and diminished the value of the right to life during the Troubles. These problems stemmed from a bureaucratic quantification of loss through income and dependency that had gendered and class dimensions that were ill-suited to remedying protracted political violence. Although there is much politicking around victimhood and deservedness for compensation in current debates on those who are bereaved, the data supports that dozens of paramilitary members were compensated, and in many ways this reflects that they were unlawfully killed, and their families should have some form of redress. Returning to the issues of assessing justice processes in posterity and during ongoing violence, it is easy to point out the

146 Ibid.

problems in hindsight. It could be said that, given the circumstances, that the courts were able to accommodate hundreds of claims and deal with them within a year or two was a feat in itself, but such procedural quantitative completion belies the attenuated qualitative rendering of justice for thousands of people who had their loved ones murdered.[147]

Lawyers and judges involved in criminal injuries compensation were themselves targeted for being associated with the legal system. Indeed, a number of compensation claims were presided over by judges Rory Conaghan and Martin McBirney, who were both assassinated simultaneously by the IRA in their homes in 1974. As Kieran McEvoy points out, the legal system as an extension of the British Government's armoury was not neutral in the conflict.[148] This is not to justify the reprehensible targeting of the legal profession, but to critically reflect on the system and those in it who followed the law, rather than do justice to victims. This goes beyond the 'largely positivistic outlook on law' shared by the legal profession at the time,[149] which also exhibited the misogynistic and sexist biases that discriminated against women and girls. The legal profession took a reductive approach to not individualise loss and not see the bigger picture of serious violations of human rights being disaggregated through the courts, which was more suited to dealing with interpersonal crime than large-scale political violence. This going through the motions as a means to legally routinise the chaotic violence that characterised Northern Ireland could be seen as a way of normalising the traumatic events that grasped the country. However, the data from our research has highlighted the devastating impact it had on bereaved families, adding insult to loss and undermining their rights to an adequate and effective remedy. This is further thwarted by the 2023 Legacy Act that forecloses all redress avenues for victims. The Act perhaps offers an opportunity now before the European Court to seek progress to creating a bereavement payment scheme to effectively acknowledge and remedy the continuing harm caused by killings during the Troubles.

147 The violence in Northern Ireland never reached the threshold for a non-international armed conflict under international humanitarian law that would provide belligerent immunity for killing, and, even if it had, the majority of people killed were civilians or those not directly taking part in hostilities. Thus the vast majority of deaths were murder, with the exception of those involving self-defence or prevention of crime under common law.

148 Kieran McEvoy, 'What did the lawyers do during the "war"? Neutrality, conflict and the culture of quietism' (2011) 74(3) Modern Law Review 350–384, 379–380.

149 Ibid 381.

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 690–719
Articles DOI: 10.53386/nilq.v75i4.1138

Neurodivergence, autism and the appropriate adult safeguard in police custody

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ABSTRACT

Neurodivergent suspects and defendants may be disadvantaged by the processes and procedures within the criminal justice system. Whilst these disadvantages may emerge at any point, they are particularly pertinent during detention in police custody. The various processes and procedures that suspects are subjected to, in combination with the critical nature of the investigative stage of the criminal process, may be destabilising or detrimental to the interests of the neurodivergent suspect. Focusing on autism, this article examines the difficulties that autistic individuals may face and the ways in which their 'vulnerability' may emerge when engaging with the criminal process. Examining the appropriate adult – a procedural safeguard in police custody – and its implementation, this article provides a robust analysis of the problems faced by autistic suspects, drawing upon, *inter alia*, empirical research. It also provides suggestions for law, policy and practice, serving as a catalyst to critically reflect upon the safeguarding of neurodivergent suspects.

Keywords: autism; neurodivergence; appropriate adults; vulnerability; police custody; fairness; safeguards; criminal process.

INTRODUCTION

There is increasing recognition that neurodivergent suspects and defendants may be disadvantaged by standard criminal justice processes. These disadvantages can exist or emerge at any point of the process, but may be particularly pronounced and impactful at the investigative stage of the criminal process (which, in many cases, is often the only stage that occurs). This is most acutely problematic when

* Thanks to Anna Heenan, Caer Smyth, Emily Kakoulis, Gareth Thomas, the Cardiff Interdisciplinary Network on Disability and the anonymous reviewers for their insightful comments on earlier drafts.

suspects are detained in police custody. Suspects, neurodivergent or not, are almost certain to encounter a range of intrusive and unfamiliar procedures and investigative powers, including but not limited to, the police interview; strip search; and confinement. Whilst general safeguards exist to promote suspects' rights and entitlements and to regulate police powers,[1] there are also specific safeguards – such as the appropriate adult (AA) – intended to promote and protect the rights and entitlements of 'vulnerable' suspects in this context. This is considered vital due to the enhanced risk of mistreatment and wrongful conviction of vulnerable individuals.[2] Whilst there are well-established concerns about the effectiveness of such safeguards generally, there is emerging evidence of specific barriers to fair and effective processes for neurodivergent suspects in custody. However, this remains an underexplored area and one only recently recognised at a policy-making level.[3]

This article extends scholarship in relation to vulnerability and neurodivergence in police custody via a specific focus on a key safeguard (AAs) and its role facilitating access to justice for autistic suspects. It begins by exploring the role of the AA, before proceeding to consider the advantages and limitations of the AA generally and in relation to autistic suspects. By drawing upon, *inter alia*, empirical data from a project on the implementation of the AA safeguard in police custody, it examines whether and to what extent the AA is a suitable form of safeguard for autistic suspects in police custody. Finally, we make recommendations for reform of law, policy and practice with the aim of improving the service provided to autistic suspects and promoting equitable access to justice at this crucial stage of criminal proceedings. Beyond this in-depth analysis, the article aims to act as a catalyst to stimulate (socio-)legal work in neurodivergence.

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1 Primarily, PACE 1984. Similar safeguards exist in Northern Ireland by virtue of the Police and Criminal Evidence NI Order 1989.

2 The term 'vulnerability' can encompass many factors: see R Dehaghani, *Vulnerability in Police Custody: Police Decision-making and the Appropriate Adult Safeguard* (Routledge 2019), although for the purposes of the AA safeguard the definition emanates from PACE Code C: see Home Office, Code C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Home Office 2023) para 3.5.

3 See, eg, CJJI, 'Neurodiversity in the criminal justice system: a review of evidence' (HM Inspectorate of Prisons and HM Inspectorate of Constabulary, Fire and Rescue Services July 2021).

AUTISM, THE CRIMINAL PROCESS, AND POLICE CUSTODY

Any individual drawn into criminal proceedings generally faces significant challenges due to the stressful, complex and specialised nature of such proceedings. These challenges are particularly acute for vulnerable persons;[4] there is a vital and enduring need to ensure fair and effective processes which protect vulnerable individuals from injustice and trauma as a result of involvement in criminal justice processes. In recent years, a particular area of focus in this context has been neurodivergence. Whilst not a set term, neurodivergence commonly describes 'perceived variations seen in cognitive, affectual, and sensory functioning differing from the majority of the general population or "predominant neurotype", more usually known as the "neurotypical" population'.[5] Neurodivergence is not a restrictive medical term but an organic concept subject to ongoing debate; however, it is commonly taken to include a range of neurodevelopmental and cognitive conditions (or differences),[6] such as autism, attention deficit hyperactivity disorder (ADHD), Tourette's, dyslexia, dyspraxia, dyscalculia, bipolar disorder, Down syndrome and dementia.[7]

Nesting within the concept of neurodivergence is autism.[8] Autism is a neurodevelopmental condition typically characterised by impairments in social reciprocal interactions and communication,

4 This is a broad and widely debated term of art but is generally taken to include both vulnerability due to age and vulnerability due to a characteristic (eg physical and mental health needs).

5 H Rosqvist, A Stenning and N Chown, 'Introduction' in H Rosqvist, A Stenning and N Chown (eds), *Neurodiversity Studies: A New Critical Paradigm* (Routledge 2020) 1.

6 See the social model perspective, M Oliver, *Social Work with Disabled People* (Macmillan 1983); R Woods, 'Exploring how the social model of disability can be re-invigorated for autism: in response to Jonathan Levitt' (2017) 32(7) Disability and Society 1090–1095.

7 These conditions often overlap and/or co-occur with mental disorder (discussed later). Perhaps more accurately and problematically, a number of these 'conditions' or characteristics are treated as mental health problems, when they are in fact distinct and separate concepts.

8 'Autism' can be understood interchangeably with autism spectrum disorder and ASC. This article recognises the open and emotive debate about appropriate terminology when discussing autism and acknowledges the importance of ensuring academic freedom of expression in writing about autism. It uses the 'identity first' (eg autistic person) construction. For more, see K Bottema-Beutel, S K Kapp, J N Lester, N J Sasson and B N Hand, 'Avoiding ableist language: suggestions for autism researchers' (2021) 3(1) Autism in Adulthood 18–29.

and restricted, repetitive patterns of interests and behaviour.[9] It also commonly involves a variety of sensory processing differences, such as hyper-reactivity (increased sensitivity) and hypo-reactivity (reduced sensitivity) to particular sensory stimuli.[10] Whilst this is not, statistically speaking, the most prevalent form of neurodivergence,[11] autism has arguably been the subject of more attention within existing literature on criminal justice procedure, policing and law;[12] and within policy and practice (eg autism awareness and autism leads in policing, focus on autism when discussing neurodivergence in the criminal justice system (CJS)), possibly because autistic individuals are more likely to come into contact with the police when compared with the general population, either as a suspect – often owing to police misinterpretation of behaviour – or, in most cases, as a victim of crime.[13]

Whilst autism has typically been described in terms of a spectrum, it is increasingly recognised that (notwithstanding the clinical markers required for diagnosis) autistic individuals have a differential experience related to variable or uneven cognitive development, sometimes described as a 'spiky' profile.[14] Contrary to the stereotypical idea of autistic behaviour and presentation (eg gaze avoidance, being non-verbal), the manner in which an autistic individual experiences the world around them and the way in which this externally presents

9 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 5th edn (APA 2013); see also C Allely and P Cooper, 'Jurors' and judges' evaluation of defendants with autism and the impact on sentencing: a systematic preferred reporting items for systematic reviews and meta-analyses (PRISMA) review of autism spectrum disorder in the courtroom' (2017) 25(1) Journal of Law and Medicine 105–123.

10 L Crane, L Goddard and L Pring, 'Sensory processing in adults with autism spectrum disorders' (2009) 13(3) Autism 215–228.

11 Current statistical data suggests that around one in 100 people are autistic and there are around 700,000 autistic adults and children in the UK, although there is also significant debate about levels of underdiagnosis: National Autistic Society, 'What is autism?'.

12 See, for example, I Dickie, S Reveley and A Dorrity, 'Adults with a diagnosis of autism: personal experiences of engaging with regional criminal justice services' (2019) 4(2) Journal of Applied Psychology and Social Science 52–70; C Holloway, N Munro, J Jackson, S Phillips and D Ropar, 'Exploring the autistic and police perspectives of the custody process through a participative walkthrough' (2020) 97 Research in Developmental Disabilities 103545; C Allely, *Autism Spectrum Disorder in the Criminal Justice System* (Routledge 2022); T Smith, *Autism and Criminal Justice: The Experience of Suspects, Defendants and Offenders in England and Wales* (Routledge 2023).

13 Holloway et al (n 12 above).

14 N Martin and D Milton, 'Supporting the inclusion of autistic children' in G Knowles (ed), *Supporting Inclusive Practice and Ensuring Opportunity is Equal for All* (Routledge 2017) 114.

can vary significantly. Alongside areas of strength, autistic individuals also experience areas of challenge which are likely to by different to neurotypical peers. Autistic people may experience challenges in communicating and interacting with other people due to differences in both communication style and cognitive processing. For example, some autistic people may be entirely non-verbal or have limited speech, whereas others may have excellent language skills, which disguise challenges in understanding non-literal language or non-verbal cues. Autistic people may, despite outward appearances, therefore fail to understand common markers of neurotypical verbal communication, such as the use of abstract concepts and idioms, or sarcasm and metaphorical turns of phrase, without further clarification or the use of more literal, explicit language.

An autistic individual may not display neurotypically expressive empathy due to an 'impaired … ability to appreciate the subjective experiences of others', a concept referred to as 'theory of mind' (ToM).[15] Autistic defendants *may* have problems with ToM, which can mean that they 'act in a certain way because they fail to appreciate what others are likely to be thinking',[16] as opposed to understanding but not caring. The perception may, however, be of someone who is insensitive or aloof. Due to sensory differences commonly associated with autism, an individual may become overwhelmed, distressed or extremely uncomfortable with too little or too much sensory information (eg lights, noises, smells, textures). Autistic people may also engage in repetitive and restrictive behaviour, such as specific behaviours, phrases or thought patterns (which may intensify when placed in a stressful situation).[17] They may closely follow a routine and ensure consistency in food, clothing, travel, and/or social activity, and/or engage in repetitive movements (often referred to as stimming).[18] As such, they may experience significant and impairing anxiety when placed in unfamiliar situations and social events; and may display repetitive behaviour or thoughts (which may intensify when placed in a stressful situation).[19] Autistic individuals may also, in situations causing extreme anxiety and overwhelm, 'melt down' (a state which involves a loss of verbal and physical control) and 'shut down' (which

15 Also referred to as 'mindblindness'. For more, see A V Askham, '"Theory of mind" in autism: a research field reborn' (*Spectrum News* 8 April 2022).

16 P Cooper and C Allely, 'You can't judge a book by its cover: evolving professional responsibilities, liabilities and "judgecraft" when a party has Asperger's syndrome' (2017) 68(1) Northern Ireland Law Quarterly 38–58, 50.

17 National Health Service (NHS), 'What is autism?'.

18 S Kapp, R Steward, L Crane, D Elliott, C Elphick, E Pellicano and G Russell, '"People should be allowed to do what they like": autistic adults' views and experiences of stimming' (2019) 23(7) Autism 1782–1792.

19 NHS (n 17 above).

involves silence or switching-off).[20] Additionally, autism (like other neurodivergent conditions) is associated with cognitive processing and executive function differences, meaning that autistic individuals may process, understand and interpret information in a non-linear manner or focus on different kinds of information to neurotypical peers; this may also mean they require extra time for processing certain kinds of information. Transposed into the context of the criminal justice process, these differences in autistic individuals' communication and behaviour can, without appropriate knowledge, support and adjustments, create various barriers to fair and effective engagement and outcomes.

Research has demonstrated that some behaviours and responses during engagement with police and other legal professionals may be misinterpreted. For example, Lim and others have noted 'the marked similarity between perceived indicators of deception and common Autistic behaviors' (such as gaze avoidance and fidgeting), which can therefore lead autistic individuals to being 'judged as more deceptive than their neurotypical peers when telling the truth'.[21] Autistic individuals may provide too much or insufficient detail in answer to questions, leading to suspicions of evasion;[22] or may interpret information literally, which may be read as disruptive or difficult. An autistic suspect might 'fail to understand questions as intended (despite having a wide, comprehensive and expressive vocabulary)',[23] leading to a misplaced belief that the question *should* be understood by them. Autistic individuals may also present themselves in a manner that deviates from expected behaviour in the context or which contravenes neurotypical norms (eg laughing when discussing the alleged offence, a coping mechanism which does not represent their actual thoughts and feelings).[24] Autistic individuals may not understand or recognise their own misinterpretation of questions,[25] and evidence suggests that police officers and legal professionals are not likely to either.

Considering that neurotypical norms dominate and shape understandings and expectations of behaviours in police custody and other criminal justice environments, autistic individuals may not

20 Ibid.

21 A Lim, R Young and N Brewer, 'Autistic adults may be erroneously perceived as deceptive and lacking credibility' (2021) 52(2) Journal of Autism and Developmental Disorders 490–507.

22 Autistic individuals can have difficulty identifying the relevance of providing (or not providing) information to another as part of dialogue in a particular situation – described by Vermeulen as 'context blindness': P Vermeulen, 'Context blindness in autism spectrum disorder: not using the forest to see the trees as trees' (2015) 30(3) Focus on Autism and Other Developmental Disabilities 182–192.

23 Cooper and Allely (n 16 above) 49.

24 Ibid 50.

25 Ibid 56.

therefore present themselves and their responses in a manner pursuant to their own interests primarily because it does not align with said norms. As such, autistic individuals may be interpreted by criminal justice professionals as untrustworthy, deliberately evading questions, 'playing for time' when being asked a difficult question,[26] or may be interpreted as insensitive to the feelings of others.[27] Indeed, the recent work of Lim et al – one of the first studies of its kind – appears to confirm that autistic individuals are perceived as more deceptive and less credible than neurotypical peers in direct, two-way interactions.[28] Alongside evidence that 'pervasive stereotypes' of deception are commonly held by officers (and other CJS professionals), this presents significant potential for misinterpretation.[29]

However, the evidence suggests that CJS professionals do not have the requisite knowledge and understanding of autism.[30] In 2020, the United Kingdom (UK) Government launched a Criminal Justice Joint Inspection (CJJI) of neurodiversity in the CJS (including autism as one of the more well-recognised neurodivergent conditions), concluding that the system offered 'patchy and inconsistent provision' for neurodivergent individuals, with 'serious gaps, failings, and missed opportunities at every stage of the system'.[31] Whilst the review recognised signs of progress (particularly in relation to autism), it suggests that the CJS remains largely unaffected by many of the insights and recommendations emerging from the research community, and that there remains much to do for autistic individuals to have fair and effective access to justice.[32] Research suggests that training on and knowledge of autism amongst officers in England and Wales has been historically inadequate (though appears to be better than for

26 Ibid 49.

27 Autistic individuals may also have difficulties with pragmatic communication, that is difficulty with understanding and/or responding in appropriate ways in social discourse (for example, use of gestures; personal space; timing; topic selection; non-literal language; and unusual prosody) ibid 50.

28 Ibid.

29 Lim et al (n 21 above) 491. We might also point to a 'core characteristic' of police culture – suspicion – as an important factor in this context: for more, see B Loftus, 'Police occupational culture: classic themes, altered times' (2009) 20(1) Policing and Society 1–20.

30 Holloway et al (n 12 above); Cooper and Allely (n 16 above).

31 CJJI (n 3 above) 4.

32 Department of Health and Social Care and Department of Education, *The National Strategy for Autistic Children Young People and Adults: 2021 to 2026* (HM Stationery Office 2021) s 8.

other neurodivergent conditions).[33] Indeed, Slavny-Cross et al have suggested that the failure to provide adequate access to AAs could be due to the inability of officers to identify autistic people as they enter custody.[34] The training officers do receive is often subsumed into training on mental health (a distinct concept), leading to dilution and confusion and therefore undermining effectiveness.[35]

The challenges are particularly pronounced in police custody. Whilst police custody can be destabilising for any suspect, an autistic suspect may be further destabilised for a number of reasons.[36] Police custody involves significant periods of isolation – typically, suspects can be detained for up to 24 hours without charge,[37] although recent research has estimated that the detention period lasts on average between 11 hours for children and 14 hours for adults.[38] The suspect, whilst not being permitted to interact with friends and family, is often required to interact with various healthcare professionals, an AA, a legal representative, and/or police custody staff. During such interactions, the suspect may be required to speak with multiple people regarding multiple issues and may be asked a range of questions pertaining to health and wellbeing, in addition to being questioned by the police regarding the allegations against them. This therefore combines the denial of access to familiar persons with a significant amount of social communication in a short period, in an unfamiliar environment, with unfamiliar people, something which can be challenging for autistic individuals without appropriate adaptations and support. This could be considered mentally and emotionally exhausting for any suspect, but is likely to be particularly acute for autistic individuals.

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33 Holloway et al (n 12 above); D Hepworth, 'A critical review of current police training and policy for autism spectrum disorder' (2017) 8(4) Journal of Intellectual Disabilities and Offending Behaviour 212–222; N Chown, D Debbaudt, L Beardon, J Scott and K Cossburn, 'Autism and operational policing' in F Volkmar, R Loftin, A Westphal and M Woodbury-Smith, *Handbook of Autism Spectrum Disorder and the Law* (Springer 2021); CJJI (n 3 above).

34 R Slavny-Cross, C Allison, S Griffiths and S Baron-Cohen, 'Autism and the criminal justice system: an analysis of 93 cases' (2022) 15(5) Autism Research 904–914.

35 Hepworth (n 33 above); I Dickie and S Reveley, '"Street" policing and autism: perceptions and preconceptions of police officers when interacting with autistic suspects in the community' in Smith (n 12 above).

36 Generally, see R Dehaghani, 'Interrogating vulnerability: reframing the vulnerable suspect in police custody' (2021) 30(2) Social and Legal Studies 251–271. In relation to autism, see Holloway et al (n 12 above).

37 PACE 1984, s 41.

38 V Kemp, N Carr, H Kent and S Farrall, 'Examining the impact of PACE on the detention and questioning of child suspects' (University of Nottingham 2023) 39. Recent observations in police custody would suggest that this is longer still with many adult suspects detained for close to 24 hours.

Isolation may also have a bearing on the suspect's ability to understand their rights and entitlements, particularly because 'reading in detention … [often] necessitates reading alone'.[39] Autistic individuals who rely on others for communication support may find reading and understanding information incredibly difficult and distressing, particularly if they are to do so without the support of someone they know and trust. Moreover, this particular challenge may be compounded by co-occurring neurodivergence (for example, dyslexia) or an intellectual disability. Police custody may also be destabilising owing to a lack of control. During detention, a suspect's movements and their routine – such as mealtimes, exercise, social interaction, and personal care – are largely controlled by the police. Again, this can be distressing and frustrating for any suspect but it can prove particularly distressing for autistic suspects who may engage in specific, repetitive behaviours and routines, designed to cope with stress and overwhelm, and provide stability, comfort and control. If an autistic suspect is unable to access such mechanisms, they may experience meltdowns or shutdowns which not only harms their wellbeing, but impedes meaningful participation in criminal justice terms. Alternatively, the high stress of detention (without support and control) may lead to an overwhelming desire to leave the custody environment as quickly as possible;[40] this can cause them to agree to anything that would facilitate that – such as declining a lawyer,[41] accepting a caution, or admitting an offence.[42] In short, autistic suspects become 'more vulnerable to adverse outcomes'.[43]

There is also significant uncertainty associated with detention in police custody in relation to the exact nature of the allegations against them and how the investigation will proceed; and they may

39 F Rock, *Communicating Rights: The Language of Arrest and Detention* (Palgrave Macmillan 2007) 109.

40 See generally L Skinns and A Wooff, 'Pain in police detention: a critical point in the "penal painscape"?' (2021) 31(3) Policing and Society 245–262.

41 L Skinns, '"I'm a detainee; get me out of here": predictors of access to custodial legal advice in public and privatized police custody areas in England and Wales' (2009) 49(3) British Journal of Criminology 399–417; V Kemp, 'Digital legal rights for suspects: users' perspectives and PACE safeguards' (University of Nottingham June 2018).

42 See Dehaghani (n 36 above) 254; R Woodbury-Smith and K Dein, 'Autism spectrum disorder (ASD) and unlawful behaviour: where do we go from here?' (2014) 44 Journal of Autism and Developmental Disorders 2738–2741; J Pearse, G Gudjonsson and C Rutter, 'Police interviewing and psychological vulnerabilities: predicting the likelihood of a confession' (1998) 8(1) Journal of Community and Applied Social Science 1–21, which highlights that confessions are the result of 'the interaction of a number of variables' including 'custodial pressure' (at 3).

43 Holloway et al (n 12 above) 2.

not understand legal language or the various processes of detention. The 'booking-in' procedure also includes a range of often intrusive questions and is typically accompanied by intrusive procedures such as the taking of fingerprints, photographs and DNA[44] and potentially strip and intimate searches.[45] Such procedures can be difficult for any suspect but again present particular challenges for autistic suspects who will often have significant sensory differences (for example, hypersensitivity to touch). There are also other specific sensory concerns that arise because of the geography of detention;[46] police custody is a wholly unpleasant environment[47] which often involves strong, unpleasant smells (urine, vomit, faeces, stale blood, (stale) alcohol, body odour and disinfectant), cells are dimly lit, clinical and cold, constructed to minimise the risk of self-harm and suicide, and strip or fluorescent lighting is used throughout the suite (outside of the cells). Custody suites are generally noisy and, depending on time of day, busy.[48] The risk of overload for autistic individuals with sensory sensitivities is acute; there is limited space, little privacy and limited ability to meet and control personal needs (such as food, toileting and feminine hygiene). Individuals may be highly sensitive to noise, light and temperature, all of which are more intense and outside of the control of the suspect. Such issues are compounded when officers lack the necessary knowledge, training, time, resources and (perhaps) empathy to recognise and manage these needs appropriately.[49]

Holloway et al's research has identified the myriad problems that autistic individuals may face in police custody such as unfamiliarity with the environment, lack of space, inability to sleep due to the lighting in the cell and a lack of privacy.[50] Their research also indicated that autistic individuals may feel overwhelmed, may be more concerned than neurotypical peers about the long-term impact of arrest and detention, and may require emotional support throughout and beyond the process. Holloway et al's research also highlighted the anxiety that autistic individuals feel in relation to communication, and that being appropriately informed about the process could reduce anxiety, but that accessible information may be required to achieve this aim.[51] One

44 PACE 1984, ss 61–63.

45 Ibid ss 54–55A.

46 See A Wooff and L Skinns, 'The role of emotion, space and place in police custody in England: towards a geography of police custody' (2017) 20(5) Punishment and Society 562–579.

47 See L Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2010).

48 CJJI (n 3 above) 44. See also Holloway et al (n 12 above) 7.

49 Holloway et al (n 12 above) 9.

50 Ibid 5.

51 Ibid 9.

way to alleviate some of the challenges faced by autistic suspects in police custody is the provision of the AA safeguard.

THE APPROPRIATE ADULT SAFEGUARD

As set out in Code C to the Police and Criminal Evidence Act (PACE) 1984,[52] vulnerable suspects are entitled to an AA during police custody. Vulnerable suspects are defined within Code C as either those below the age of 18 or those who because of a mental health condition or mental disorder[53] (1) may struggle to understand or communicative effectively about the implications of various procedures and the process connected with their arrest and detention, voluntary attendance, or rights and entitlements (and the exercise thereof); (2) do not appear to understand the significance of what they are told, questions asked, or their replies; and/or (3) are prone to becoming confused or unclear about their position, agreeing to suggestions of others without protest or question, or, without knowing or wishing to do so, providing unreliable, misleading or incriminating information or accepting or acting on suggestions from others.[54] In short, a suspect is considered vulnerable if they are a minor or, if an adult, have a mental health condition or mental disorder that results in barriers to communication and information-processing and/or suggestibility or acquiescence. However, if a police officer has reasonable grounds to suspect that the suspect is vulnerable but does not have an identified or diagnosed mental health condition or mental disorder, they can nevertheless

52 PACE 1984 implemented a legislative framework through which to regulate police powers and procedures and safeguard suspects' rights and entitlements. The AA safeguard is not included within the primary legislation; it is outlined in the sub-statutory Code of Practice C (which relates to the detention, treatment and questioning if suspects).

53 Defined as 'any disorder or disability of the mind': see Home Office 2023 (n 2 above), note 1G in combination with the Mental Health Act 1983, s 1(2).

54 Home Office 2023 (n 2 above) para 1.13d. Prior to 2018, adult suspect vulnerability was premised on whether the suspect had a 'mental vulnerability' (difficulty with understanding 'the significance of what is said, of questions or of their replies' due to issues with mental state or capacity; or 'mental disorder' ('any disorder or disability of the mind'): for both, see Home Office, Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers (Home Office 2017), note 1G, in combination with the Mental Health Act 1983, s 1(2). For a discussion and critique of these new provisions, see R Dehaghani, 'Interpreting and reframing the appropriate adult safeguard' (2022) 42(1) Oxford Journal of Legal Studies 187–206; R Dehaghani and C Bath, 'Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C' (2019) 3 Criminal Law Review 213–232.

treat the individual as vulnerable provided that they meet one of the 'functional test' criteria.[55]

It is important to note that, in determining the necessity of an AA, two categories emerge: the former (being a juvenile) which is very clear; and the latter which is open to interpretation by officers, and therefore less clear. Crucially, Code C does not provide officers with much guidance on how to identify vulnerability – rather, it discusses the identification of risk, which is typically focused on reducing the risk of physical harm to the suspect (eg physical illness, suicide, or self-harm) or to others (eg attacks on other detainees or staff),[56] the exclusion of justice risks (eg misleading or wrongful confession) and an inability to meaningfully and effectively participate – whether through active participation, resisting participation (eg answering 'no comment') or avoiding participation (eg remaining silent). As such, the focus of assessing vulnerability is not only dependent to a significant extent on the knowledge, awareness and understanding of individual custody officers (COs), but is skewed away from vulnerability affecting justice-related experiences and outcomes.

Should a suspect be identified as vulnerable and in need of an AA, an AA should be called to attend custody. An AA's role is to provide support, advice and assistance relating to any procedure or practice of Code C or any other code or when the suspect is 'given or asked to provide information or participate in any procedure'.[57] The AA must assist the suspect in communication (and the absence of communication, respecting the suspect's right to silence) with the police and uphold fairness by ensuring that the suspect understands their rights and entitlements whilst also ensuring that rights are protected and respected by the police.[58] The AA must also be present for various procedures where rights and entitlements are engaged such as charge, cautions, warnings in relation to adverse inferences, the taking of samples (ie fingerprints, photographs and DNA), reviews of detention, and the conduct of intimate searches.[59]

Code C permits a range of individuals to perform the AA role for adults – these include: relatives, guardians or other individuals responsible for the care or custody of the adult; or someone experienced in dealing with vulnerable people but who is not prohibited from acting as an AA; or someone responsible who is over the age of 18 who is

55 Home Office (n 2 above), note for guidance 1G.
56 Dehaghani (n 2 above).
57 Home Office (n 2 above) para 1.7A.
58 Ibid.
59 Ibid paras 16.1, 10.12, 10.11A, read alongside para 10.11, annex A, paras 2B, 11.17, 1.4.

not prohibited.[60] Those who are police officers or have contractual arrangements with the police or otherwise lack independence from the police, lawyers, and independent custody visitors are prohibited from performing the role of AA.[61] Thus, the AA role can be performed by a number of different individuals, although as Dehaghani has argued, they can be categorised as (a) friends/relatives (to include family members), (b) volunteers or (c) professionals. Category (a) will include those who are known personally to the suspect; category (b) will include those who volunteer as AAs (either from a scheme or otherwise) and who, whilst unpaid, may have some level of training; and category (c) are those who may act as an AA in their professional capacity either as part of their job (such as social workers) or as their job (ie those employed as an AA).[62]

VULNERABILITY AND THE APPROPRIATE ADULT SAFEGUARD – GENERAL CRITICISMS AND CHALLENGES

However, the AA safeguard faces considerable challenges in both law and practice. PACE 1984 fails to include any information on vulnerability and/or the AA safeguard – the requirement for an AA and the guidance around both vulnerability and the role is entirely contained within Codes of Practice, which, as sub-statutory soft law, lack the enforceability of statute.[63] This is because breaches of the Codes are not subject to civil or criminal sanction[64] and can merely result in exclusion of evidence at trial,[65] where the case reaches that stage.[66] The one exception here is that the AA safeguard for young suspects is on a statutory footing by virtue of the Crime and Disorder Act 1998 which requires that youth offending teams[67] attend as AAs for young suspects where an AA cannot otherwise be secured. Second, the focus of Code C largely frames vulnerability in respect of adults

60 Ibid para 1.7.

61 Ibid and note for guidance 1F.

62 R Dehaghani, 'Defining the "appropriate" in "appropriate adult": restrictions and opportunities for reform' (2020) Criminal Law Review 1137–1155.

63 R Dehaghani, 'He's just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody' (2016) 55(4) Howard Journal of Criminal Justice 396–413.

64 PACE 1984, s 67(10).

65 For example, in relation to confession evidence, under PACE 1984, ss 76 or 78; or in relation to any evidence, PACE 1984, s 78.

66 See Dehaghani (n 2 above).

67 These are multi-agency teams which are co-ordinated by a local authority to reduce reoffending amongst children and young people.

as an inability to or interference with the ability to provide reliable evidence.[68] Until 2018 (when Code C underwent significant revision), the AA's role did not involve appreciation of the suspect's rights[69] and the AA's role in facilitating communication did not acknowledge the need to respect the suspect's right to silence.[70] The AA safeguard is mainly concerned with the integrity of evidence rather than the needs of the suspect.[71]

There are also significant challenges with implementing the AA safeguard in practice. Whilst 39 per cent of suspects may qualify for the AA safeguard (based on a diagnosis of 'mental disorder'),[72] only 6.2 per cent of suspects receive an AA.[73] All young suspects are provided with an AA based on age; as noted above, this is typically straightforward to determine and subject to no discretion or 'interpretative judgment'.[74] In contrast, the determination of whether an AA is required in respect of adult suspects is left to the CO. Research examining how COs make such decisions identified three overarching barriers – definition, identification and decision-making.[75] First, COs may fail to acknowledge that a suspect is vulnerable as they may adopt a narrow definition of vulnerability, which focuses on whether the

68 Home Office 2017 (n 54 above) note 1G; see also Home Office 2023 (n 2 above).

69 This was arguably as a result of the input of the National Appropriate Adult Network (NAAN), a charity that oversees AA provision across England, Wales, Northern Ireland and the Isle of Man: see Guide for Appropriate Adults (Home Office and NAAN 2011); Guidance for Appropriate Adults (Home Office 2003).

70 As per Dehaghani's recommendation to the Home Office. For a discussion of the challenges posed by adverse inferences from silence, see H Quirk, *The Rise and Fall of the Right of Silence* (Routledge 2017).

71 Dehaghani (n 2 above).

72 This highlights problems for supporting vulnerability when a suspect is undiagnosed. These figures are the closest estimate there is to ascertaining levels of required AA need: I McKinnon and D Grubin, 'Health screening of people in police custody – evaluation of current police screening procedures in London, UK' (2013) 23(3) European Journal of Public Health 399–405.

73 Rates also vary between police forces such that the rates of implementation may actually be much lower in individual forces: see C Bath and R Dehaghani, *There to Help 3: The Identification of Vulnerable Adult Suspects and Application of the Appropriate Adult Safeguard in Police Investigations in 2018/19* (National Appropriate Adult Network 2020).

74 S Bronitt and P Stenning, 'Understanding discretion in modern policing' (2011) 35(6) Criminal Law Journal 319–332.

75 Police culture and (the lack of) oversight can explain some of the reasons for definition, identification and decision-making being approached in this way: see Dehaghani (n 2 above).

suspect understands basic procedures and concepts.[76] Typically, an adult suspect must appear in some way 'childlike'[77] (CO-2 Interview) or 'abnormal' and must 'perform' their vulnerability. This problem arguably emerges because of the term used for the safeguard and the fact that it is also applied to juveniles.[78]

AAs have also acknowledged the shortcomings of their own skills in identifying whether a suspect has, for example, a mental health condition or mental disorder.[79] There is also a failure, or unwillingness, to recognise that a suspect may (at least appear to) understand what is being said to them but may, for example, be suggestible or acquiescent.[80] Second, there are challenges presented by how COs identify vulnerability. As noted above, Code C does not outline how a CO is to identify vulnerability, although it does comment on how COs should identify 'risk'. COs predominantly rely upon the risk assessment, conducted upon 'booking in',[81] the suspect's behaviour upon booking-in, and to a certain extent during their time in custody, for making a determination as to whether the suspect requires an AA. The risk assessment does not, however, focus on the identification of vulnerability and does not include specific questions that may enable an officer to identify whether the suspect is to be considered vulnerable.[82] Further, suspects may not evidently display any behavioural clues that would give rise to a suspicion that they are vulnerable as per the police conceptualisation noted above (such as failing to understand basic questions or behaving in a 'childlike' or 'abnormal' manner when answering risk assessment questions). Although officers can refer to information about the suspect contained in the Police National

76 An officer who subscribes to traditional expressions of police culture, such as cynicism and suspicion, may find it difficult to accept a suspect as vulnerable. For an example of how officer attitudes shape conceptualisation of victims as vulnerable, see N Caveney, P Scott, S Williams and L Howe-Walsh, 'Police reform, austerity and "cop culture": time to change the record?' (2020) 30(10) Policing and Society 1210–1225.

77 Dehaghani (n 2 above).

78 Ibid.

79 Ibid.

80 There is a significant body of evidence regarding coerced-compliant confessions, which are often linked to vulnerable individuals: see G Gudjonnsson, 'The science-based pathways to understanding false confessions and wrongful convictions' (2021) Frontiers in Psychology 12. More on this in relation to autism below: also see Dickie et al (n 12 above).

81 'Booking in' is the collective term for various procedures which must occur when a suspect arrives at a custody suite. These include searches, risk assessment, identifying any welfare needs of the suspect, informing the suspect about rights and entitlements, and evaluating the necessity of detention. These tasks are normally conducted by the CO.

82 See Dehaghani (n 2 above).

Computer or the Police National Database, they may not always do so and, even if they do, the information there may be limited (as it is based on what others have recorded/thought important to record). Moreover, COs could over-rely on the computer and may therefore fail to engage their autonomous skills of assessing vulnerability.

Officers can also rely on, for example, information provided by others such as healthcare professionals (HCPs), family members and friends of the suspect, the lawyer (if one is requested) or other police officers (such as information gathered at the time of arrest or information relating to the offence).[83] These sources can be limited, as HCPs, lawyers and police officers may lack the specific knowledge of vulnerability generally or of specific vulnerabilities and/or may lack legal knowledge (ie knowledge of the requirements of the Code);[84] and family members and friends may not come forward with information (particularly so if they are not aware that the suspect is being detained).

The effective and consistent identification of vulnerability in respect of autistic suspects appears to be an area of weakness in this regard. Identification of autism amongst healthcare professionals in police custody reflects similar trends in respect of identifying vulnerability more generally. Of 55,301 adult liaison and diversion (L&D) cases that did not involve an AA, at least 550 people were identified as having autism spectrum condition (ASC) by L&D and were not provided with an AA.[85] However, given the under-identification of autism generally and autism in police custody, this figure is highly likely to underestimate the scale of the problem.

COs may feel that the AA is unnecessary even if they determine that the suspect is vulnerable. This may be because a solicitor has been requested and is seen to obviate the need for an AA;[86] or because the

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83 In terms of the arresting officer, since they will have chosen to exercise the power of arrest, they are likely to believe a suspect is either not vulnerable at all; not so vulnerable that they cannot be detained; or have simply not considered this (for example, in a perceived situation of urgency). As such, it is questionable whether they will be a useful or reliable source of information for COs considering vulnerability at the police station.

84 For example, the role of L&D in custody is vital to vulnerable suspects accessing appropriate support, but may be hindered by a lack of knowledge/understanding of autism amongst L&D practitioners. See E Burch and J Rose, 'The subjective experiences of liaison and diversion staff who encounter individuals with autism' (2020) 6(2) Journal of Criminological Research, Policy and Practice 137–150. HCPs and police officers may lack knowledge of the Code but lawyers may also lack in-depth knowledge thereof.

85 Bath and Dehaghani (n 73 above).

86 For discussion see R Dehaghani, and D Newman, 'Can – and should – lawyers be considered "appropriate" appropriate adults?' (2019) 58(1) Howard Journal of Crime and Justice 3–24.

offence is unlikely to reach the courts and will therefore not be subject to scrutiny. Alternatively, there may be a determination that the suspect is insufficiently vulnerable to warrant an AA or that, notwithstanding any vulnerability, calling an AA will lead to 'unnecessary' delay in the interview, leading to a release from custody and an adverse effect on the workload of other officers or the CO.[87] Whilst practices may have slightly improved since the revised Code was implemented, evidence suggests that a large number of suspects are still not being provided with an AA even when they are likely entitled to one.[88] Yet, it is arguable that the 'loose' definition of when an AA should be called grants COs significant interpretive scope under the regulatory framework, one which is in theory designed to aid in protecting vulnerability via the AA safeguard. In the context of autistic suspects, this means that the aforementioned deficit in provision is likely entirely lawful even if the evidence suggests such decisions create a significant unmet need in custody for vulnerable autistic suspects.

The AA's role has also been subject to critique in law and in practice. First, although the AA is required to facilitate communication, they are not subject to legal privilege,[89] thus interfering with open communication between the suspect and (if present) the lawyer. An AA may therefore lack sufficient knowledge and awareness of, for example, the interview strategy or the suspects' involvement or otherwise in the offence. The AA may also be placed in a difficult position if compelled to give evidence at trial and may therefore avoid the lawyer consultation altogether to circumvent this possibility. Second, AAs for adults are not always present for the procedures required (as discussed above) and are typically only called to be present at the interview stage.[90] Third, the AA is discouraged from taking an active role as they can be asked to leave if considered unreasonably obstructive,[91] which is compounded further by the fact that Code C fails to elaborate on what

87 See Dehaghani (n 2 above).

88 See Bath and Dehaghani (n 73 above).

89 *A Local Authority v B* [2008] EWHC 1017 (Fam). See also C Bath, 'Legal privilege and appropriate adults' (2014) 178(27) Criminal Law and Justice Weekly.

90 Dehaghani (n 2 above). This mirrors the established problem of defence lawyers who are 'interview focused' – that is, who only attend custody for their client's interview, leaving suspects unsupported for most of their time in custody. By placing exclusive emphasis on support during the specifically investigative/evidential aspects of custody, rather than the custody experience as a whole, lawyers/AAs ignore the impact of the wider context of custody on the suspect's welfare and ignore the potential impact of a difficult custody experience on the interview.

91 Dehaghani (n 62 above). See Home Office 2023 (n 2 above) para 11.17A.

is considered an unreasonable obstruction.[92] In practice, critique has been levelled at the AA safeguard over concerns regarding the quality of AAs generally or of specific types of AAs,[93] inconsistencies in service delivery,[94] the remit of the AA role,[95] and the interpretation of the AA's role and position.[96] Further, as Dehaghani has previously argued, the AA may be limited by power dynamics as they are dependent on the police for their safety whilst in custody.[97] Finally, the AA seeks to address multiple vulnerabilities and needs across an array of different frameworks and, in doing so, they may fail to address some or all of the suspect's needs[98] and may also provide a false sense of safety. The following section will discuss several of the above concerns in more detail in relation to autistic suspects, demonstrating that AAs – as currently conceived in law and practice – may not be an adequate safeguard in custody.

92 This can prove advantageous for the police who will have discharged their duty by calling an AA but can eject an AA if they determine that the AA is being unreasonably obstructive.

93 J Hodgson, 'Vulnerable suspects and the appropriate adult' (1997) Criminal Law Review 785; T Jessiman and A Cameron, 'The role of the appropriate adult in supporting vulnerable adults in custody: comparing the perspectives of service users and service providers' (2017) 45(4) British Journal of Learning Disabilities 246; H Pierpoint, 'How appropriate are volunteers as "appropriate adults" for young suspects? The "appropriate adult" system and human rights' (2000) 22(4) Journal of Social Welfare and Family Law 383–400; K Quinn and J Jackson, 'Of rights and roles: police interviews with young suspects in Northern Ireland' (2007) 47(2) British Journal of Criminology 234–255.

94 M Perks, 'Appropriate adult provision in England and Wales: report prepared for the Department of Health and the Home Office by Mark Perks Development Officer, National Appropriate Adult Network' (NAAN 2010). In 2017/18, 18 per cent of local authority areas had no scheme for adults, with the result that 16 per cent of the population lived in an area without identifiable AA provision. Of the areas with a scheme, only 45 per cent had a scheme that operated 24/7: C Bath, *There to Help 2: Ensuring Provision of Appropriate Adults for Vulnerable Adults Detained or Interviewed by Police: An Update on Progress 2013/14 to 2017/18* (NAAN 2019).

95 Hodgson (n 93 above); Pierpoint (n 93 above); Quinn and Jackson (n 93 above).

96 Her Majesty's Inspectorate of Constabulary (HMIC), 'The welfare of vulnerable people in police custody' (HMIC 2015); H Pierpoint, 'A survey of volunteer appropriate adult services in England and Wales' (2004) 4(1) Youth Justice 32–45; P Fennell, 'Mentally disordered suspects in the criminal justice system' (1994) 21 Journal of Law and Society 57; Dehaghani (n 36 above).

97 Similar to lawyers: see Quirk (n 70 above).

98 See Dehaghani (n 54 above).

AUTISM AND APPROPRIATE ADULTS: ENTITLEMENT AND IDENTIFICATION

In addition to the general challenges and criticisms outlined above in respect of definition, identification and decision-making on vulnerability, and on the AA safeguard and on the scope of the AA safeguard itself, there are specific considerations in respect of autistic individuals which raise questions about the functionality of the AA as a safeguard for this vulnerable category of suspect.

As discussed above, COs define vulnerability in respect of the AA safeguard in a manner that constructs vulnerability as something 'abnormal' or 'childlike'. With this in mind, if an autistic suspect does not 'perform' vulnerability in a manner which aligns with this interpretation, they may be denied access to an AA and therefore placed at a disadvantage in the custodial context. This may be compounded if the individual does not present in a stereotypically autistic manner (eg gaze avoidance or being non-verbal), which is a particular concern as many autistic individuals have learnt to 'mask' or camouflage their autism.[99] For example, autistic individuals may engage in 'social echolalia', which involves responding to questions 'in a way that could appear as if they have accurately understood … when in fact this might not be the case'.[100] This form of camouflaging operates by either 'hiding behaviour that might be viewed as socially unacceptable or artificially "performing" social behaviour deemed to be more neurotypical' and can present significant problems in identifying and protecting vulnerable autistic suspects,[101] because 'they [may] appear to be in possession of a greater level of awareness about their current situation context than is the case'.[102] When the current situation context is police custody or interview, officers or others may overlook the suspect's true vulnerability, leading to inappropriate outcomes such as unfairly assigning culpability or failing to provide support to cope with such encounters because the individual's 'needs might go unrecognised or be ignored'.[103] Combined with the barrier of

99 M C Lai, M V Lombardo, A N V Ruigrok, B Chakrabarti, B Auyeng, P Szartmari, F Happe and S Baron-Cohen, 'Quantifying and exploring camouflaging with men and women with autism' (2017) 21(6) Autism 690–702.

100 Ibid 9; see T Attwood, *The Complete Guide to Aspergers Syndrome* (Jessica Kingsley 2007). For further discussion of the function of echolalia in communication of autistic individuals, see L Sterponi and J Shankey, 'Rethinking echolalia: repetition as interactional resource in the communication of a child with autism' (2014) 41(2) Journal of Child Language 275–304.

101 Lai et al (n 99 above) 690.

102 Dickie et al (n 12 above) 56.

103 Ibid 65.

not 'performing' vulnerability in a compliant manner, it becomes clear that autistic suspects are likely to be denied the support of an AA.

In the study mentioned at the start of this article, COs discussed who would and would not have access to the AA safeguard and stated that they would query why autistic individuals should access the safeguard when the autistic suspect was, for example, highly intelligent:

> I have a friend who's a consultant anaesthetist who's on the Autistic [spectrum], his son's at Oxford University doing languages. You would say that their behaviour sometimes is a bit ... how they talk, that's a bit different. But does that make them different? No ... There are degrees and I think they show themselves when you talk to people, I think. It's a judgment call. The Autistic Society – is it the Autistic Society? – recommend that everybody has an [AA]. Do they? Does my friend who's a consultant anaesthetist need one for interview? I'd say not. So, you know, everyone has to be dealt with individually. You can't just sort of say, blanket, across the board, that everybody needs an [AA]. (CO4-W Interview)[104]

This quote shows a significant and problematic misunderstanding of autism, particularly autistic presentation and hidden vulnerability, which has implications for the ability to identify when a suspect may be vulnerable and therefore in need of an AA. First, the CO conflates high intelligence with competence in other areas of cognitive function. This fails to recognise that an autistic person's apparently high intelligence may be accompanied by other developmental differences which can create challenges, such as emotional regulation, sensory processing, executive function and social communication skills.[105] This therefore relies on a stereotypical and restrictive interpretation of 'vulnerability' (and, indeed, autism) – that intelligent individuals cannot be vulnerable. Second, although the individual's autism is known in the above quote, it more broadly illustrates a failure to identify the potential for autistic masking (eg social echolalia, mentioned above). Autistic individuals may be adept (intentionally or not) at masking any vulnerability. As such, the CO's reliance on their ability to identify vulnerable autistic individuals ('I think they show themselves when

104 When asked why, CO4-W stated: 'because they know the difference between right and wrong, they know why they're here'.

105 In the context of healthcare, see P Bradshaw, E Pellicano, M van Driel et al, 'How can we support the healthcare needs of autistic adults without intellectual disability?' (2019) 6 Current Developmental Disorder Reports 45–56. See also G A Alvares, K Bebbington, D Cleary, K Evans, E J Glasson, M T Maybery, S Pillar, M Uljarević, K Varcin, J Wray, and A J Whitehouse, 'The misnomer of "high functioning autism": intelligence is an imprecise predictor of functional abilities at diagnosis' (2020) 24(1) Autism 221–232.

you talk to people') is misplaced.[106] Third, the quote suggests a static understanding of vulnerability; that is, that an individual who is not vulnerable in one context (eg practising as an anaesthetist) will not be vulnerable in others (eg in police custody). Again, this makes assumptions which may lead to the denial of support on the basis that all contexts pose effectively the same challenges to individuals – which is undoubtedly not true.[107] Fourth, the quote highlights the disadvantage of thinking in 'spectrum' terms, where there is a fairly crude dichotomy between 'low functioning' (associated with low intelligence) and 'high functioning' (associated with high intelligence).[108] The former implies that someone is more vulnerable, the latter less so; in fact, there are very likely to be a variety of strengths and weaknesses for different autistic individuals in different contexts (the aforementioned 'spiky profile'). Further, it ignores the cumulative effects of detention (see the section above on 'Autism, the criminal process, and police custody'). After several hours in police custody, an autistic suspect who may have been invisibly 'coping' with various challenges at the early stages of detention – sensory overload, adapting to neurotypical communication, processing new information and circumstances – could, later in the process (such as at the point of interview), find that their cognitive and emotional resources are depleted, leading to them to simply agree to whatever is presented to them or to disengage completely.[109]

The process by which the need for an AA is identified may also be problematic in respect of autism. First, the risk assessment questions asked upon booking-in do not contain any autism-specific questions or any questions that may prompt an autistic suspect to disclose information that may lead to the identification of vulnerability and thus the need for an AA. Holloway et al have suggested that some autistic individuals see their autism as part of their identity and may therefore not disclose this information as part of the risk assessment, as they do not perceive it in such terms.[110] Second, autistic suspects may be reluctant to disclose personal information pertaining to their autism or otherwise, for example, for fear of stigma, which may be compounded by a lack of trust in or fear of the police. Autistic individuals in Crane et al's research were reluctant to disclose their autism diagnosis due

106 See J Cook, L Crane, L Hull, L Bourne and W Mandy, 'Self-reported camouflaging behaviours used by autistic adults during everyday social interactions' (2022) 26(2) Autism 406–421.

107 For more, see the work of Martha Fineman on universal vulnerability.

108 Alvares et al (n 105 above).

109 The exclusionary rules of evidence under PACE 1984, ss 76 and 78, may account for the consequences of interviewing an autistic suspect under such circumstances, although given the notable challenges with the admissibility rules (see Dehaghani n 2 above) it would be problematic to rely on these as a remedy.

110 Holloway et al (n 12 above) 5.

to 'fear of discrimination or victimisation by police officers'.[111] Of a total of 28 adults with autism who were questioned about whether they would disclose their diagnosis, 39 per cent said that they would always do so, 36 per cent said that they would never do so, and 25 per cent said that they would 'on some occasions, but not others'.[112] This may be further compounded by the absence of autism-specific questions, but also compounded further still by a lack of explanation as to why this information is being asked for and recorded. An autistic suspect – or any suspect – may not disclose information if they do not know why that information is requested.

Additional questions found on the risk assessment – namely, those that police forces have included that go beyond the scope of the authorised professional practice – first require a police officer to consider asking them and, second, may not apply to the situation, (eg where the autistic suspect is asked whether they went to a 'special school', may not understand what 'special school' means or may not have, in fact, attended a 'special school').[113] COs and other custody staff may rely on behavioural cues to identify whether a suspect is vulnerable, but the absence of behavioural cues in those who have successfully learnt to mask[114] their autism may interfere with the ability to accurately determine whether an AA is required. This challenge was acknowledged by CO13-W:

> Autism at different ends of the spectrum is quite apparent to see or not. People present really, really well and they say 'I'm Autistic' and if you hadn't have told me that you were Autistic, I would never have known and I would've gone ahead and said 'Right, go to interview straight away'. And if people present well to me and they seem to know what is happening then I put them through I say 'Right, go to interview'.[115]

That the CO would not have detected autism is problematic for the reasons outlined above, yet a disclosure from the suspect should be enough to trigger the AA safeguard. Unfortunately, for the autistic suspect, in line with the approach taken by CO13-W (and of many COs),[116] a self-disclosure would not be enough to trigger the safeguard as the suspect did not 'perform' their vulnerability in line with

111 L Crane, K Maras, T Hawken, S Mulcahy and A Memon, 'Experiences of autism spectrum disorder and policing in England and Wales: surveying police and the autism community' (2016) 46 Journal of Autism and Developmental Disorders 2028, 2036.

112 Ibid 2036.

113 See generally K Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Crown 2009).

114 Lai et al (n 99 above).

115 Dehaghani (n 2 above).

116 Ibid.

expectations. There were, however, officers who, upon identifying that the suspect was autistic, would provide an AA as a general rule – CO9-W and CO10-W commented that 'anything on the Autistic spectrum' (CO9-W Interview) would warrant the AA safeguard because 'our rule book says "They will have an [AA]"' (CO9-W Interview).[117]

In Crane et al's research, of the 192 police officers (out of a total of 400 respondents) responding to the question of whether an autistic suspect would have an AA, 67 per cent stated that autistic suspects always had an AA and 31 per cent stated that an AA would sometimes be involved.[118] This research, however, relies on police officers accurately reporting their practices, does not unpick how police officers understand autism and whether they understand the condition and its effects sufficiently, and undoubtedly does not take into account instances where officers fail to detect that the suspect was autistic. With regard to training, Richards and Milne found that 37 per cent of officers had received training on autism, although there was a recognised need for training tailored to the specific role that the police officer was performing.[119] Moreover, having training on autism does not necessarily ensure that one has an understanding of autism or, at least, enough of an understanding to be able to identify whether someone is autistic.[120] Richards and Milne did, however, note that, whilst 48 per cent of police officers rated themselves as knowledgeable about autism, those with autism (total 80) who completed the survey felt that other officers lacked general knowledge and awareness of autism such that their needs 'were not being met'. They also felt 'there was a lack of information, and explanation, given by police officers', that 'delays at various stages were unacceptable' and 'some individuals felt victimised or discriminated against by police officers'.[121]

AUTISM AND APPROPRIATE ADULTS: SUITABILITY

Questions also arise as to the AA's suitability in assisting autistic suspects, supposing access is granted. The first point to note is that the AA safeguard is not, at a regulatory level, designed around the needs of autistic suspects or any specific type of vulnerable suspect;

117 The 'rule book' is Code C in Home Office 2023 (n 2 above). See Dehaghani (n 2 above).

118 Crane et al (n 111).

119 Ibid 2036.

120 Indeed, this will depend on the nature and quality of training and how officers engage with it. See I Dickie, S Reveley and A Dorrity, 'The criminal justice system and people on the autism spectrum: perspectives on awareness and identification' (2018) 4(1) Journal of Applied Psychology and Social Science 1–21; and Hepworth (n 33 above).

121 Ibid 2036.

rather, it is a safeguard aimed at vulnerability generally.[122] The role, in terms of who can deliver it, can be flexibly interpreted based on the particular suspect; whilst this clearly has advantages it also means that there are few fixed demands in terms of skillset and qualification. For example, the AA may be a communication specialist in a general sense but be unfamiliar with differences in communication style of autistic individuals or recognise particular challenges for autistic suspects (such as common linguistic devices like multi-part, open or 'tagged' questioning).[123] Even where the AA is a specialist in communication (eg a speech and language therapist), they may not necessarily possess the skills and awareness needed to support the autistic suspect they have been assigned to. In addition, they may not know the specific suspect on a personal level, and therefore they may not know how (best) to respond to their specific needs. If the AA is someone known to the suspect (eg a family member, friend, or care worker), they may possess the specific awareness of need and understanding of how (best) to provide support, but they may lack the legal and procedural knowledge required of their role. This may therefore mean that the AA is not able to adequately support an autistic suspect either through lack of knowledge of autism and its relevance in the context, or of law and process in custody.

Previous research has indicated a general awareness of autism amongst AAs, however, this research also indicated challenges in how this knowledge would be put into practice in an interview setting. In Richards and Milne's research examining AAs' understanding of autism, of the 49 who responded, 28.6 per cent (14) reported that they had undertaken training on autism. This training included 'awareness of the characteristics of [autism], developing an understanding of the spectrum, discussion of behavioural issues, communication issues, and methods of diagnosis'.[124] The majority of respondents (43 out of 48) indicated that further training would be useful.[125] AAs were generally able to recognise characteristics that are associated with autism, most typically 'understanding the minds of others … and difficulties understanding gestures and tone of voice … However, less association was given to understanding social rules … and the ability to give eye contact.'[126] Whilst AAs could correctly distinguish between psychopathy and autism, they tended to agree with stereotypical

122 See Dehaghani (n 2 above).

123 See Judicial College, *Equal Treatment Bench Book* (April 2023) para 164.

124 J Richards and R Milne, 'Appropriate adults, their experiences and understanding of autism spectrum disorder' (2020) 103 Research in Developmental Disabilities 12: appropriate adults rated their training as good or very good (at 12).

125 Ibid.

126 Ibid 12–13.

and disadvantageous conceptualisations, such as the suggestion that autistic people can be 'very aggressive' or that autistic people had good memory recall (an assumption which would undermine a suspect who failed to meet this expectation).[127] They also found that AAs had an awareness of autism, despite only 14 having undergone training, yet only 16 had prior experience of autistic people.[128] Convergence was also found in responses regarding the three characteristics that AAs believed would most impact upon interview – whilst 'the majority identified ... characteristics indicative' of autism, there were 'more obscure comments' such as 'people with [autism] resisting authority, not understanding right from wrong, refusing to admit guilt, and being unwilling to conform'.[129] Underlying such comments is a negative judgement of the autistic suspect and, arguably, a suggestion that the suspect should adapt their behaviour to be compliant with police (and AA) expectations. However, this not only dismisses their vulnerability but ignores the reasons behind such behaviour (for example, resistance or meltdown as a response to stress, not as an attempt to be 'difficult'). Moreover, such comments see AAs positioning themselves as police allies, suggesting a serious misunderstanding of their role in custody or interview. Richards and Milne therefore rightly note the need for further research to ascertain whether such 'stereotypical information is detrimental to the quality of support an [AA] provides'.[130]

Although these results are promising in that at least some AAs have knowledge of autism, there are particular concerns regarding the limitations of the sample, given its relatively diminutive size and scope (16 out of 58 organisations took part in the research). The findings may be limited further still by the fact that there are significant disparities in AA provision and organisation nationwide.[131] A lack of understanding of how autism affected the suspect was found in Maras et al's research to be the reason that a number of police officers (50 % of 189 respondents) found the AA safeguard unhelpful (30%) or neutral (20%).[132] Ultimately, the current inference one can draw from available research is that, in practice, AAs may be unable to offer the support envisaged by the regulatory framework.

It is also worth considering how helpful the addition of an AA to the circumstances of custody and interview truly is. Whilst designed as a form of support for an autistic suspect, it should be remembered that custody already involves a whole host of new information,

127 Ibid.
128 Ibid 21.
129 Ibid.
130 Ibid.
131 See Perks (n 94 above).
132 51 per cent found the AA helpful: Crane et al (n 111 above) 2034.

routines and – crucially – people. In the course of the process, an autistic suspect is likely to encounter COs and custody detention officers (CDOs), interviewing officers, a lawyer (if they request one) on the phone and/or in person, L&D staff and (in a less direct way) other officers and detainees in a custody suite. To add an AA to the already extensive number of new people arguably only increases the strain on a suspect caused by excessive social communication. As such, we might ask whether the AA, regardless of who they are, is the right *kind* of safeguard in custody, particularly without other adjustments (for example, to environments or interview questioning style). It may well be that the provision of a lawyer and/or an AA may be deemed adequate to safeguard the suspect's rights and entitlements, and that nothing else need be done. In reality, this may not be helpful at all.

IMPROVING THE SAFEGUARDING OF AUTISTIC SUSPECTS

At this juncture, it is necessary to summarise the key problems and pitfalls of custody for autistic suspects. First, there are particular characteristics of police custody that may be problematic for autistic suspects: the absence of familiar support and significant compelled social communication with unfamiliar people in positions of authority (ie the police); disruption to routines with control vested in others; intrusive processes and procedures; significant and sustained uncertainty; and an unfamiliar, destabilising and sensorily overwhelming environment. Second, there are general and specific problems with the AA safeguard: it is not always implemented owing to (mis)interpretation of need, barriers to identification, and various factors influencing decision-making; it is limited in scope and in terms of the (type of) support it can provide to vulnerable suspects generally and autistic individuals in particular; and it may be detrimental, rather than beneficial, for some autistic suspects.

Following on from the analysis of the problems and pitfalls in relation to police custody and the AA safeguard for autistic suspects, here we consider what changes to law, policy and practice are necessary to improve the AA safeguard. It is, however, important to first acknowledge that the AA safeguard, and other rights and entitlements under PACE 1984, do not exist in isolation and necessarily require consideration in their wider context. Broader reforms addressing COs and lawyers, their powers and duties, and their knowledge and understanding, are also necessary.

In terms of legal and regulatory reform, one must consider whether PACE Code C requires amendment to include autism- and neurodivergent-specific provisions, particularly in relation to the

definition and identification of vulnerability. Providing an indicative and non-exhaustive list of conditions and clarifying how COs could identify vulnerability could reduce, albeit not eradicate, the scope for interpretation and the challenges posed by and to definition and identification. The ability to identify autism and the possible need for an AA also requires significant improvement, particularly deeper knowledge and a more sophisticated understanding of autism. This is necessary across all professional actors in police custody such as lawyers, police officers, COs, CDOs, HCPs, L&D staff and AAs. A more pervasive form of cultural change is required – away from suspects as a dangerous 'other' or a risk to be managed towards a recognition of their vulnerability, particularly within the context of custodial detention. It may be necessary to remove key decision-making away from COs and towards (more impartial) health and social care professionals, given the concerns regarding CO 'independence' from the broader functions of policing.[133]

This form of structural change must be coupled with improved knowledge and understanding of autism – and of vulnerability more broadly – amongst criminal justice professionals. First, knowledge and understanding must improve amongst those working on the frontline who are making a determination during the early – and often only – stages of the criminal process, as noted above. Yet, this knowledge and understanding shift must also occur amongst the judiciary,[134] particularly those who are tasked with determining the admissibility of evidence where, for example, an autistic or otherwise 'vulnerable' suspect has confessed without an AA present. This knowledge and understanding should arguably also extend to understanding how autistic suspects 'present' and what other challenges a neurotypical-centred CJS may create. It is perhaps necessary to reimagine the criminal justice process, although doing so is outside of the scope of this article.

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133 See I McKenzie, 'Helping the police with their inquiries: the necessity principle and voluntary attendance at the police station' (1990) Criminal Law Review 22; and R Dehaghani, 'Automatic authorisation: an exploration of the decision to detain in police custody' (2017) 3 Criminal Law Review 187–202; M McConville, A Sanders and R Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).

134 This need exists not only in domestic courts, but also at the European Court of Human Rights. The recent *Hasáliková* case demonstrated the need for judges to understand what makes a suspect vulnerable and what is sufficient – and what is not sufficient – to address this vulnerability. The dissenting judgment of Turković and Schembri Orland demonstrated a more sophisticated knowledge and understanding of vulnerability: see *Hasáliková v Slovakia* App no 39654/15 (24 June 2021).

Autistic suspects should be considered vulnerable under Code C if they meet the 'functional test' (see the section above on 'The appropriate adult safeguard'), and it is likely that (many) autistic suspects would meet at least some of these requirements. Whilst there is certainly scope for 'interpretative judgment'[135] in determining whether a suspect is vulnerable and therefore requires an AA, it is necessary that the CO dispel the notion that the suspect is vulnerable.[136] Relying on stereotypical – and misplaced – understandings of autism is likely not enough to do so. When an AA is granted, we should not – as discussed above – simply accept that as adequate. Arguably, the AA safeguard (now largely unchanged in basic terms for four decades) is overdue a redesign, and provision for autistic suspects makes a good case for doing so. The reconceptualisation of the AA based on particular needs (rather than its current form which is relatively general) might suggest the necessity of different 'types' or 'categories' of AA. Indeed, the name itself is problematic – 'appropriate adults' were designed with children in mind, and this ethos of vulnerability lingers in the background of modern assessment of need and provision of support.[137] Alternative categories might include familiar supporter (a non-professional known to the suspect); specialist supporter (a professional expert in particular conditions/differences); and a communication supporter (to focus on this aspect of need). These are merely examples, but imply a more bespoke role with an emphasis on support for all vulnerability (not just because of age). In short, the goal would be to ensure the appropriateness of safeguard(s).[138]

Whilst a significant and well-considered redesign of the AA role is important, this will, undoubtedly, take time to achieve; until that happens, it is imperative that officers and others adopt a more tailored approach when an autistic individual enters police custody. There are a range of adjustments which can and should be considered in such cases, on the basis of a person's particular profile. For example, sensory adaptations – such as adjusted lighting, quiet areas, use of ear defenders, or provision of fidget toys – could be deployed quickly and at low cost. The aforementioned issue of isolation could be ameliorated with some informal access to an (appropriate) family member or other close figure. Indeed, that person may – in fact – eventually act as an AA; but even short of this, some form of access would likely be achievable in most cases with no meaningful impact on the integrity and effectiveness

135 Bronitt and Stenning (n 74 above).
136 Home Office 2023 (n 2 above) para 1.4.
137 See Dehaghani (n 54 above).
138 See Dehaghani (n 62).

of a police investigation.[139] Other adjustments might, potentially, be more complex to implement but could be highly impactful: for example, consideration of what food an autistic individual is given; or whether they can be granted access, in some form, to a special interest to enable emotional regulation whilst detained. The argument might be advanced that such adjustments amount to special treatment not extended to other detainees, but this is misplaced. Such adjustments are more akin to a levelling of the playing field for autistic detainees and could be the difference between making custody a stressful but manageable process and one which is overwhelming, traumatic and obstructive to effective investigation.[140]

CONCLUSION

It is evident that autistic suspects require support whilst in police custody and throughout the investigative stage(s) of the criminal process, and it is evident that there are obstacles to this, namely in the correct identification of their vulnerability but also in the type of support offered and whether such support is appropriate. Despite its importance to vulnerable suspects, the efficacy of the AA safeguard is undermined by numerous barriers both in its implementation and its operationalisation, both generally and in relation to autistic suspects. By building on existing work on vulnerable suspects and the AA, this article has outlined and analysed the challenges faced by autistic suspects in a neurotypical and largely coercive environment and serves as a catalyst to reflect upon how safeguards may be improved to ensure proper access to justice for autistic people. It is necessary to analyse the challenges and critique shortcomings in law and practice, yet this article has gone further by making recommendations for reform which aim to improve the service provided to autistic suspects who are detained, with the objective of promoting equitable access to justice at this crucial stage of criminal proceedings.

Undoubtedly, many of the challenges faced by autistic suspects may also arise in the same or similar way for other neurodivergent suspects, although the reason for these challenges may be different. For example, individuals with ADHD can be inattentive and/or hyperactive and impulsive which may impact their ability to effectively participate in the criminal process; dyslexic individuals may have issues with reading comprehension and this may hamper their ability to understand and enforce their rights and entitlements; individuals with Tourette's may

139 However, a potential danger here might be the conclusion that an AA is no longer needed as the suspect has had 'familiar' support.

140 For more on the potential range of adjustments that could be made, see Holloway et al (n 12 above); and CJJI (n 3 above).

experience uncontrollable tics, which can increase in severity and/or frequency in stressful situations, with the risk that officers may incorrectly interpret this as threatening. Further research is required to address the limitations of pre-trial safeguards for individuals with other neurodivergent conditions, building upon the vital research in forensic and developmental psychology[141] and the nascent research in law and socio-legal studies.[142]

141 See, eg, Dickie et al (n 12 above); Dickie and Reveley (n 35 above); and Dickie et al (n 120 above); Crane et al (n 111); K Maras, C Dando, H Stephenson, A Lambrechts, S Anns and S Gaigg, 'The witness-aimed first account (WAFA): a new technique for interviewing autistic witnesses and victims' (2020) 24 (6) Autism 1449; Richards and Milne (n 124).

142 See, eg, Holloway et al (n 12 above).

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 720–752
Articles DOI: 10.53386/nilq.v75i4.1089

Promoting corporate citizenship through clinical legal education

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ABSTRACT

With the conversation regarding corporations and their role in society becoming mainstay in the public discourse, the broad consensus appears to be that the corporation does in fact owe a duty to more than its investor constituency, even though there remains to be a similar agreement regarding the extent of the aforementioned duty. Corporate citizenship had been devised as a prism by which one might evaluate the role of business in society. However, the perceived voluntarism that often underpins pervasive notions of corporate citizenship and its interchangeability with the parallel concept of corporate social responsibility meant that it had been widely considered to be merely an extension of the latter in its base state. In this article, I argue for an expansion of the concept of corporate citizenship, a paradigm of consideration of the rights and obligations of corporations similar to those of natural citizens. Furthermore, the article considers what role clinical legal education, particularly business law clinics who work with start-ups, might play in ushering corporations along the path to true citizenship.

Keywords: corporate citizenship; clinical legal education; corporate governance; business ethics; business law clinics.

INTRODUCTION

Most observers of trends within corporate governance might have become accustomed to having corporations talk about becoming better corporate citizens. However, the term corporate citizenship (CC) has quite a nebulous affect, in that sense that there is yet to be a broadly accepted description of what it means to be a 'corporate citizen', much less a good one.[1] The nagging question remains regarding the capacity for corporations to be aptly described as citizens and whether this connotes a citizenship replete with the rights and corresponding obligations enjoyed by natural persons.

The question as to what the notional CC connotes furthers the debate regarding the ultimate objective of the corporation and what that

1 Carmen Valor, 'Corporate social responsibility and corporate citizenship: towards corporate accountability' (2005) 110(2) Business and Society Review 191–212,195.

should be. The focus of the latter has oscillated between the current emphasis on investors and their interests and a more pluralistic view of the firm, which pays attention to a host of other constituencies including employees, customers, the host communities and indeed the physical environment. A society's approach to corporate governance is a natural consequence of its view of the firm and how businesses should participate in and interact with their immediate environment. Therefore, a society which views the firm as a privately ordered vehicle for private wealth enhancement may consequently require the company to do no more than fulfil its core objective. This approach would inevitably differ in societies that view corporations as a means to attain a greater social good.

The view of a corporate citizen is variedly interpreted; with viewpoints ranging from CC involving a voluntaristic, philanthropic ethos to the conceptualisation of citizenship which is mimetic of the obligations and rights of the natural citizen. In this article, I adopt a view of citizenship which mimics the latter but is formulated on the back of the notion of a *pro-social* corporation – a corporation which prizes the collective interest above individual profitability. Here, corporate actors go beyond the mere rhetoric that espouses the values of so-called 'stakeholder capitalism'[2] but involves a corporate system where each constituent is conditioned to function as the natural citizen is, enjoying rights (which corporations do) and corresponding obligations (which corporations do not always have). I argue that there is a need for a pivot in our view of how companies participate in society and whether the firm has a role beyond profit maximisation. Especially as the volatility of our present-day circumstances – in regard to the environment and other socio-political unrests – bears witness to the excesses of a profit-centred approach to corporate governance.[3] On the other hand, a society where corporations work pro-socially might very well lead to sustainably better living standards for all within,

2 The influential Business Roundtable, a conglomeration of CEOs of the largest corporations, released a statement in favour of what it termed 'Stakeholder Capitalism'. This was a major shift from its previous position that the corporation should be run to benefit shareholders mainly and all other competing interests were to be merely ancillary to this overarching objective. This statement represented a tectonic shift in the Anglo-American approach to corporate governance and adds further fuel to the decades-long debate on the corporate objective and the primacy of shareholder interests: Business Roundtable, 'Statement on the purpose of the corporation' (*Business Roundtable* 19 August 2019).

3 Martin Wolff, 'Milton Friedman was wrong on the corporation' *Financial Times* (London 8 December 2020).

entrenched worker rights etc.[4] The challenge, however, in the absence of the requisite political will, extends beyond mere conceptualisation of a true corporate citizen to its attainment. How, therefore, could corporations become true citizens? In this article, I extend clinical legal education (CLE) – particularly business law clinics – as a useful instrument for the promotion of citizenship values through its work with infant corporations.

CLE is generally considered a social good; whose initial conception was as a vehicle for attainment of social justice objectives by 'educating students about economic disparities, unequal application of the law, and abuses of power'.[5] As such, a law clinic should service those least able to afford legal costs and most in need of it. Thus, clinics step into a figurative void, left by decades of divestment from a threadbare social welfare infrastructure.[6] It is therefore not surprising, considering the initial bent of these clinics, how some might view the notion of a clinic established to service the business community as undermining their core mission.[7] Here, however, I argue that the utilisation of law clinics in this manner not only has valuable educational benefits for participating students but, by helping to instil citizenship values in infant corporations, they also embody the socially oriented value systems that clinics are meant to promote. To further this, I highlight what CLE as a methodology for true CC could entail, showing some of the work that clinics could do, both with and through their student participants, to help build responsible and socially conscious corporations from the ground up. It is important to stress at this point that the discussions within this article are theoretical and are focused on the participants of business law clinics, and how they could support the businesses they engage with in their clinical practice.

The article is outlined as follows: the next section will consider the traditional/mainstream Anglo-American view of the firm and whether it should have a social function. I have chosen to focus on this model of corporate governance due to the growth of shareholder-centred governance – and the attendant consequences – even in jurisdictions

4 CROWE, 'Socialism, social democracy, and capitalism: a debate on which is right for America' (University of Wisconsin 11 March 2020)

5 Praveen Kosuri, 'Losing my religion: the place of social justice in clinical legal education' (2012) 32(2) Boston College Journal of Law and Social Justice 331, 342; Donald Nicolson, 'Legal education, ethics and access to justice: forging warriors for justice in a neo-liberal world' (2015) 22(1) International Journal of the Legal Profession 51–69, 52.

6 Nicolson (n 5 above) 52.

7 Elaine Campbell, 'A dangerous method? Defending the rise of business law clinics in the UK' (2015) 49(2) The Law Teacher 165–175, 166.

that had previously adopted different governance approaches.[8] Section two will explore the concept and debates about CC, whilst section three will outline the author's views on how corporations could become better citizens. The final section will examine a possible role for law clinics in attaining the aforementioned objective and will address the practical ways the latter could be achieved. The article concludes thereafter.

THE PARADOX OF THE SOCIALLY RESPONSIBLE CORPORATION

Milton Friedman, in considering the concept of a socially responsible corporation, stated unequivocally that the only responsibility of a business was to increase its profits.[9] It is fair to say that, whilst this view might have been slightly outside of the mainstream at the time the article was published in 1970, the pervasion of the neo-liberal ideology in the decades since has ensured its acceptance as the norm.[10] It is, therefore, the popular view that the corporation should prioritise profits and that shareholder interests should be at the fore of the corporate agenda.[11]

Despite its popularity in boardrooms across Anglo-American jurisdictions, the shareholder primacy doctrine[12] has received pushback from those who insist that the corporation should have

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8 Henry Hansmann and Reinier Kraakman argued that there was a convergence towards the Anglo-American shareholder governance model even within jurisdictions that had shown some reticence or hostility towards the model. They attributed this to several factors including the perceived success of British and American firms compared to their global counterparts and the failure of the other models of corporate governance and the growth of the shareholder class across the globe, as well as the legislative framework that tends to the latter: Henry Hansmann and Reinier Kraakman, 'The end of history of corporate law' (2000).

9 Milton Friedman, 'The social responsibility of business is to increase its profits' *New York Times Magazine* (New York 13 September 1970).

10 Neoliberalism is an extreme form of free market economics: 'It champions economic liberalisation, privatisation, free trade and deregulated markets, and seeks to reduce government spending as far as possible. Neo-liberalists believe that leaving matters to private enterprise is far more efficient than collective action, and consequently seek to replace the state with private enterprise, and notions of social justice and the public good with profit-making and self-interest.' Nicolson (n above 5) 52.

11 In *Peoples Department Stores v Wise* (2003) 244 DLR, the Canadian court declared 'the interests of the corporation as coinciding with the interests of all of the shareholders in the pursuit of the objectives of the creation of the corporation'.

12 This is the view that the corporate objective should be the maximisation of shareholder wealth. See D Gordon Smith, 'The shareholder primacy norm' (1998) 23 Journal of Corporation Law 277.

responsibilities that extend beyond profit maximisation.[13] The resistance to this ingrained value system has only intensified in the wake of devastating financial crises, extreme levels of income and wealth inequalities, not to mention the adverse effects of corporate activity on environmental prospects in the long term. These increased agitations have not been without response, however, as corporations have voluntarily shown an openness to broaden the corporate objective, displaying a willingness to countenance the needs of the firm's other stakeholders and become good corporate citizens.[14] Hence, CC has become a fashionable and important weapon in the public relations arsenal of the largest corporations.

Notwithstanding the laudability of this leftward shift – if one were to disregard the patent self-promotive intent – it remains the case that CC continues to be voluntary. In the sense that corporate acts of social responsibility continue under an incentivized self-imposed system, rather than from an innate acceptance of the firm's responsibility to all its stakeholders. However, to fully critique the current position, one must first consider two key questions: whether firms have social responsibility and, if so, what the basis for said responsibility should be.

The traditional view of the corporation: the view of the firm as amoral

As living standards have improved in the developed world, people in the West have begun to consider the 'social cost of their own enrichment'.[15] This has caused us to question our purchasing habits, as well as the environmental and social impact of the industrial and productive processes which afford our leisured lifestyles. These questions are invariably put towards the corporation which is the prime vehicle of the technological advancements which have made all these possible. In so doing, we project the burdens of our own moral consciences unto the corporate form, hence: if our individual or collective consternation about the costs of our lifestyle ignites a sense of responsibility towards society at large, there, therefore, must be a corresponding sense of corporate responsibility.

As mentioned above, until recently the consensus on corporate responsibility – at least within Anglo-America and other like-minded jurisdictions – was a singular focus on shareholder wealth

13 R Edward Freeman, Andrew Wicks and Bidhan Parmar, 'Stakeholder theory and the corporate objective revisited' (2004) 15(3) Organization Science 364–369.

14 Susan McPherson, 'Corporate responsibility: what to expect in 2019' *Forbes* (New Jersey 14 January 2019)

15 Thomas Kempner, Kevin Hawkins and Keith Macmillan, 'The role of business in society' (1970) 2(4) Long Range Planning 3.

maximisation.[16] Corporations were focused on the interests of their owners for a myriad of reasons[17] and were urged to pay some consideration to the interests of their other stakeholders. This is known as the enlightened shareholder value approach.[18] There is no evidence to suggest that the drafters chose this approach to corporate governance due to a recognition of the corporation's responsibility to all its stakeholders, as much as from the need to balance corporate interests effectively.[19]

Corporate social responsibility (CSR) could be understood to consist not only of corporations engaging in business activities that benefit society but also of avoiding activities that impose significant social costs or harms.[20] To this point, Friedman believes that the notion of CSR is antithetical to the interests of shareholders.[21] He argues that

16 Michael Jensen echoed this position when he said that 'multiple objectives, was no objective'. See Michael Jensen, 'Value maximization, stakeholder theory and the corporate objective function' (2002) 12(2) Business Ethics Quarterly 235–256, 238.

17 One of the common reasons proffered to justify the maximisation of shareholder interests is that shareholders are a vulnerable class, a consequence of their position as residual claimants. This argument ignores the fact that shareholders are entitled to dividend payments and are also able to potentially earn significant returns on their initial investments when there are price increases: Kenneth Goodpaster, 'Business, ethics and stakeholder analysis' (1991) 1(1) Business Ethics Quarterly 53–73, 69. Furthermore, Jensen and Meckling, amongst others, argue that prioritising shareholder interests is the most efficient way to govern the corporation and reduce agency costs: see Michael Jensen and William Meckling, 'Theory of the firm: managerial behaviour, agency costs and ownership structure' (1976) 3(4) Journal of Financial Economics 305–360.

18 The Companies Act 2006, s 172, encouraged directors to prioritise the interests of their members, whilst paying consideration to the needs of other stakeholders including employees, customers, suppliers and the environment. This position has been branded the enhanced shareholder value, one which still subscribes to the notion of shareholder primacy, but also considers the needs of the other stakeholders, albeit as having a secondary status. See Andrew Keay, 'Having regard for stakeholders in practising enlightened shareholder value' (2019) 19(1) Oxford University Commonwealth Law Journal 118–138.

19 The Company Law Reform Steering Group was tasked with identifying the best approach to corporate governance. The committee was also charged with the codification of director's duties, which was previously grounded in common law. The group's objective was to maintain the common law approach of shareholder primacy. But sought to 'strike a balance' between the competing stake-holding interests, to achieve the stated goal. This approach was deemed necessary to encourage the cultivation of long-term relationships, which would help corporations to avoid being overly focused on the short-term. See, John Armour, 'Shareholder primacy and the trajectory of UK corporate governance' (2003) 41(3) British Journal of Industrial Relations 531, 531–555.

20 Valor (n 1 above) 194.

21 Friedman (n 9 above).

if managers were to undertake policies aimed at advancing social interests, the opportunity costs would be to forego opportunities to enhance the wealth of their owners. As such, he states:

> What does it mean to say that the corporate executive has a 'social responsibility' in his capacity as businessman? If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers. For example, that he is to refrain from increasing the price of the product in order to contribute to the social objective of preventing inflation, even though a price increase would be in the best interests of the corporation. Or that he is to make expenditures on reducing pollution beyond the amount that is in the best interests of the corporation.[22]

It appears that Friedman looks beyond the charade of corporate personality and views the corporation as a legal fiction, meant to facilitate the business activities of the private actor.[23] This view considers the corporation as a mere platform for the transactional, principal–agent relationship between managers and investors, with the former being the only entity capable of exercising responsibility. A responsibility, which is owed – as far as the corporation is concerned – solely to shareholders. Mirroring Friedman's position on CSR is the view which holds the firm as having some responsibility but agrees that focusing the corporate objective on shareholder interests is the most efficient way to govern.[24] Adolf Berle believed that it was to the wider interest that the corporate objective be narrowed sufficiently to enhance the interests of its members.[25] Arguing that prioritising investor interests was the best way to curb managerial powers and control for managerial abuse.[26] Although, Berle's middling view avoids the ostentation and brashness of Friedman's opinion, he essentially arrives at the same conservative conclusion, at best his views represent a form of progressive conservatism.

It is important to note that, in times past, the view within Anglo-America of the role of business was very different. Nineteenth-century entrepreneurs took a more active role in the wellbeing of their employees and immediate community and, in many ways, were

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22 Ibid.

23 Here Friedman echoed the contractarian view of the firm, which views the latter as a nexus of contracts, basically a platform upon which private actors can contract. Marc Moore, 'Private ordering and public policy: the paradoxical foundations of corporate contractarianism' (2014) 34(4) Oxford Journal of Legal Studies 693–728.

24 Friedman (n 9 above).

25 Adolf Berle Jr, 'For whom corporate managers are trustees: a note' (1932) 45 Harvard Law Review 1365–1372, 1367.

26 Ibid.

forced to do so.[27] A notable example is Henry Ford of the Ford Motor Company, who believed that paying a good wage to his employees was ultimately to the company's economic benefit.[28] Kemper and colleagues note, however, that this sense of responsibility began to weaken with the expansion of the welfare state[29] as the government began to play a more active role in the provision of services that companies previously undertook.

One could argue that the firm does in fact owe an unconditioned social responsibility and this responsibility is to all constituencies touched by corporate activity.[30] This responsibility extends to its employees, customers, creditors and the environment. One could also argue that the corporation has a responsibility to treat its employees fairly and pay a fair wage, deal with its creditors in an ethical manner, provide the best service to its customers and be responsible about its environmental impact.[31] The preceding is not optional, but imperative.

If we, therefore, agree that corporations do owe some responsibility to a broad and more expansive constituent base, an appropriate justification must be provided. In the following section, I proffer an argument that ascribes a citizen-like status to the corporation and argue that the latter provides an appropriate platform to situate the corporation's social responsibility.

CORPORATE CITIZENSHIP: COULD CORPORATIONS BE TRUE CITIZENS?

As ubiquitous as the term CC has been recently, what is not often clear upon casual observance, is the true meaning of the term and how this differs from the notion of CSR?

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27 Due to the indifference of the state to public welfare in the nineteenth century, entrepreneurs stepped in to fill the void and provide amenities for their employees that would today fall within the remit of national and local governments, such as housing and education. Whilst this level of involvement was in line with the paternalism with which these entrepreneurs dealt with their employees, it did, however, arise from a sense of responsibility or *noblesse oblige*: see Kempner et al (n 15 above) 4.

28 Tim Worstall, 'The story of Henry Ford's $5 a day wages: it's not what you think' *Forbes* (New Jersey 14 March 2012).

29 Kempner et al (n 15 above); also, see Norman Bowie, 'A Kantian approach to business ethics' in Thomas Donaldson, Patricia Werhane and Margaret Cording, *Ethical Issues in Business: A Philosophical Approach* (Prentice Hall 2002) 61, 69.

30 R Edward Freeman, 'The politics of stakeholder theory: some future directions' (1994) 4(4) Business Ethics Quarterly 409–421, 419.

31 Bowie (n 29 above) 9.

CSR as a concept is relatively self-explanatory and could be articulated simply as the desire to secure the non-mandated adherence to hyper-norms, that is, universally accepted principles of the human rights to life, liberty and personal dignity. Perhaps it could be defined more diminutively as corporations taking responsibility for their societal impact or adopting a strategy of harm prevention.[32] The overarching idea is corporate responsibility for the (negative) externalities that result from corporate activity. CSR as a concept, advertently or not, portrays a penchant for *post hoc* redress of the negative impact on those touched by corporate activity. Its reactive nature, therefore, essentially ensures that CSR, with its focus on the amelioration of corporate harm, remains constantly behind the curve.

To put this into context, a firm which is responsive to its environmental impact takes steps to mitigate the impact of this to its neighbours, which, though laudable, could only happen after the fact and the negative effect of the harm has been felt. Whilst mitigation may take the form of clean-up measures and compensation payments, these do no more than repair injury caused (which might be impossible in some cases) and the law only requires that the individual be restored to their pre-harm status, with appropriate compensation required where the latter would be infeasible. This is even worse where full restoration cannot be had.

However, true CC concerns itself not simply with the mitigation of harm, but rather its prevention or, dare I say, a situation where harm causation is beyond the limits of foreseeability. It is the ordering of corporate activity in such a way as to ensure that the causation of harm becomes most unlikely. The latter is what a citizen-like corporation should be about. This is a contemplation of the notion of CC that draws clear parallels between the rights and obligations of the natural citizen. On this note, a corporate citizen is one which eschews its instinct to act in self-interest solely or even primarily, in favour of an approach to its objective that places the collective well-being at par with profitability. A citizen-like corporation assesses the risks its actions could present to its stakeholders and refrains, should the risks to the latter outweigh the benefits or present significant harm to another. A citizen-like corporation does not press on with ventures which are profitable but environmentally risky; relocate production to off-shore locations; or treat legal penalties as an operational cost. In short, profitability – though an undeniable necessity for corporations – lags behind the collective well-being.

32 J Longsdon and D Wood, 'Business citizenship: from the domestic to global level of analysis' (2002) 2(2) Business Ethics Quarterly 155–187, 162; Alejo Jose G Sison, 'From CSR to corporate citizenship: Anglo-American and continental European perspectives' (2009) 89 Journal of Business Ethics 235–246, 237.

It is perhaps beneficial at this juncture to outline the environmental understanding of citizenship in this context and the value of the concept to this discourse. I consider CC here to include both citizenship in a narrow and more localised sense, on the one hand, as well as a globalised view of citizenship, on the other. The reach and spread of the large transnational corporations inform the necessity of the aforementioned view. As such, corporations are both local and global citizens, perhaps much like the average person could, at least theoretically, be both a citizen in a local and globalised sense, at the same time. The latter point being less so in the case of transnational corporations whose operations span the globe, being resident and incorporated within multiple jurisdictions at the same time. This brings me to the value of citizenship and why this might be a useful lens through which we may view corporate responsibility. Citizenship is valuable in the sense that it helps to foster a sense of belonging within a community; this sense of belonging allows the community to define the goals that it intends to pursue purposefully. Viewing corporations as citizens allows them to work within the confines of these shared goals in achieving the corporate objective.[33] Furthermore, a community of citizens is one that creates an environment where all are treated as equals. Simon Duffy argues that citizenship goes beyond a means to protect the common interests but is an end in itself, if that end goal is a community of equals,[34] as citizenship allows the community to reconcile their distinctive characteristics and desires whilst pushing towards a shared goal. Citizenship thinking, therefore, allows corporations to situate their purposes and policies within the larger narrative and could create a shared prosperity. It also presents a viable alternative to the shareholder primacy approach to corporate governance that we considered earlier. Having an approach that views all corporate stakeholders as equals could also help resolve some of the familiar issues that result from a shareholder, profit-oriented approach.

It is fair to note that the aforementioned is in some contrast to the current understanding of CC. Duane Windsor notes that the extant understanding of CC invokes notions of the firm as a 'good neighbour':[35] a watered-down version of citizenship, which aims to position the firm as an ultimately altruistic entity, whose objectives are geared towards the common good. This contemplation of CC frames it as a sequence of largely voluntary actions undertaken by the

33 Simon Duffy, 'The value of citizenship' (2017) 4(1) Research and Practice in Intellectual and Developmental Disabilities 26–34, 27.

34 Ibid 29.

35 Duane Windsor, 'Corporate citizenship evolution and interpretation' in Jorg Andriof and Malcolm Mcintosh (eds), *Perspectives on Corporate Citizenship* (Taylor & Francis 2001) 39.

corporation, which cater to the needs of its immediate environment.[36] In this sense, CC becomes – and is in fact – interchangeable with CSR, which, as previously mentioned, is concerned with harm mitigation and 'random acts of corporate kindness'. Moon and colleagues argue that this contemplation of CC fails to define a new role for the firm and leaves CC with no political significance.[37]

The ascription of citizen-like status to corporate entities

A major obstacle to the placing of the firm within the traditional understanding of citizenship is the overwhelming view of citizenship as something attributed to natural persons.[38] On this point, Windsor highlights the ways corporations have been endowed with some of the status and entitlements enjoyed by natural persons. For instance, the fact that corporations are considered in law to be persons, albeit of an artificial nature.[39] Also, the fact that, for instance in the United States (US), companies are entitled to some of the same constitutional protections as natural persons, like the right to speak freely,[40] be conscientious objectors to government mandates,[41] make political contributions[42] and vote in elections.[43]

Windsor acknowledges that the *de jure* status of firms delineates them from natural persons, but that their *de facto* treatment under the law justifies the metaphorical use of the term 'citizenship' with regard

36 David Logan, *Corporate Citizenship: The Role of Companies as Citizens of the World* (Panorama Press 2018).

37 A Crane, D Matten and J Moon, *Corporations and Citizenship* (Cambridge University Press 2008) 22.

38 J Moon, A Crane and D Matten, 'Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society' (2005) 15(3) Business Ethics Quarterly 429–453, 432.

39 The US Supreme court initially recognised the legal personality of the private corporation in *Dartmouth College v Woodward* (1819) 17 US 481; the courts stated that by establishing a corporation the founders had created 'an artificial being, invisible, intangible and existing only in contemplation of law'. This view was furthered by the decision in *Salomon v Salomon & Co Ltd* (1897) AC 22, where the firm's legal personality was deemed to be separate from that of its founders.

40 Amy J Sepinwall, 'Citizens united and the ineluctable question of corporate citizenship' (2012) 44 Connecticut Law Review 575, 583.

41 The US Supreme Court in *Burwell v Hobby Lobby* 573 US 682 (2014) ruled that closely held corporations may refuse to provide contraceptive coverage to their employees under the then recently enacted Affordable Care Act, if said requirement contravened the religious beliefs of the corporation's owners.

42 *Citizens United v Federal Election Commission* 130 S Ct 876 (2010).

43 Some municipalities in the US state of Delaware allow all property owners including limited liability corporations to vote in local elections. See Hal Weitzman, 'Delaware: the state where companies can vote' (*Promarket* 23 May 2022).

to them.[44] On this point, Moon and colleagues critiqued the rigid definitions of citizenship which limited the notion to the traditional (liberal and communitarian) conceptions, thus ignoring the range of 'potential citizenship roles'.[45] They argue that 'citizenship thinking' should be able to add a fresh perspective to our understanding of the way corporations can participate in society,[46] believing that the notional CC should not be constrained in any way, but should have a bold normative trajectory that goes beyond a narrow set of obligations, enabling corporations to be situated within a definition of citizenship, and that these should extend beyond the normal business activities to aspects of corporate political engagement, including lobbying, campaign financing and other types of legislative involvement.[47]

With regard to corporations behaving like citizens, Moon and colleagues state that 'alluding to corporations in terms of citizenship does not literally mean that corporations are citizens or have citizenship but that their substance or their actions can be understood as being in some meaningful way similar to that of citizens or citizenship'[48] and that a new way of theorising CC was necessary, in order to forge a distinction between 'that which can acknowledge and conceptualize the distinction between corporations having the legal identity "of" citizens, and of them participating in society "like" citizens do'.[49] It is factually true that corporations can participate in society similarly to citizens in a lot of ways – albeit with aforementioned limitations.[50] The question, however, is whether that provides ample justification for the notion that society should have similar expectations of corporations as they do of natural citizens.

CORPORATE CITIZENSHIP SHOULD BE ABOUT CORPORATIONS AS CITIZENS

As noted earlier, the concept of citizenship proves especially useful when proffering a paradigmatic shift in the ways corporations relate to wider society. Citizenship provides us with the tools to navigate

44 Crane et al (n 37 above).
45 Moon et al (n 38 above) 431.
46 Ibid 432.
47 Ibid.
48 Ibid.
49 Crane et al (n 37 above) 44.
50 As highlighted previously, whilst corporations may not vote or participate in the electoral process, they may, however, make contributions to preferable candidates or actively support beneficial policy proposals. Corporations also have political speech rights and are allowed to participate in the polity in ways that mimic the rights of natural citizens: ie pay taxes, obey laws etc. Moon et al (n 38 above) 432.

the often quite severe power asymmetries that exist in the said relationship between firms and the communities they inhabit, as well as the individuals within those communities. These imbalances are more pronounced within the lower-wage, capital-needy but resource-rich communities where a healthy amount of corporate activity by large multinational corporations is conducted. The fact that a lot of these activities take place within social contexts where the basic legal protections are often absent or lacking in effectiveness, reinforces the need for corporations to behave in ways that portray a citizen-like dynamic in how they interact and conduct their activities within the community. Furthermore, viewing the corporation as a citizen (in the same vein as natural citizens) opens the door for the state to adopt a more paternalistic approach to regulating corporate activity.

This issue, however, is not isolated to the developing world and is also evident in wealthier countries in the Global North, where the consistent roll-back of the statist infrastructures has provided a platform for corporations to increase their influence in society. This trend is most evident in places like the United Kingdom (UK), where privatisation[51] has allowed corporations increasingly to take on responsibilities – like public security and other social services – which had hitherto been within the sole purview of the state.[52] This power dynamic furthers the case for good global CC.

Moon and colleagues highlight various institutional pressures which force even the most inordinately powerful corporations to adopt a socially responsible stance or even take on social causes which extend beyond their brief[53] – institutional pressures driven by contemporary phenomena like market, social or government regulation, as well as other market drivers which force companies to value sustainability in supply chains and factor important issues like employee wellbeing into their business practices. It could be argued that this infatuation with fostering responsible, citizen-like corporations arises from the unease with the current levels of corporate power and the wielding of this power in relation to the more vulnerable in social

51 The Thatcher Government began selling off key assets in sectors that had been under the control of the Government, including transportation, communications and utilities. This spate of privatisations was carried further throughout the following decades, culminating in the recent privatisation in the previously sacrosanct sectors of healthcare, law enforcement and the wholesale of Royal Mail in 2012. See Richard Seymour 'A short history of privatisation in the UK: 1979–2012' *The Guardian* (19 March 2012).

52 J Moon, A Crane and D Matten, 'Corporate power and responsibility: a citizenship perspective' in Jesus Conill, Reinhard Mohn and Tatjana Schonwalder-Kuntze (eds), *Corporate Citizenship, Contractarianism and Ethical Theory* (Taylor & Francis 2006).

53 Ibid 14.

settings[54] and that this power dynamic between corporations and other societal stakeholders necessitates a greater requirement that corporations act responsibly. Moon and colleagues believe that corporations could be considered citizens due to the close relatedness to the concepts of power and responsibility. Adding that the consideration of power and citizenship should be contextualised by the themes of power and responsibility.[55]

As highlighted previously, one could argue against corporations being ascribed citizenship status, based on the fact that corporations are unable to fully avail themselves of the benefits of citizenship, like natural persons. Whilst this point is not without merit, the fact is that corporations have been accorded with enough benefits to validate a citizen-like status. For example, Moon and colleagues outline the three dimensions of citizenship, *à la*:

- citizen status (which constitutes passive rights, ie free speech and property rights);[56]
- citizen processes (which extend beyond base rights to the right to participate fully in the public polity, ie to vote and hold office);[57] and
- freedom to participate in society (which includes various citizens' entitlements, ie education etc).[58]

Although, currently, the rights ascribed to corporations only fall within one of these dimensions (citizen status), corporations are, however, accorded further benefits, which mimic those of ordinary citizens. For instance, corporations seek and often receive various forms of 'corporate welfare', for example state-funded subsidies to support innovation and expansion, as well as bailouts and other forms of economic stimuli. Furthermore, corporations enjoy a proximal closeness to the rights they do not enjoy. For instance, although corporations are unable to vote,[59] they are able to influence the outcome of democratic elections in ways that outstrip the capacity of the average citizen.[60] Corporations are unable to hold office, but corporate lobbying ensures they significantly influence the legislative and regulatory processes and are able to

54 Ibid 18.
55 Ibid 16.
56 Moon et al (n 52 above) 19.
57 Ibid
58 Ibid.
59 As noted earlier (n 43 above), there have been some unsuccessful efforts by local municipalities in the state of Delaware to grant limited liability corporations the right to vote in local elections.
60 The *Citizens United* decision established corporations' capacity to exceed previously determined campaign contribution limits, on the basis that this was an expression of political speech (n 42 above).

help craft the domestic and foreign policy frameworks in ways the democratic processes in which natural citizens partake could not.

The aforementioned rights stem from the separate legal personality accorded to incorporated firms under the law.[61] Corporations are consequently thought to possess a moral personhood[62] which forms the basis for the increased expectations that companies eschew morally reprehensible behaviours.[63] Windsor goes further to argue that although the *de jure* status of companies differs from that of natural persons, the former are effectively considered human in law. This assertion is supported by the attitude governments sometimes adopt in relation to companies, often granting some national identities.[64]

Not all, however, agree with the above. Amy Sepinwall, in response to the *Citizen's United* decision, argues that the tenor of the court's decision does not suggest that the law views corporations as being in nature similar to natural citizens.[65] Sepinwall posits that the *Citizen's United* decision 'does not rest on a conception of the corporation as a citizen; instead, the majority opinion grounds corporate free speech rights largely on the right of listeners to hear a speech from as many different voices as possible'.[66] In doing this, she distinguishes between legal and normative citizens, arguing that, whilst corporations are considered legal citizens by virtue of legal instruments (ie their corporate charter), they are not normative citizens. Accordingly, corporations are unable to participate in any of the three central mediums of active citizenship, which are the jury, the ballot and the armed forces.[67] Her argument raises questions as to whether corporations could even attain normative citizenship and whether they should even be allowed to align their interests with society's. With regard to the first, she firmly believes that corporations, whilst legal, are not accorded a pathway to normative citizenship according to our current conceptualization, stating that: 'What matters then is not the corporation's metaphysical or ontological status, but instead the plain social fact that corporations are not expected to participate in the central institutions of citizenship, just as foreigners are not expected to do so.' If expectations were changed (and some way for corporations to vote, sit on a jury, and serve in the military were developed), corporations would count as normative citizens. But these

61 Sepinwall (n 40 above) 589; Crane et al (n 37 above).
62 Kenneth Silver, 'Can corporations be worthy of moral consideration?' (2019) 159 Journal of Business Ethics 253–265, 255.
63 Crane et al (n 37) 26.
64 Ibid 27.
65 Sepinwall (n 40 above) 581.
66 Ibid.
67 Ibid 594.

things are not currently expected of corporations.[68] As for the second issue, she argues that corporations are generally prohibited via the tenets of shareholder value from fulfilling associative obligations in relation to the communities they inhabit.[69]

Whilst it is important to caveat the preceding by stating that Sepinwall's argument related to the issue of whether corporations should be granted political speech rights, these arguments, however, are inherently relatable to the context of obligative citizenship. Normative citizenship as we know involves the submissiveness to a sovereign in return for physical, economic and social protections. This unwritten social contract between the citizen and the state obligates the former to defend the state when needed, engage in the polity, as well as contribute to the treasury by way of taxes, where possible.[70] Citizens are also expected to be good neighbours and act with due care whilst dealing with their neighbours. Basically, citizenship involves a juxtaposition of the needs of the collective against the rights and obligations of the individual and how the conflicts that inevitably arise are resolved. In fact, there is the age-old idea that good citizenship prioritises the needs of the community or at the very least places the latter at par with one's own interests, effectively creating a sort of 'dual responsibility' which burdens the individual with a sense of duty towards public affairs;[71] the absence of the latter, according to Pericles, makes the individual a 'useless character' and one unentitled to citizenship.[72]

As noted earlier, our current view of CC has little to do with 'citizenship' in the traditional sense; often having voluntary and philanthropic undertones.[73] It is the view of this author that the latter ignores the realities of the corporate's existence and place within society. In fact, one might argue that obligations on the corporation fall somewhat below the expectations the state places on the natural citizens. One could argue further that corporations mostly enjoy the benefits of citizenship, without the corresponding obligations: Corporations are granted a number of significant benefits including, limited liability and corporate welfare (ie tax subsidies and grants etc), whilst being mainly encouraged to do the bare minimum (ie ensuring their activities fall within legal boundaries). So, therefore, what should CC look like?

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68 Ibid 605.

69 Ibid 606.

70 Jan W van Deth, 'Norms of citizenship' in Russell J Dalton and Hans-Dieter Klingemann (eds), The Oxford Handbook of Political Behaviour (2007 Oxford University Press; online edn, Oxford Academic, 2 September 2009).

71 Ibid 403.

72 Ibid.

73 Longsdon and Wood (n 32 above) 158; Logan (n 36 above) 64.

I posit that the concept should mean that the citizenship status attributed to corporations should mirror natural citizenship in as close a sense as possible. That is, corporations should be deemed citizens, just as any natural born citizen. I argue that this is justified by the aforementioned points, namely that corporations are a creation of the state, that they enjoy rights and privileges that mirror those of natural born citizens – and may even exceed the influence of natural persons in some respects. Also, there currently exists an asymmetry between the rights enjoyed and the obligations imposed – which are often the bare minimum. But perhaps the most significant reason for the imposition of the citizenship status is the outsized impact corporations have on local communities: everything we can see and touch is produced, marketed or owned by corporations. I posit that CC is not only a way to keep said power in check, but also a means to ultimately ensure that the benefits of this power and influence are shared widely. In this case, attributing citizenship-like values to corporations benefits society more than it does corporations because it opens the door for the state to exercise a level of control over corporate activity that the current model does not allow. It is true that our view of capitalism has placed limits on the ways the state is allowed to regulate corporations and corporate activity. However, a CC model like this allows the state greater leeway in providing a much-needed legal framework to check corporate power. For example, granting citizenship status to corporations could help prevent the quite common practice of corporations being domiciled in friendlier jurisdictions (for tax benefits etc) whilst maintaining operations within their home jurisdictions. A model of CC like this could open the door for legislation that could allow the state to treat such corporations as alien entities, thereby stripping them of all prior financial benefits and state subsidies and imposing stiff tax penalties on these firms.

This conceptual model of citizenship would need legislative backing that, admittedly, is most unlikely within the current economic climate. This leaves a vacuum that educating business leaders is a viable option,[74] which I will consider later in the paper.

Facilitating a regime of good corporate citizenship

Bridging the legislative gap between corporations and natural citizens

As alluded to in the preceding section, establishing a model of true CC might well require a corporate law regime that sets the standard of corporate behaviour at levels higher than we have become

74 Paul Prinsloo, Cecilia Beulkes and Derick de Jongh, 'Corporate citizenship education for responsible business leaders' (2006) 23(2) Development Southern Africa 197–211, 198.

accustomed to. Here, the expectations go beyond the bare minimum and regulations are accompanied by an assortment of penalties which guarantee consequences for failures to adhere, as is the case for natural citizens. However, unlike natural citizens, corporations today have the capacity to influence the law-making process and ameliorate the impact of laws made far better than the natural citizen. That in itself creates a conundrum on two parts: what to do to limit the influence of powerful corporations on the legislative process and how to ensure that corporations which fall afoul of existing laws are held accountable.

The first is perhaps the most straightforward, albeit with significant challenges of its own. The influence gained by corporate political activity is no secret,[75] it is far less clear as to how we might strive to limit said activities and even more difficult to gauge the breadth of the political will to do so. The latter point is important, considering the influx of corporate cash in the democratic process through activities 'to shape government policy in ways favourable to the firm'.[76] Alex Neron highlights the fact that good CC would ultimately require corporations to ensure that their political activism works to the 'common good' and is not self-interested in nature.[77] He admits that the inherent difficulty in making sure that firms that use their behind-closed-doors access to policymakers are expected to promote this common good provides ample justification for laws that aim to constrain the ability of these corporations to engage with the political system.[78] It is, therefore, the case that we might very well need laws in place to prevent corporations from being able to influence the political process.

The focus then shifts to how you ensure that corporations that fall short of the legal standards are held accountable for their actions. The difficulty to do the preceding lies on two fronts: the presence of 'loopholes' that allow corporations to legally avoid compliance or the underenforcement of existing laws which makes breaching said laws the more economically viable option and the difficulty in identifying a responsible party or appropriate penalties for each breach. In regard to the first, there is evidence showing that the presence of these loopholes

75 Dorothy Lund and Leo Stine Jr, 'Corporate political spending is bad for business' (2022) 100(1) Harvard Business Review.

76 A Scherer, D Baumann-Pauly and A Schneider, 'Democratizing corporate governance: compensating for the democratic deficit of corporate political activity and corporate citizenship' (2012) 52(3) Business and Society 473–514, 477.

77 Pierre-Yves Neron, 'Rethinking the ethics of corporate political activities in a post-Citizens United era: political equality, corporate citizenship, and market failures' (2016) 136 Journal of Business Ethics 715–728, 717.

78 Ibid 721.

is a direct consequence of corporate political activism,[79] further emphasising the need to have these constraints on corporate political activism. The second issue has to do with the difficulty in identifying the party or parties responsible for the corporate wrong, as evidenced by the difficulties in determining corporate criminal liability.[80] Often punitive measures for violations have taken the form of fines, which are mostly ineffective in preventing corporate malfeasance, as companies often consider these to be the cost of doing business.[81] These are all serious considerations that must be reckoned with if one were to ensure the efficacy of future legislation.

THE REORIENTATION OF CORPORATE SOCIAL VALUES

What a citizen-like corporation could look like

Besides regulating corporate behaviour to ensure corporations adopt citizen-like traits, an arguably more effective method – considering the aforementioned prevalent socio-political factors that inhibit legislative effectiveness – could be the reorientation of corporate social value systems to allow corporations to view themselves as citizens and thus factor citizenship into their operating model.

This aforementioned would inevitably require a re-evaluation of the corporate's value system and would require a shift from one which prioritises profits and profitability to one which is pluralistic and places the needs of the community at its core. This will require a shift from the current shareholder-centred governance model to a citizenship model of corporate governance – one that emphasises the citizenship responsibilities of the corporation. However, the issue then becomes the method by which this may be accomplished.

In this article, I hypothesise on the role law clinics could play in ushering a new era of progressive corporate governance founded on a

79 Lee Drutman, 'How corporate lobbyists conquered American democracy' (*The Atlantic* 20 April 2015).

80 The foundational common law requirement that a person must possess a guilty mind for criminal liability to exist had made it extremely awkward to prosecute cases involving criminal culpability by corporations. Ensuring that liability is often contained to individual actors, unless the said actor was of sufficient seniority to be deemed to be the organisation's controlling mind, the corporation may subsequently be liable by virtue of the 'identification doctrine'. The latter scenario is more likely to occur in small private companies as against the larger multinational corporations, making successful prosecutions of large corporations utilising the aforementioned doctrine an often-rare prospect.

81 Daniel T Ostas, 'Legal loopholes and underenforced laws: examining the ethical dimensions of corporate legal strategy' (2009) 46(4) American Business Law Journal 487–529, 501.

model of CC, which I will discuss the specifics of in the next section. The aim here is simply to lay the groundwork for the theoretical formulations I will be detailing. The key is precipitating a reorientation of the corporate's system of values, particularly in relation to how it sees its role or lack thereof in the wider community. One's social value orientation is their preference for an outcome in relation to theirs or the interests of others in interdependent situations.[82] It is widely accepted that there are three types of these social value orientations, namely *prosocial* (which seeks desirable outcomes for everyone), *individualist* (concerned with themselves) and *competitor* (desiring progress at others expense). The current corporate governance model ensures that corporate social orientation falls within the latter two categories (known as *proself*) whilst a fair few could be reliably described as having a 'competitor' orientation. The *proself*, as the name suggests, rejects any suggestions of a responsibility which extends beyond the need to maximise one's own interests, including at the expense of another. This view embodies the previously discussed mainstream view of the corporate objective, that social responsibility was but a secondary undertaking and, when undertaken, should be merely a means to a predetermined, profit-oriented end.[83] It is important to add that even this latter view was not always the norm, and even Friedman admits that corporations may choose to adopt a socially responsible stance within reason.[84] Friedman, however, argued against the notion of a socially responsible corporation, stating that a corporation's engagement with social causes effectively placed costs on its stakeholders.[85] These costs could be in the form of higher rates for customers, as well as lower profits and wages for investors and employees, respectively. He posits that utilising corporate resources for the advancement of social causes is effectively akin to managers spending other people's money and that the decision to utilise firm resources to advance social causes should be left to the people whose resources they are, and people should do good 'at their own expense'.[86] In other words, to be successful, the corporation must be *proself*.

In a nutshell, the *proself* corporation is free to engage in the form of winner-takes-all capitalism we have become accustomed to. The consequences of which are well documented and have been mentioned

82 W Anderson and M Patterson, 'Effects of social value orientations on fairness judgments' (2008) 148(2) Journal of Social Psychology 223–246, 224.

83 Friedman (n 9 above).

84 Ibid.

85 Ibid.

86 Ibid.

previously.[87] However, growing social movements strive to necessitate an urgent rethink of the way corporations interact with wider society, with a new generation of global citizens demanding greater accountability for the externalities of corporate activity, particularly in relation to the environment and falling living standards, in other words, asking corporations to be more *prosocial*. The largest businesses have begun to take note.[88] But, so far, the efforts to effect a change could be described as little more than corporate virtue signalling, that is, essentially maintaining the *status quo*, as they cosplay social activism.

Effective change would require a complete top-down reorientation of the corporate ethos and the widespread adoption of prosocial values. The question becomes whether corporations, which have reaped significant rewards from the current state of affairs, could prioritise the well-being of a wide berth of stakeholders, possibly at the expense of profitability. A corporation that views itself as a vehicle for shareholder wealth creation might not, but one which views itself as a citizen of the social environment it inhabits (a prosocial corporation) may very well do so.

To conclude this section, a citizen corporation imbued with prosocial values at its core would look and operate very much like the portrait painted by Martin Wolff, that is, one that does not deny climate change but embraces it and works towards limiting its contribution to the phenomenon, or does not lobby for tax systems that benefit itself to the detriment of society as a whole, one which treats its employees and customers fairly and does not strive to be anti-competitive in its approach to business.[89]

It is fair to note that the above would require a significant amount of divestment from the *status quo* to facilitate a pivot from the current corporate parasitism to a symbiosis more akin to a citizen-like co-existence. Whether corporations could exercise the requisite willingness and capacity to behave like citizens remains to be seen, especially with little chance that this could be necessitated by legislative intervention.

Therefore, institutions of higher education represent a viable option for corporations to be reorientated to act like citizens. In the following section, I argue that, in theory, business law clinics might have a role in helping infant corporations adopt the citizenship governance model and that the latter sits well within the clinics' implicit social justice function that underpins the activities that assume there could be an opportunity for business law clinics to take on a major role in these efforts.

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87 Martin Wolf, 'There is a direct line from Milton Friedman to Donald Trump's assault on democracy' in Luigi Zingales, Jana Kasperkevic and Asher Schecter (eds), *Milton Friedman 50 Years Later* (Promarket 2020) 114.

88 Business Roundtable (n 2 above).

89 Wolf (n 87 above).

A ROLE FOR CLINICAL LEGAL EDUCATION IN FACILITATING THE CORPORATE CITIZEN

Law clinics have traditionally been viewed as existing to provide access to justice to those who otherwise would be excluded. The consensus is that the promotion of a socially just cause should steer the activities of the law clinic.[90] The reason for this is that the first law clinics were inextricably linked to the civil rights movement and were established to train future lawyers in 'client-centred lawyering'.[91] There is some debate as to the ultimate purpose of the law clinic, as some have argued that these clinics could and perhaps should have a purpose that transcends a purely social justice function, while others have resisted this view and maintain that clinics are meant to serve the least in society.[92] CLE is defined is a:

> legal teaching method based on experiential learning, fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centred, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues.[93]

Rose Voyvodic further describes CLE as 'a curriculum-based learning experience, requiring students in role, interacting with others in the role, to take responsibility for the resolution of a potentially dynamic problem'.[94] She views it as the 'most effective pedagogic device for forcing students to address a whole range of intellectual and social issues' by offering what is essentially the best of both worlds: 'practical experience on the one hand and the intellectual inquiry and enhanced sensibility on the other'.[95]

Clinics aim to impart the students with these skills by exposing them to real clients with real issues and allowing the students to gain knowledge and skills along with an awareness of the intricacies of legal

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90 Kosuri (n 5 above) 332.

91 Ibid 333.

92 Campbell (n 7 above) 170.

93 European Network for Clinical Legal Education, 'ENCLE defines Clinical Legal Education as follows'.

94 Rose Voyvodic, 'Considerable promise and troublesome aspects: theory and methodology of clinical legal education' (2001) 20 Windsor Yearbook of Access Justice 111–140.

95 Ibid 111.

practice, under the supervision of qualified lawyers.[96] Clinics generally aim to service low-income and indigent clients who typically would be unable to afford legal fees. Kosuri states that clinicians justify the social justice function of law clinics on the grounds that most students might otherwise never encounter these issues over the course of their professional lives.[97] Voyvodic argues that clinics provide a medium by which otherwise privileged students might encounter the 'culture shock' of issues they may never have cause to engage with otherwise, like the struggles of low-income people or those from marginalised and other underserved communities,[98] stating that this is further enhanced with the inclusion of professional responsibility and ethics as a pedagogical goal.[99]

The bias in favour of social justice stems from the origins of CLE, which came about in response to the inadequacies of the case method of legal education.[100] Although, clinics were not meant to replace the case method in its entirety, but to work conjunctionally with the latter in providing a holistic form of legal training. The function of these clinics began to evolve in the 1960s, with the dawn of the civil rights movement in the US, when a number of clinics began to take on social

96 Ibijoke Patricia Byron, 'The relationship between social justice and clinical legal education: a case study of the Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria' (2014) 20(2) International Journal of Clinical Legal Education 563, 565–577.

97 Kosuri (n 5 above) 339.

98 Voyvodic (n 94 above) 119.

99 Ibid.

100 The development of the case method of legal education is credited to Christopher Langdell, a former Dean of Harvard Law School. It is the predominant method of teaching in US law schools and focuses on the analysis of legal and judicial opinions as against the provision of lectures and reading of textbooks. Pioneers of CLE, like Karl Llewellyn and Jerome Frank, were part of a group of legal realists who decried the emptiness of the case method, with its emphasis on interpretation of legal rules, calling instead for a fact-based educational method which focused on the conversion of legal knowledge into action. Frank likened a rule-based legal education to 'architects who study pictures of buildings and nothing else' and his proposed remedy was the establishment of 'legal clinics' in law schools that would help to deepen the students' understanding of legal theory, with the aim that these clinics would service legal-aid groups, but also government agencies and quasi-public bodies. Accordingly, this method was not meant to replace the case method in its entirety, but to work conjunctionally with the latter in providing a wholesome legal training. See Jerome Frank, 'Why not a clinical law school?' (1933) 81 University of Pennsylvania Law Review 907–923, 908; Karl Llewellyn, 'On what's wrong with so-called legal education' (1935) 35 Columbia Law Review 651, 658.

justice causes.[101] There has been quite a significant growth in the number of these clinics in UK institutions of higher learning over the last few decades,[102] largely driven by the increasing demand for access to justice by communities effectively left behind by reforms to legal aid and other social provisions that have heightened the need for the services that law clinics provide.[103] Although the core responsibility for clinics could still be considered to be servicing the legal advice needs of marginalised communities, there is a growing number of clinics which have chosen to not restrict themselves to these core/traditional social issues, choosing to provide services to some within the business community.[104] It would be a mistake, however, to suggest that the choice to work with non-traditional clients, like fledgling businesses, is a deviation from the previously mentioned social justice remit that these clinics are meant to have. I argue in this article that there could be a social benefit to working with these businesses. CLE provides an important platform for law students to acquire the much-needed skills that may very well serve them in their professional lives and could be an instrumental medium by which citizenship values may be impacted upon these businesses.

The perception of an inherent social justice mandate for law clinics

As stated previously, law clinics have traditionally had a social justice function. By social justice, I mean a redistributive function that focuses in providing access to indigent and other marginalised communities. There is also a significant view within the CLE community that the latter should be the primary function of law clinics.[105] To this point, Kosuri argues that this narrow conception of the value and function of

101 Stephen Wizner, 'The law school clinic: legal education in the interests of justice' (2002) 70(5) Fordham Law Review 1929–1937, 1933; Stephen Wizner, 'Is social justice still relevant?' (2012) 32 Boston College Journal of Law and Social Justice, 345–355, 346–348.

102 James Sandbach and Clare Johnson, 'Impacting justice: the contribution of clinical legal education and law school clinics to pro bono and access to justice in England and Wales' (European Network for Clinical Legal Education and International Journal of Clinical Legal Education Conference, Bratislava, July 2019) 4.

103 The passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 led to severe cuts to public funding for legal services, leading to an 80 per cent loss of available legal aid resources and services in the UK, and also leading to an increase in the demand for the services provided by law clinics. Joanna Clarke and David Raeburn, Law Clinics Network Report 2013–2014 (LawWorks and the Law Society September 2014) 3.

104 Campbell (n 7 above) 168.

105 Deborah Rhode, *Access to Justice* (Oxford University Press 2004) 193.

law clinics has resulted in a form of intellectual homogeneity[106] and cite the danger that law students may very well adopt this view from clinicians:[107] a view that makes it unsurprising that some question the legitimacy of business law clinics in particular and clinics that do not, on their face, naturally fit within the initial social justice conceptualisation of CLE.[108] They see this drift towards the social justice mission as a natural consequence, considering CLE traces its origins to the civil rights movement.[109]

It is has been said that it is becoming more difficult to maintain this social justice function of law clinics due to a multiplicity of factors, including the drive to make students employable which has helped steer students towards placements outside of law clinics and the foray of law clinics into the private sector.[110] Weinberg highlights this fact by stating that law schools have created the aforementioned issues by fostering an ultra-competitive environment that rewards the best students with the best grades, a fact which often leads to significant rewards in the job market.[111] The implication being that students no longer consider the clinical work in its original contemplation – serving the underserved – but rather as a way to acquire the skills and experience that could make them attractive to future employers.

However, Julia Lawton does question whether a new perspective concerning the function of clinics is needed and cautions clinicians with social justice leanings from striving to impose their values on students.[112] She highlights that law schools in general strive to impose a social justice morality on their students and they do this through the imposition of *pro bono* requirements, experiential learning opportunities, as well as funding support,[113] and calls instead for students to be exposed to social justice morality rather than for said morality to be imposed upon students.[114] Kosuri echoes Lawton in calling for a more expansive and inclusive view of law clinics; one that caters to the needs of the student body and ensures there are opportunities for all students interested in clinical work regardless of

106 Kosuri (n 5 above) 336.
107 Ibid.
108 Ibid 340.
109 Ibid 333.
110 Jacqueline Weinberg, 'Preparing students for the 21st century practice: enhancing social justice teaching in clinical legal education' (2021) 28(1) International Journal of Clinical Legal Education 5–67, 7.
111 Ibid 17.
112 Julia Lawton, 'The imposition of social justice morality in legal education' (2016) 4 Indiana Journal of Law and Social Equality 57–75, 67.
113 Ibid 68.
114 Ibid 73.

their interests.[115] This introduces the argument for law clinics to be opened up to a broader slate of clientele, which could include fledgling start-ups or infant corporations seeking legal guidance. In theory, working with these corporations at a pivotal point in their operational history could present an opportunity for them to embody the value systems that could very well help them become good corporate citizens. Law clinics present a unique opportunity to guide the next generations of corporations along that path.

Clinical legal education as a methodology

The work done within the law clinics places these entities in a uniquely effective position when it comes to addressing and tackling social issues. As discussed in the previous section, clinics are a medium by which students learn the vagaries of legal practice, whilst providing a much-needed public service, allowing the participants to develop a range of hard and soft skills[116] even as they help those most in need of the services they help provide.

Voyvodic highlights the unique methodology that CLE presents for the impacting of legal skills and by extension social values in the student participant. In that it allows the student to not just learn a skill by 'doing', clinical work further provides 'an insight into the meaning and content of what is done', outlining the rationale and importance of the skill being taught.[117] She states further that 'clinical programs aim to teach analytical methods of planning to [help the students] deal with unstructured situations'.[118] Exposing law students to this level of training could be beneficial in a number of ways: the relative youth and inexperience of the average university student privileges them with an idealism that is not often present the older people get. That idealism along with the socio-political awareness that they may very well gain from exposure to the social challenges of their clients, coupled with an understanding of the important role corporations play within society as a whole, might inject them with the vigour and vibrancy needed to impact the practice of the businesses they deal with. Furthermore, the absence of the cynicism that often accompanies life experience could make believers out of these students in the possibility of a good corporate citizen. This fervour could allow them to adopt a 'no holds barred' approach when working with fledgling businesses in advising

115 Kosuri (n 5 above) 336.

116 Rachel Dunn, Lyndsey Bengtsson and Siobhan McConnell, 'The policy clinic at Northumbria University: influencing policy/law reform as an effective educational tool for students' (2020) 27(2) International Journal of Clinical Legal Education 68–102, 74.

117 Voyvodic (n 94 above) 116.

118 Ibid.

the latter on the notions of CC. On the other hand, the aforementioned youth and relative inexperience could also make the students more open to viewing the theoretical notions of citizenship discussed in this article as attainable. This belief is in line with research showing Generation Z (born between 1995 and 2010) as more socially and environmentally engaged at a young age than older generations.[119] This level of engagement with these pivotal issues could allow them to better see the possibilities for change and make them more open to solutions that fall outside the norm. The perceived responsiveness of corporations to the whims of this generation, coupled with their ethical approach to consumption,[120] in my view, places them in a unique position to steer these businesses towards citizenship-like behaviours.

On a separate note, clinical education provides a platform for students to both engage with and consider the policy reasons behind the situations that their clients deal with.[121] This exposure could allow the students to understand the impact that laws have on the welfare of citizens in general. It could also help them see the benefits a people-centred policy framework could have on the welfare of everyone, including policies that regulate the behaviours of corporations and prioritise their relationships with employees, consumers and the environment. There is evidence that students within law clinics involved in policy work (eg conducting empirical research with the aim of influencing policy) develop a greater social justice ethos as a result of the work done within the clinics.[122] Engaging in policy work allowed the student participants to understand the impact policies have on the people subject to said policies and the contributions they could make to society via policy work, with the participants reporting a range of benefits particularly in relation to their understanding of the social and ethical implications of policy decisions, especially on those who are most likely to require the clinic's services.[123] Additionally, working with clients could also provide a platform by which students could witness the implications their professional choices and decisions could have on those impacted by them, both in the far and near term.

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119 A survey conducted by the consulting firm McKinsey & Company in 2019 found that Gen Z is more likely than previous generations to prioritise environmental sustainability, with 90 per cent of respondents saying that they would pay more for products that are environmentally friendly. The survey also found that Gen Z is more likely to prioritise social causes such as racial justice and income inequality. Taylor Francis and Fernanda Hoefel, 'True Gen: Generation Z and its implications for companies' (Mckinsey & Co Report 2018).

120 Johnny Wood, 'Gen Z cares about sustainability more than anyone else – and is starting to make others feel the same' (*World Economic Forum* 18 March 2022).

121 Dunn et al (n 116 above) 101.

122 Ibid 100.

123 Ibid.

Such exposure might help students begin to develop an awareness of the consequences of their actions at a much earlier stage than usual.

Finally, and perhaps more relevant to the discussion here, is that clinics provide needed services to the business community. Whilst this might seem out of step with the core functionality of CLE as a methodology, the point that needs to be emphasised here is that business law clinics do not represent a compromise of the social justice ethos that has always underpinned CLE. If anything, it may very well represent an extension of this core function: by providing legal services to economically challenged entrepreneurs, on the one hand, but also working with these businesses in the early stages in a bid to imbue them with progressive values that may allow them to establish sustainable business models and entrench them as citizens within their host communities.

How business law clinics can help corporations become better citizens

As discussed above, one of the major arguments against business law clinics is that they fail to fulfil the social justice mandate – by servicing the needs of the indigent – that clinics are thought to have.[124] This view, I believe, stems from a misconception of the nature and scope of transactional law clinics. It is fair to admit that advising clients on intellectual property or investment issues does not appear to have the same weighting on the altruistic scale as the work traditionally done within law clinics. That said, this section aims to highlight the potential of business law clinics from a social justice perspective and reveal how fulfilling this potential could help alter the current view of the effectiveness of these clinics. In this section I argue that business law clinics could work with start-ups, helping educate the directors on the values of progressive, socially conscious CC and highlighting the wider social benefits this approach could have.

First, and most importantly, business law clinics that have a commitment to progressive values – a commitment to environmental preservation, economic justice and true equality of opportunity – could have the effect of instilling these values within the students. This could have wider benefits in the future as the students go on to careers in business and legal practice. Students who have participated in a business law clinic with social justice at its core and who imbibe these values in their practice could carry these on into careers in business, legal practice, politics and other forms of public service. This could lead to more responsible corporate governance, socially and

124 Kosuri (n 5 above) 341.

environmentally friendly public policy mandates and possibly lead to a more informed electorate and spur greater socially conscious activism.

In furthering greater CC, these clinics could help educate start-up corporations on their responsibilities to their immediate environment, emphasising the fact that these responsibilities are concomitant with their licence to operate within the host community, as is the case with individuals. As has been discussed quite extensively in this article, a citizen-like corporation recognises its responsibility to a wide berth of stakeholders. The aim is to have clinics equip young corporations with the progressive values that could broadly impact the corporate objective and enable the company to pivot from the profit-centred mindset discussed earlier in the article. The latter could be attained in a number of ways.

For a start, clinics could educate start-ups on employee rights and the right approach to employee management. Companies could be encouraged to view their workers as prime assets and not an easily dispensable factor of production. They could be encouraged to set policies in place that ensure the statutory rights for employees are upheld, particularly in the areas of compensation. Companies could be advised to ensure all workers are compensated fairly and not the least allowed by law, that they should refrain from harmful practices like wage theft[125] and the utilisation of casualised, unsecure labour.

The preceding is important for the following reasons: first, it could have a positive impact on employee morale, which translates to better individual and collective performance. Research has shown that firms whose employees believe they are treated fairly tend to outperform their peers.[126] Second, there are also the practical implications of having well-compensated and motivated employees, in the sense that they are more likely to form part of the company's customer base. The latter fact was recognised by the pioneer Henry Ford over a century ago.[127] On a final note, firms should be discouraged from the mainstream perception of employees as expendable and refrain from the knee-jerk reaction of effectuating job losses upon an economic downturn. At an early stage, start-ups could be encouraged to countenance the broader social and economic impact of every lost

125 Victoria Noble, 'How Britain's online retailers are profiting from wage theft' (*Open Democracy* 30 September 2020).

126 Clement Bellet, Jan-Emmanuel De Neve and George Ward, 'Does employee happiness have an impact on productivity?' (Saïd Business School WP 2019-13 2019).

127 Henry Ford advocated for higher wages and better working conditions for his workers not out of charity but based on the conviction that this would improve worker productivity and benefit the business in the long-term. See Sarah Cwiek, 'The middle class took off 100 years ago … thanks to Henry Ford?' (*NPR* 27 January 2014).

job and explore other cost-cutting measures, resorting to workforce reduction only as a last resort.

Furthermore, law clinics could further advise start-up corporations with an appreciation of the value of situating and maintaining their activities within their local communities. Rapid globalisation has made it easier for corporations to situate their core business activities in offshore locations, due to the cost-saving benefits.[128] As such, the last four decades have borne witness to a gradual but sustained erosion of our manufacturing and productive capabilities, with the largest corporations choosing to outsource these to low-wage countries, spurred on by the enormous savings on wages and tax liabilities.[129] The consequences to the communities impacted have been devastating. The apparent lack of political will to address these issues has left a vacuum that law clinics could help fill, by helping enlighten founders of these start-ups of the benefits of a citizen-oriented approach to corporate governance rather than being profit-centred at all costs. In sum, a good corporate citizen sees itself as part of the community and makes decisions that work to the benefit of all who inhabit it. Furthermore, on a more practical point, the students could be trained to advise start-ups on various tax and investment reliefs provided by the central and local governments. It could be argued that, if infant businesses are made aware of the various reliefs available whilst in their infancy and are able to properly take advantage of these, it could help reduce the likelihood that they seek the benefits offered elsewhere.

Business law clinics could further prove useful in advising the businesses they work with on the benefits of being mindful of their environmental impact. Climate change, as we know, is poised to be one of the challenges – if not the greatest challenge – of the twenty-first century and corporate activity has been a major contributor to the phenomenon to date.[130] The reversal of the current trend towards a complete environmental meltdown would depend to a huge extent on whether companies choose to address the way they do business. Business law clinics, I believe, could aid them along those lines, by encouraging fledgling corporations/start-ups to consider the environmental impact of their chosen businesses and perhaps persuade them to adopt the least environmentally destructive path towards achieving the corporate objective. Furthermore, they could help these start-ups affirm a commitment to limiting their environmental impact, by having such a

128 Mojtaba Kheryian, 'Where would globalisation be without outsourcing' (Centre for Geopolitics and Security in Realism Studies Research Paper 2015) 4.

129 Andrew Barber and David Riker, 'The effects of offshoring on domestic workers' (USITC Office of Economics Working Paper 2017-10-A 2017) 3.

130 Elliot Hyman, 'Who's really responsible for climate change?' Harvard Political Review (Cambridge 2 January 2020).

commitment drafted into the company's articles either at inception or post-formation.

Furthermore, with the growing reliance on environment, social and governance (ESG) metrics to guide investment decisions by the largest investors, start-ups would do well to develop and entrench these progressive values within their governance approach. A genuine commitment to ESG as a guiding principle in their interactions with those directly or indirectly impacted by their activities could give these capital-needy start-ups the opportunity to showcase how investable they are.

The limitations of CLE as a method for impartation of citizenship values in corporations

That said, this author recognises that, whilst these ideas may seem sound in theory, the practical application might present its own challenges. For one, whilst start-up corporations might be receptive to some of these ideas in their infancy and whilst privately owned, this may very well change as the company grows and its priorities inevitably evolve – a familiar dilemma when companies decide to become publicly owned.[131] In that case, the realities of corporate governance and the weight of shareholder expectation might cause a deviation from a citizenship governance approach to the more conventional profit-centredness that has come to define the modern public corporation.

There is also the likelihood that start-ups might be unwilling to adopt this approach and reject it for the more traditional profit-oriented approach, which is understandable considering the fact that start-ups are often backed by investors looking for a return on their investments. As such, the pressures to not only provide a return to current investors, but also to signal profitability to potential investors, might cause the company to adhere to conventional wisdom to attain profitability in the short term.

Furthermore, whilst citizenship-centred governance might be good in the various ways we have already explored, there is the salient question as to how it sits within the common ideation of what a company should be. I have already discussed the view that the company should prioritise shareholder interests, which is a euphemistic for a profits-first approach. There is also evidence that the latter view has generally

131 This dilemma was the driving force behind Elon Musk's attempt to take electric car-maker Tesla private in 2018. He alleged that the weight of shareholder expectation and the drive towards attaining and maintaining profitability was stifling the company's creative capacities and limiting its ability to invest in R&D initiatives. Musk argued that the inordinate focus on share price fluctuations had been a major distraction for the company and its employees. See Arash Massoudi, Richard Waters and James Fontanella-Khan, 'Elon Musk declares plan to take Tesla private' *Financial Times* (London 7 August 2018).

been good for both companies and shareholders.[132] Governing according to principles that deprioritise profits may very well place the company at a strategic disadvantage in comparison to its peers, as investors may choose to invest in companies that guarantee a healthy return on their investment. As such, those companies that prioritise good CC may well struggle to fulfil their core objectives, which, in turn, could hinder the attractiveness of this approach to corporate governance.

There may also be the issue of how impactful the clinics could be considering the relatively limited time they would otherwise have to work with the companies. In working with companies to formulate their initial approach to governance, clinics may initially be able to impart this citizenship mindset on start-ups. However, the question then shifts to the longevity of these efforts: could the pressures to grow and expand eventually outweigh the desire to be a wholesome corporation? These are legitimate questions that are worthy of consideration.

There are further limitations that are inherent to CLE as a means to disseminate the citizenship model discussed here. Access may prove to be a barrier in terms of the number of available clients willing to engage with the services provided by the clinics and the number of opportunities available to students to take up the work of the clinics. Regarding the former, there might be a dearth of start-ups needing the *pro bono* services provided by clinics or they may be unaware of the availability of these provisions even if willing to use them. That could severely limit the impact clinics could have. On the other hand, most clinics only have a limited number of spaces available to students, further limiting the number of students that may benefit from the work with start-ups. While this may yet prove to be of immense value to those able to engage in the work with start-ups, it does present a challenge of scale. The efficacy of CLE as a methodology in this sense largely rests on the capacity to involve as many of the so-called future leaders as possible. The current provision within clinical programmes makes this a significant challenge.

CONCLUSION

In this article, I have sought to outline my conceptualisation of a good or true corporate citizen and the values I anticipate a citizen-like corporation should uphold and ultimately embody. I argue that the responsibilities and society's expectations of a corporate citizen should mimic those of the natural citizen. I base this argument on the fact

132 William Lazonick, 'Profits without prosperity' (Havard Business Review September 2014).

that the corporation's social standing is one replete with the privileges of citizenship (free speech, various forms of civic participation), often without the corresponding responsibilities. It is my belief that according this level of responsibility to corporations would not only be appropriate, but precipitate a slew of benefits that could encompass a range of concerns including those involving a rapidly changing climate, employee rights and other social causes. However, I recognise that in the absence of the legislative will to enact laws to reflect the aforementioned, this leaves room only for alternative paths to true CC. As such, I proposed a role for law clinics and business law clinics in particular. The choice of these clinics is strategic based on their proximal nearness to small start-ups and the impact they could have on participating students.

Working with small start-ups could help clinics to guide these corporations in more progressive directions, helping them formulate policies that take the 'triple bottom-line' approach, placing the welfare of their environment, workers and host communities at par with the need to achieve and sustain profitability. Furthermore, the work with the student participants is also crucial in enlightening and equipping a generation of students who appear to possess greater levels of awareness than their forebears and may very well be in positions to influence policy in both the public and private sectors.

On a final note, what this article has tried to do is differentiate true CC – replete with rights, privileges and wider social responsibilities – from its current understanding which entails a more voluntaristic/philanthropic approach to doing well by doing good: a CC that goes beyond mere virtue-signalling but understands the breadth of its impact on the communities it inhabits and is required to work for the collective good, very much in the vein of the expectations we place on natural citizens.

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 753–789
Articles DOI: 10.53386/nilq.v75i4.1090

A comparative analysis of the intersection of mental capacity laws and international human rights law in Northern Ireland and Ireland

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ABSTRACT

This article examines the law on mental capacity in Ireland and Northern Ireland. It sets out key provisions in the Mental Capacity Act (Northern Ireland) 2016 (MCA (NI)) and the Assisted Decision-Making (Capacity) Act 2015 (ADMCA). The slow legislative progress in Ireland and Northern Ireland requires closer examination, particularly due to the unique links between the jurisdictions. Both Northern Ireland and Ireland have ratified the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), and this article considers how both legislative models align with human rights obligations under the CRPD. The 'fusion' model of legislation adopted in Northern Ireland represents an experimental approach, retaining provisions on substitute decision-making but placing a greater emphasis on supporting persons to make decisions. The legislation in Ireland also adopts an experimental approach placing a premium on supported decision-making, while also retaining substitute decision-making provisions. The article evaluates the jurisprudence of the Committee on the Rights of Persons with Disabilities on article 12, using it as a lens to assess the MCA (NI) and the ADMCA. By comparing the principles underpinning the legislative frameworks, best interests in the MCA (NI) and will and preferences in the ADMCA, and the different approaches to capacity assessment, this article argues that the ADMCA aligns better with the CRPD's requirements. The ADMCA in Ireland and the fusion model in Northern Ireland are gaining international attention for their experimental approaches to capacity legislation reform and seeking alignment with article 12 of the CRPD. While these models aim to enhance autonomy, respect human rights and move away from restrictive systems, their effectiveness in practice requires further research to identify operational challenges and ensure alignment with the CRPD. These models offer valuable insights for global capacity law reform initiatives.

Keywords: mental capacity law; CRPD; Northern Ireland; Ireland; legal capacity; article 12; best interests; will and preferences; law reform; equal recognition before the law.

INTRODUCTION

This article examines the law on mental capacity in Ireland and Northern Ireland.[1] It looks at the development of the Mental Capacity Act (Northern Ireland) 2016 (MCA (NI)) and the Assisted Decision-Making (Capacity) Act 2015 (ADMCA). There has been significant legislative development in other jurisdictions in this area, including jurisdictions of the United Kingdom (UK). The delayed legislative development in both Ireland and Northern Ireland demands greater consideration of the respective legal frameworks, especially given the unique relationship between both jurisdictions. The cross-border nature of life for some Irish and British citizens introduces a unique complexity to the application of legal protections for persons whose mental capacity may be in question. This freedom to move, live and work between Ireland and Northern Ireland means that persons could potentially be subject to either legislative regime, depending on where they choose to live or seek services.[2] Consequently, the differences between the legal frameworks in these jurisdictions can lead to varied human rights protections. The ability to navigate between these legal systems becomes crucial. Therefore, this article seeks to develop an understanding of the governing mental capacity in both regions. It has been noted that cross-border healthcare remains a largely neglected aspect of public policy, with limited appetite from authorities on either side of the border to address the issue.[3] The ongoing efforts both in Northern Ireland and the Republic of Ireland to implement new capacity and mental health legislation presents a valuable opportunity for cross-border cooperation to not only facilitate smoother implementation of both models but also to lay the foundation for developing larger, long-term collaboration in cross-border healthcare.

Both Northern Ireland and Ireland have ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), and this article considers whether the law in both jurisdictions complies with obligations under article 12 of the CRPD. The fusion model in Northern Ireland, with its focus on substitute decision-making,

1 Northern Ireland is part of the United Kingdom of Great Britain and Northern Ireland, which consists of England, Scotland, Wales and Northern Ireland. Ireland is a separate jurisdiction created initially under the Anglo-Irish Treaty in 1921, as the Irish Free State in 1922 and as a republic in 1949. For the purposes of this article the law on the island of Ireland, as it relates to Northern Ireland and Ireland, is considered.

2 See Clayton Ó Néill and Andrea Mulligan, 'Health law: convergence and divergence on the island of Ireland' (2023) 34(2) Irish Studies in International Affairs 285–329.

3 Deirdre Heenan, 'Cross border cooperation: health in Ireland' (2021) 32(2) Irish Studies in International Affairs 117–136, 134.

marks an experimental departure in legal and policy frameworks in this area. Meanwhile, Ireland's legislation has introduced a range of supported decision-making components while also maintaining substitute decision-making provisions. This article critiques the delayed enactment of these laws in both jurisdictions and points out the critical differences and similarities. The development of new laws in both jurisdictions has not yet yielded substantial comparative analysis. A more thorough comparative analysis of the legislative frameworks is needed.[4] This article seeks to add to the existing literature in developing this comparative analysis.

NORTHERN IRELAND

The relevant legislation in place in Northern Ireland is the MCA (NI), which received royal assent on 9 May 2016. Despite the lengthy period required to develop and enact the MCA (NI), the legislation is not fully implemented and is being commenced slowly on a phased basis.[5] Given the delayed implementation, the pre-existing legislation, the Mental Health (NI) Order 1986, remains on the statute book and interfaces with the MCA (NI). This will remain the case until such time as the MCA (NI) is fully implemented and repeals the Mental Health (NI) Order 1986. Therefore, at the time of writing this article the two systems continue to operate alongside each other. The approach adopted in Northern Ireland is known as the fusion approach, amalgamating mental health and mental capacity laws in a standalone piece of legislation. It has been suggested that the MCA (NI) represents 'an exciting and innovative development and there are substantial potential benefits, including the reduction of stigma, the protection of patient autonomy and the removal of confusing parallel mental health and mental capacity legislation'.[6] This approach differs from the approaches adopted in other parts of the UK (England and Wales (Mental Capacity Act 2005) and Scotland (Adults with Incapacity (Scotland) Act 2000). The discussion in this section is confined to key issues such as the background to the legislation, the best interest principle, assessing capacity etc, as it

4 See Anne-Maree Farrell et al, 'Mental health policies and laws on the island of Ireland' (Edinburgh School of Law Research Paper 7/2022 2022); and Ó Néill and Mulligan (n 2 above).

5 Phase one implementation took place between October and December 2019. See Mental Capacity (2016 Act) (Commencement No 1) Order (Northern Ireland) 2019, 2019 No 163 (C 5), Mental Capacity (Deprivation of Liberty) (No 2) Regulations (Northern Ireland) 2019, Mental Capacity (Research) Regulations (Northern Ireland) 2019, 2019 No 193 and Mental Capacity (Money and Valuables) Regulations (Northern Ireland) 2019.

6 Gerard Lynch, Catherine Taggart and Philip Campbell, 'Mental Capacity Act (Northern Ireland) 2016' (2017) 41(6) BJPsych Bulletin 353–357, 357.

is not feasible to comprehensively address every aspect of the MCA (NI) within the scope of this article. This approach will facilitate a comparative analysis with key corresponding provisions implemented in Ireland by way of the ADMCA.

Background to the MCA (NI)

The enactment of the MCA (NI) has taken a long and winding path. One of the main drivers for law reform in Northern Ireland was recognition that it was out of step with the developments in the other jurisdictions of the UK (namely England and Wales and Scotland). Therefore, the Department of Health for Northern Ireland commissioned a number of studies and reports into this area of law and corresponding areas of 'mental health' and 'learning disability service delivery'. A report published in 2007 marked the culmination of this lengthy review process and the report made recommendations that ultimately informed the MCA (NI) 2016.[7] This review process is known as the Bamford Review. One of the key recommendations from the report of the Bamford Review was the creation of 'a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland'.[8] The rationale for this recommendation was that such an approach would support a reduction in stigma and prejudicial attitudes directed towards having separate mental health legislation, while simultaneously augmenting protections for persons considered to lack capacity and support them to make legally effective decisions relating to mental or physical health, personal welfare or financial decisions.[9] The Bamford Review identified that confusion arose as a result of having legislation covering mental illness and another piece of legislation covering mental capacity.[10] Therefore, it considered it desirable for:

> one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust ... Northern Ireland should take steps to avoid the discrimination, confusion and gaps created by separately devising two separate statutory approaches, but should rather look to creating a comprehensive legislative framework which would be truly principles-based and non-discriminatory.[11]

The approach adopted in Northern Ireland is referred to as the 'fusion' or 'fused' approach as it brings together mental health and

7 Bamford Review, *A Comprehensive Legislative Framework: The Bamford Review of Mental Health and Learning Disability* (Northern Ireland) (2007).
8 Ibid.
9 Ibid.
10 Ibid 36.
11 Ibid.

mental capacity laws into a standalone piece of legislation.[12] The Law Commission for England and Wales defines fusion as 'a single legislative scheme governing the non-consensual care or treatment of people suffering from physical and/or mental disorders, whereby such care or treatment may only be given if the person lacks the capacity to consent'.[13] Dawson and Szmukler are the leading proponents of this model.[14] They argue that it is feasible to conceive a law that merges the advantages of incapacity and civil commitment models, drawing on the intervention criteria set out in the Mental Capacity Act 2005 of England and Wales.[15] Their proposed approach aims to minimise unwarranted legal bias against persons with mental disorders and enforce uniform ethical standards throughout medical law.[16] Essentially, the argument is that the fusion approach to mental health and capacity law suggests that it can enhance the rights of persons subject to the legislation and aligns better with the obligations arising from international human rights law, including the CRPD. However, the approach has proven controversial with many commentators critiquing the approach from a variety of different perspectives. As Campbell and Rix point out, the fusion model has been proposed and rejected in other jurisdictions of the UK.[17] However, recent law review processes in England, Wales and Scotland have shown renewed interest in adopting this model as a replacement for their current legislative approaches.

The approach in England and Wales has been to deal with mental health through the Mental Health Act 1983 and mental capacity through a separate piece of legislation, the Mental Capacity Act 2005. However, there has been an increased interest in fusion as evidenced by the Law Commission for England and Wales' consultation on its work on *Mental Capacity and Deprivation of Liberty*. The Commission's consultation coincided with the enactment of the Mental Capacity (Northern Ireland) Act 2016. The Law Commission in its report emphasised the potential for the fusion model to reform mental health legislation in England and Wales, suggesting that the approach could be the future direction of reform in that jurisdiction. The Commission

12 Gavin Davidson, Tomas Adell and Aine Morrison, 'The development of a non-discriminatory alternative to mental health law, the Mental Capacity Act (Northern Ireland) 2016' (2020) 1 Journal of Elder Law and Capacity 68–78.

13 Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) 2.

14 John Dawson and George Szmukler, 'Fusion of mental health and incapacity legislation' (2006) 188(6) British Journal of Psychiatry 504–409.

15 Ibid.

16 Ibid.

17 See Philip Campbell and Keith Rix, 'Fusion legislation and forensic psychiatry: the criminal justice provisions of the Mental Capacity Act (Northern Ireland) 2016' (2018) 24(3) BJPsych Advances 195–203.

recommended in its report that the UK and Welsh Governments take that opportunity to consider this approach. Fusion was also recently considered as part of the ongoing review of Scottish mental health law. The review advocated for a gradual process of reform, outlining reforms for the short, medium and long-term.[18] It recommended that merging laws related to mental health and capacity could be a long-term goal, but it would be more beneficial to seek closer harmony between the different pieces of legislation as an initial step. It was suggested that this could be achieved by establishing common principles based on human rights, and by embracing a framework that promotes human rights enablement, supported decision-making, and autonomous decision-making.[19] Additionally, it recommended making immediate, short-term enhancements that do not necessitate changes in the law or complex alterations in policy.[20] This phased approach was recommended, given the vast, intricate and interconnected nature of the fusion approach.

An overview of the MCA (NI)

Northern Ireland was the last jurisdiction in the UK to enact updated legislation regulating the area of mental capacity. Like the corresponding legislation in England and Wales, the Northern Ireland legislation provides for a presumption of capacity in respect of adults (persons aged 16 and over).[21] The legislation also provides for a test of incapacity. In the context of medical decision-making, it provides for the 'doctrine of necessity'.[22] While one of the purported benefits of the fusion approach is to reduce confusion and complexities in the legislation, the MCA (NI) nonetheless is a highly complex statute. Part 1 of the Act sets out the key principles underpinning the legislation. These principles codify and expand the common law presumption of capacity of persons aged 16 and above.[23] In addition, the principle of 'best interests' is placed on a statutory footing in section 2.[24] The principle applies to persons aged 16 and over, who lack capacity in relation to whether the act should be done, or a decision made for or on behalf of a person who is 16 or over and lacks capacity to make

18 See Mental Health Directorate, *Scottish Mental Health Law Review: Our Response* (Health and Social Care, 28 June 2023) 8.
19 Ibid.
20 Ibid.
21 See part 1, MCA (NI).
22 See Explanatory Notes to Mental Capacity Act (Northern Ireland) 2016: Explanatory Notes, para 3.
23 See s 1, MCA (NI).
24 See ibid ss 2 and 7.

the decision.[25] Section 7 outlines the principles to be followed when determining what is in the 'best interests' of a person aged 16 or over under this Act. It emphasises that decisions should not be based solely on age, appearance, or other characteristics that might lead to biased assumptions about their best interests. The decision-maker is required to consider all relevant circumstances and is specifically instructed to assess whether the person is likely to regain capacity regarding the matter in question and to involve the person as much as practicable in the decision-making process. Additionally, section 7 requires special consideration to be given to the person's past and present wishes, beliefs, values and any other factors that they would consider if able.[26]

Importantly, the provisions on the presumption of capacity[27] and the 'best interests' principles[28] emphasise the need to support persons subject to the legislation to exercise their legal capacity and engage in decision-making. This is considered to be an improvement on the existing law. The legislation retains substitute decision-making, which applies in circumstances where a person is considered to lack the mental capacity to make a specific decision at a particular time. The provisions of the MCA (NI) are set out in 15 parts consisting of 308 sections in total. In addition, there are 11 schedules accompanying the legislation. Part 1 of the MCA (NI) emphasises the key principles underpinning the legislation. The principles place on a statutory basis the common law presumption of capacity and the requirement that decisions made by a third party for a person considered to lack mental capacity need to be done in the person's 'best interests'. Part 1 of the MCA (NI) also seeks to recognise the obligations arising from the UK's ratification of the CRPD (which happened after the Bamford Review). In that regard there is recognition of the need to take measures to support persons subject to the legislation to make decisions for themselves. Ó Néill and Mulligan have suggested that the UK's decision to ratify the CRPD in 2009 probably had a more significant impact on the law reform process in Northern Ireland than the theoretical discussions regarding the fusion model, given the requirement in the Convention to move towards a more rights-focused framework.[29]

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25 See ibid ss 2(1)(a) and 2(1)(b).

26 Ibid s 7, also requires consultation with relevant persons, defined broadly to include family, caregivers and legal representatives, in order to ensure a comprehensive understanding of best interests. The decision-making process must also seek to accomplish its goals in the least restrictive manner to the person's rights and freedoms, consider the implications of inaction, and expressly prohibits decisions on life-sustaining treatment from being motivated by a desire to end the person's life.

27 See ibid s 1.

28 See ibid ss 2 and 7.

29 See Ó Néill and Mulligan (n 2 above) 296.

Section 9 of the MCA (NI) is significant as it formally codifies the common law principle, often referred to as the defence of necessity. This section essentially allows persons involved in the care, treatment or personal welfare of someone aged 16 or older, who is unable to make decisions regarding their care, to act on their behalf.[30] The placing of the doctrine of necessity on a statutory basis was considered essential to address the concerns of persons who provide services and support to persons whose decision-making is called into question.[31] The rationale for this provision is that it insulates third parties from both civil and criminal liability when making decisions on behalf of a person. It is subject to the requirement that this protection is only available when that third party makes the decision in the person's best interests.[32] There are additional safeguards provided for in part 2 of the MCA (NI). The legislation provides that where the intervention in respect of the person considered to lack capacity is more significant, the greater level of safeguards applies.[33] Before an intervention takes place it has to be established that the person lacks the mental capacity and that the intervention by the third party has to be in that person's best interests. Therefore, the requirement to undertake a formal assessment of the relevant person's mental capacity and to appoint and consult with a nominated person are seen as core safeguards.[34]

Section 3 outlines the meaning of 'lacks capacity' under the MCA (NI). It states that a person is considered to lack the capacity concerning a specific issue if, at the time when a decision is needed, they are 'unable to make a decision' on their own regarding that issue (as defined in section 4) 'because of an impairment of, or a disturbance in the functioning of, the mind or brain'.[35] Therefore, the reason for the inability to decide must stem from disturbance in the functioning of the mind or brain. Essentially, the definition in section 3 zeroes in on the precise moment a decision is required and the specific issue at hand. It does not evaluate a person's overall decision-making abilities. A person might be assessed as lacking capacity for one issue but not another. The section further clarifies that lacking capacity can apply even if the capacity loss is temporary and irrespective of the

30 However, MCA (NI), s 10, specifies an exception to this rule: acts related to psychosurgery are not covered under this defence. Consequently, psychosurgical treatments for persons who are unable to consent must be authorised by a court.

31 See Explanatory Notes to Mental Capacity Act (Northern Ireland) 2016: Explanatory Notes, para 3.

32 See s 9(1)(d)(ii), MCA (NI).

33 See Explanatory Notes to Mental Capacity Act (Northern Ireland) 2016: Explanatory Notes, 16.

34 Ibid.

35 See s 3(1), MCA (NI).

impairment or disturbance's cause.[36] This cause could be a disorder or disability, but it might also not be.[37] Section 4 is important as it outlines the criteria for determining if a person is unable to decide about a particular issue. A person is deemed unable to make a decision if they cannot: (a) understand the information related to the decision, including understanding the likely outcomes of different decisions or the absence of a decision; (b) retain that information long enough to make a decision; (c) recognise the significance of the information and incorporate it into the decision-making process; or (d) communicate their decision.[38] Therefore, both the diagnostic and functional criteria are connected by the requirement of a causal relationship.[39]

Sections 13 and 14 of the MCA (NI) address the procedures for formally assessing a person's capacity, particularly in situations involving significant interventions. Section 13 stipulates that for actions constituting or forming part of a significant intervention, a detailed assessment of the person's capacity is mandatory, along with the issuance of a statement declaring incapacity.[40] Section 9 also provides that a belief that the person lacks capacity is not reasonable without the completion of a formal capacity assessment. Furthermore, this assessment must be recent enough to be applicable and meaningful.[41] Section 14 defines a 'formal capacity assessment' as an evaluation performed by a professional deemed appropriately qualified as per future regulations. A 'statement of incapacity'[42] is also defined in this section, as a written declaration by the assessor affirming that, in their professional judgement, the person lacks the capacity for a significant intervention. This statement must detail which specific functional aspects of the capacity test, as described in section 4, that the person cannot fulfil due to a mental or cognitive impairment. Crucially, the statement should also document any unsuccessful attempts to provide the person with the necessary assistance or support to make the decision independently.

Hence, the assessment method for capacity provided for in the MCA (NI) differs significantly from the approach in the ADMCA in Ireland. Unlike the ADMCA, which relies solely on a functional assessment of capacity, the MCA (NI) incorporates both a diagnostic

36 See ibid s 3(2).
37 See ibid s 3(3).
38 See ibid s 4(1)(a)(b)(c)(d).
39 See Ó Néill and Mulligan (n 2 above) 297.
40 Without these actions, the person conducting the intervention cannot claim immunity from liability as outlined in s 9 of the MCA (NI).
41 However, this requirement is waived in emergency scenarios, as provided for in ibid ss 65 and 66.
42 See ibid s 14(3).

and functional test. Ó Néill and Mulligan have noted that this dual approach in the MCA (NI) does not align with article 12 of the CRPD.[43]

The fusion model and the MCA (NI)

Dawson and Szmukler argue for a law that applies to all persons who are considered unable to make important decision for themselves, irrespective of the reason for that 'inability'.[44] As mentioned above, the main thrust of their argument for this approach is that it reduces or eliminates discrimination in respect of the persons subject to the legislation. Therefore, one of the main aims of the fusion approach is to eliminate discrimination against persons with a 'mental health disability', through fostering respect for the person's dignity.[45] It is suggested that an appropriate 'capacity' criterion is not discriminatory provided 'certain strict conditions are met' and that it can mean that the domestic law complies with international human rights law.[46] However, Flynn and others have expressed concern about the fusion approach and the potential that the assessment of whether the person has 'functional capacity' to understand and appreciate the nature and consequences of their decision-making can be excessively flexible, resulting in the erosion of the person's rights.[47]

The introduction of the CRPD has ensured that the concept of disability has undergone a 'paradigm shift' in thinking.[48] Traditionally, the response to disability was known as the medical model, which focused on what is 'wrong' with the person and the 'problem' caused by a particular impairment or condition.[49] This shift in thinking is encapsulated in the move from the 'medical model' to the 'social model'

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43 See Ó Néill and Mulligan (n 2 above) 298.

44 John Dawson and George Szmukler, 'The "'fusion law"' proposals and the CRPD' in Michael Stein et al (eds), *Mental Health, Legal Capacity, and Human Rights* (Cambridge University Press 2021) 95–108, 107.

45 Ibid.

46 Ibid.

47 See Peter Bartlett, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' (2012) 16(6) International Journal of Human Rights 831–844 and Eilionóir Flynn, 'Mental (in)capacity or legal capacity? A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland' (2013) 64(4) Northern Ireland Legal Quarterly 485–505.

48 Rosemary Kayess and Phillip French, 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) Human Rights Law Review 1–34.

49 Charles O'Mahony and Shivaun Quinlivan, 'The Convention on the Rights of Persons with Disabilities' in Gerard McCann and Féilim Ó hAdhmaill (eds), *International Human Rights, Social Policy and Global Development: Critical Perspectives* (Bristol University Press 2020).

and now to the 'human rights model' of disability.[50] The medical model assumes that any reduction in quality of life, or ability to participate in society, is because of a medical condition intrinsic to the person. Therefore, the focus of the medical model has been on medical solutions such as healthcare and related services. The focus is on addressing the functionality of the person to allow them to live a more 'normal' life, in other words all the failings are with the person.[51] Degener highlights that this has resulted in several assumptions, for example, that people with disabilities need to be minded and protected or are not capable or able.[52] These assumptions have led to the development of segregated or separate law and social policies such as mental health and guardianship laws, special schools and institutions. Therefore, the assessment method for capacity provided for in the MCA (NI) (see discussion above), which incorporates both a diagnostic and functional test, can be seen as embedding the medical model in the legislation, an approach at odds with article 12 of the CRPD and its philosophy.

Series and Nilsson note that functional approaches to determining capacity have been gaining favour due to their perceived respect for individual autonomy and are argued to be non-discriminatory towards disabilities.[53] It is suggested that these approaches, which focus on assessing the process of decision-making rather than the decision's outcomes, offer a more personalised and non-biased method to restrict legal capacity in specific areas, in contrast to traditional guardianship criteria.[54] In that regard Dawson and Szmukler have argued that a carefully designed fusion law, which respects a person's rights, will and preferences, and includes necessary safeguards against abuse, could be compatible with the CRPD.[55] In support of this proposition they identify the MCA (NI) as a close approximation of the fusion approach they advocate for.[56] They argue that the legislation, through combining elements of mental health and capacity legislation, complies with the

50 Anna Lawson and Angharad E Beckett, 'The social and human rights models of disability: towards a complementarity thesis' (2021) 25(2) International Journal of Human Rights 348–379.

51 Shivaun Quinlivan, 'The United Nations Convention on the Rights of Persons with Disabilities: an introduction' (2012) 13(1) ERA Forum 71, 71–85.

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

53 See Lucy Series and Anna Nilsson, 'Article 12 CRPD: equal recognition before the law' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities* (Oxford University Press 2018) 339–382.

54 See Wayne Martin, *Towards Compliance with CRPD Art 12 in Capacity/ Incapacity Legislation across the UK: An Essex Autonomy Project Position Paper* (6 June 2016).

55 Dawson and Szmukler (n 44 above).

56 Ibid.

requirements of international human rights law.[57] However, their argument is not convincing as it does not address the core criticisms of the functional approach made by the Committee on the Rights of Persons with Disabilities in General Comment No 1.[58] The Committee in its General Comment No 1 firmly dismisses interpretations of functional assessments of mental capacity as complying with article 12 of the CRPD. The Committee criticised the functional approach for two primary reasons. First, it is often applied in a discriminatory manner in respect of persons with disabilities.[59] Second, it assumes a flawed ability to accurately evaluate a person's mental processes.[60] Therefore, the Committee has concluded that this approach risks denying fundamental human rights, such as equal recognition before the law, based on a person's disability or decision-making capabilities. Instead of allowing for such discrimination, article 12 advocates for providing necessary support to persons to help them exercise their legal capacity.[61]

In his testimony before the Northern Ireland Assembly regarding the legislation when it was a Bill, George Szmukler described it as 'a ground-breaking step which I strongly support'.[62] Subsequently, Dawson and Szmukler described the MCA (NI) as 'cleav[ing] quite closely to the "fusion" model … an important new development in health law'.[63] Under the MCA (NI) non-consensual treatment for both mental or physical medical conditions is decided on the basis of the person's perceived incapacity to consent in conjunction with acting in a person's 'best interests'. Unlike other jurisdictions, the non-consensual treatment of the person is not based on factors such as mental disorder or risk. The MCA (NI) does, however, require that support has to be provided to the person to make the decision for themselves before a determination of a lack of capacity is made. Section 1(4) requires that '[t]he person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success'. Section 1(5) further requires that '[t]he person is not to be treated as unable to make a decision for himself or

57 Ibid.

58 See 'General Comment No 1: Equal Recognition Before the Law (article 12)' (UN Committee on the Rights of Persons with Disabilities 11 April 2014) 4.

59 Ibid.

60 Ibid.

61 Ibid.

62 See George Szmukler, 'Comments on Mental Capacity Bill 2015' (Ad Hoc Committee on the Mental Capacity Bill and Clerk to the Committee for Health, Social Services and Public Safety 7 July 2015).

63 Dawson and Szmukler (n 44 above) 107.

herself about the matter merely because the person makes an unwise decision'.

As discussed above, proponents of the fusion model, such as the one adopted in Northern Ireland, dispute the interpretation of the CRPD as outlined by the CRPD Committee in General Comment No 1.[64] However, it is noteworthy that the fusion model pre-dates the development of the CRPD and the jurisprudence that has emerged on legal capacity (article 12) and the right to liberty (article 14). The discourse surrounding the review of mental health and capacity law in Northern Ireland also precedes the drafting and entry into force of the CRPD. As such the CRPD did not form an important aspect of the initial law reform dialogue on the development of the legislation.[65] However, Flynn has noted that the CRPD became more important and prominent in the development of the new legislation for Northern Ireland.[66]

Szmukler and other supporters of the fusion approach have pointed to some of the conflicting interpretations of the relevant international human rights law in this area as a means of supporting their proposals for law reform.[67] For example, Szmukler has pointed to the statements of other UN human rights bodies such as the UN Human Rights Committee and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which differ and diverge from the jurisprudence of the CRPD Committee.[68] Notwithstanding the different interpretations, the fusion model does not achieve compliance with article 12 of the CRPD and the requirement for state parties to ensure that their domestic law guarantees that persons with disabilities can exercise their legal capacity on an equal basis with others. Szmukler has not substantially engaged with the Committee on the Rights of Persons with Disabilities' fundamental critiques of the functional assessment approach, choosing rather to challenge the Committee's understanding of the requirements for compliance with article 12 of the CRPD. This approach does not facilitate the resolution of key disputes concerning the interpretation of international law.

The Essex Autonomy Project, commenting on the MCA (NI) when it was a Bill, described it as a 'pioneering piece of legislation'.[69] However,

64 See 'General Comment No 1' (n 58 above).

65 See Flynn (n 47 above) 496.

66 Ibid.

67 See George Szmukler, '"Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) World Psychiatry: Official Journal of the World Psychiatric Association 34–41.

68 Ibid.

69 See W Martin et al, 'Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK' (*Essex Autonomy Project* 6 June 2016) 51.

the centrality of substitute decision-making and the 'best interest' principle underpinning the legislation mean that the MCA (NI) requires significant amendment if it is to comply with article 12 of the CRPD. The CRPD Committee has been clear as to what is required by article 12 of the CRPD:

> State parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[70]

The UK signed the CRPD on 30 March 2007 and ratified it shortly thereafter on 8 June 2009 and subsequently signed the Optional Protocol (OP) to the CRPD on 26 February 2009 and ratified it on 7 August 2009. The UK entered a reservation in respect of article 12(4) of the CRPD at the time of ratification. However, it is important to note that this was not a reservation as to the substantive provisions contained in article 12 of the CRPD. The rationale for this reservation was that the UK Government was of the view that the system in place for appointing third persons to collect social security on behalf of a person with a disability was not consistent with the CRPD. Once this matter was addressed, the UK withdrew this reservation.[71]

In 2017 the CRPD Committee published its first report on the UK's application of the CRPD to domestic law and policy. The Committee's report was highly critical of a number of areas of government policy. In respect of the UK's domestic laws on capacity, it was not surprising that the Committee expressed its concern about the legislation across the different jurisdictions. The Committee noted that the domestic laws restricted the legal capacity of persons with disabilities based on actual or perceived impairment. The Committee was critical of the 'prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities'.[72]

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70 'General Comment No 1' (n 58 above).

71 The UK withdrew this reservation, as a result of adopting a new procedure to manage this process in 2011.

72 'Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland' (Committee on the Rights of Persons with Disabilities 3 October 2017) para 30.

The Committee further highlighted the insufficient support to all asylum seekers and refugees with psychosocial and/or intellectual disabilities in exercising their legal capacity. The Committee also focused on the research that reports that a higher number of black people with disabilities are compulsorily detained and treated against their will in the UK.[73] In respect of the UK's compliance with article 12, the Committee recommended that the UK should closely consult with organisations of persons with disabilities, including those representing persons from black and minority ethnic groups and in line with the Committee's General Comment No 1 (2014) on equal recognition before the law.[74] The Committee, in accordance with its existing jurisprudence, recommended the abolition of all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws.[75] In addition, the Committee advised the UK to step up efforts to foster research, data and good practices and speed up the development of supported decision-making regimes. It is regrettable that the Committee did not seize the opportunity to discuss the MCA (NI), especially since this model is being considered for adoption in other jurisdictions. By critiquing the legislation and explicitly addressing its compliance with article 12, the Committee could have significantly contributed to clarification as to compliance of the fusion approach with international human rights law.

The UK's next State Party Report is due, and it remains to be seen how the UK Government will frame its response to the criticisms and recommendations contained in the Committee's Concluding Observations on its divergence from the requirements contained in article 12. The existing legislation in place in Northern Ireland has not been reformed in order to implement the Committee's recommendations in the intervening period nor has the legislation even commenced. This is despite the clear communication from the Committee that the models developed in Northern Ireland, and the rest of the UK, do not comply with the CRPD.

It is important to note some of the important differences in the MCA (NI) and the ADMCA in Ireland. As discussed above, section 3 of the MCA (NI) outlines the meaning of 'lacks capacity' under the MCA (NI). Essentially, a person is considered to lack the capacity concerning a specific issue if, at the time when a decision is needed, they are 'unable to make a decision' on their own regarding that issue 'because of an impairment of, or a disturbance in the functioning of,

73 Ibid.
74 Ibid para 31.
75 Ibid.

the mind or brain'.[76] The approach in the ADMCA is based solely on a functional assessment. Therefore, the approach in the MCA (NI) includes a diagnostic test for determining incapacity, an approach that does not align with article 12 of the CRPD. The manner in which the MCA (NI) addresses 'best interests' also differs from the approach in Ireland's ADMCA, which eschews the concept of 'best interest' in favour of the person's will and preferences, which is the central guiding principle of the legislation. This reliance on a diagnostic criterion and the inclusion of 'best interests' renders the legislation less compliant with the commitments derived from the CRPD, which will be discussed below.

IRELAND

Like the law reform processes in Northern Ireland, the journey to enacting new legislation in Ireland has been long. Until recently the law in Ireland meant that a person's legal capacity could be restricted through the ward of court system, a type of plenary guardianship operating under Victorian era legislation, known as the Lunacy Regulation (Ireland) Act 1871. Before the enactment of the ADMCA, the law in this area was also informed by common law principles developed through case law.[77] The ADMCA, which has recently commenced (April 2023), modernises the law and brings closer compliance with Ireland's obligations under article 12 of the CRPD. The new legislation brings Ireland into closer compliance with the CRPD but, arguably, will still fall short due to the retention of provisions on substitute decision-making. This section of the article will discuss Ireland's road to ratification of the CRPD and provide an overview of the ADMCA, its background and key provisions. The section will also provide a brief overview of the Assisted Decision-Making (Capacity) (Amendment) Act 2022 (ADMCA 2022). The ADMCA 2022 made significant amendments to the principal legislation. It will be evident from the discussion below that the approach ultimately adopted in Ireland differs from the model introduced in Northern Ireland, and it will be argued that the approach in the ADMCA aligns better with the requirements of the CRPD, which will be discussed in greater detail in the next section of this article.

76 See s 3(1), MCA (NI).

77 See Patricia T Rickard Clarke, 'Decision-making capacity: standards required by the constitution' in Mary Donnelly and Caoimhe Gleeson (eds), *The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections* (Health Service Executive 2021) and *Fitzpatrick v FK and Another* [2008] IEHC 104.

Ireland and the CRPD

Ireland signed the CRPD in 2007 and ratified it in 2018[78] but deferred ratification of the OP.[79] Ireland adheres to the common law tradition of not ratifying treaties until such time it considers that Irish domestic law is in general conformity with the treaty. This has been the justification for the delayed ratification of the CRPD and the refusal to ratify the OP. When ratifying the CRPD in 2018, Ireland entered a Declaration and Reservation on article 12.[80]

Before ratification the Department of Justice indicated that Ireland, when ratifying the CRPD, would enter an interpretative declaration in respect of article 12 (similar to the declarations of other states parties such as Canada, Australia and Norway).[81] This was not a surprise given that the ADMCA provides for substitute decision-making. It declared its understanding of the CRPD as permitting both supported and substitute decision-making arrangements, subject to appropriate and effective safeguards. It went on to state that 'the extent Article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards'.[82] This understanding of article 12 is clearly at odds with the established jurisprudence of the CRPD Committee.[83] Ireland's Declaration in respect of articles 12 and 14 states that Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person and a right to respect for physical and mental integrity on an equal basis with others. However, it declared its understanding of the CRPD to allow for involuntary care or treatment for 'mental disorders', when circumstances require treatment as a last resort, and the treatment is subject to legal safeguards.[84] Ireland's initial state report under article 35 of the CRPD sets out the domestic

78 Ireland was the last country in the EU to ratify the CRPD largely due to the delay in reforming outdated capacity legislation (Lunacy Regulation (Ireland) Act 1871), which does not comply with international human rights standards. This has been replaced by the ADMCA, which was recently commenced (see discussion below).

79 The protocol allows for complaints to be submitted directly to the CRPD Committee, which is a UN body of independent experts which monitors implementation of the CRPD by countries that have become party to it. A person can make a complaint alleging the violation of rights contained in the CRPD if the state party has ratified the optional protocol.

80 UN, Ireland's 'Declaration: articles 12 and 14' (20 March 2018).

81 'Roadmap to Ratification of the United Nations Convention on Persons with Disabilities' (Department of Justice and Equality October 2015).

82 Ibid.

83 'General Comment No 1' (n 58 above).

84 UN, Ireland's 'Declaration' (n 80 above).

position with respect to each article of the Convention.[85] In the report, Ireland highlighted recent developments in public policy and legislation that it considered to bring the state into compliance with the CRPD. Of particular note, the Irish Government showcased its work on the development of the ADMCA, which provides for a new Decision Support Service to support the rights and interests of people who may need support with decision-making.

As noted earlier, Ireland has not yet ratified the OP. This failure to ratify the OP to the CRPD means that Ireland at the time of writing is an outlier amongst European Union (EU) member states (along with the Netherlands and Poland). The OP to the CRPD essentially provides for two procedures to strengthen it, namely the individual communications procedure and the inquiry procedure.[86] The failure to ratify the OP to the CRPD has been criticised by non-governmental organisations, disabled persons' organisations and the Irish Human Rights and Equality Commission as undermining Ireland's commitment to implementing and realising the rights contained in the CRPD. The ADMCA represents a progressive step towards empowering persons with disabilities, and others, by recognising their legal capacity and promoting their ability to make decisions regarding their lives. However, the commitment to respecting human rights in this area is called into question when international safeguards, like the CRPD's OP, are not in place.[87] Ratifying the OP would allow persons, including those under the ADMCA's purview, to file complaints directly with the Committee on the Rights of Persons with Disabilities if they believe their rights under the Convention have been violated (should they meet the Committee's admissibility criteria). This mechanism is crucial for addressing grievances and ensuring accountability, especially in cases where domestic remedies are unavailable, ineffective or have been exhausted. The absence of this international recourse means that persons who face discrimination or whose rights to legal capacity are infringed upon have reduced avenues for redress. It creates a gap in the protection framework, leaving persons subject to the ADMCA without a critical tool to challenge violations and seek justice.

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85 See 'Initial Report under the Convention on the Rights of Persons with Disabilities: Ireland' (Initial Report to the Committee on the Rights of Persons with Disabilities December 2020).

86 The ratification of the OP is 'optional' in that states are not obliged to become parties to the protocol, even if they are party to the parent treaty (the CRPD).

87 The Minister for Children, Equality, Disability, Integration and Youth recently announced the creation of an 'Inter-Departmental Group to speed up work to ratify the Optional Protocol'. See Department of Children, Equality, Disability, Integration and Youth, 'Inter-Departmental Group to Accelerate Work to Ratify the Optional Protocol to the UNCRPD' (5 March 2024).

Overview of the ADMCA: background and key provisions

The Irish Government accepted for many decades that there were significant deficiencies with the wards of court system and committed to the introduction of new legislation.[88] Despite many commitments, new legislation only commenced in April 2023. Prior to the implementation of the ADMCA, the law governing decision-making capacity was largely shaped by principles established through common law and the evolution of case law.[89] In the landmark judgment of *Fitzpatrick v FK*,[90] the High Court was asked to decide whether a hospital could administer a blood transfusion to a patient who had not given consent. Justice Laffoy's ruling in this case is a seminal judgment as it was the first time that an Irish court had to determine the extent to which it could intervene in medical decisions involving an adult patient who had refused treatment in circumstances where their mental capacity was in dispute. Justice Laffoy formulated what was essentially a functional test.[91] In determining whether a patient is deprived of capacity to decide to refuse medical treatment Justice Laffoy set out a three-stage approach, adapted from the English case of *Re C*.[92] Justice Laffoy's test involved assessing whether the person (a) comprehended the treatment information, (b) believed the treatment information, and (c) weighed the information.

Around the same time as Justice Laffoy issued her judgment in *Fitzpatrick v FK*, the Department of Justice published the scheme of the Mental Capacity Bill in 2008. The 2008 Heads of the Bill were largely based on the Law Reform Commission of Ireland's recommendations in its body of work in this area.[93] It is of note that the approach recommended by the Irish Law Reform Commission, which culminated in the 2008 Bill, was modelled on the English Mental Capacity Act 2005. The 2008 Bill sought to reform the ward of court system in so far as it applies to adults and replace it with a guardianship system that would regulate decision-making of persons considered to

88 See, for example, 'Second Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities' (June 2009) 96.

89 See Clarke (n 77 above) and *Fitzpatrick v FK* (n 77 above) .

90 *Fitzpatrick v FK* (n 77 above).

91 Justice Laffoy in her judgment acknowledged that an adult patient has the mental capacity to decide to refuse medical treatment, but that presumption can be rebutted.

92 *Re C (Adult: refusal of medical treatment)* [1994] 1 All ER 819.

93 See Law Reform Commission, *Vulnerable Adults and the Law* (LRC (83) 2006), Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC (37) 2005), Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC (23) 2003).

lack mental capacity. The Government at the time considered that the 2008 Bill would 'give effect to the Convention in so far as it applies to the legal capacity issues in Article 12 of the Convention'.[94] The draft scheme of the 2008 Bill sought to strike a balance between autonomy and protection. However, much of the commentary on the scheme of the 2008 Heads of Bill recognised that it fell significantly short of complying with the emerging understanding of the requirements of article 12 of the CRPD.[95]

A range of interest groups, professionals and other stakeholders were centrally involved in the reform process through feeding into the Law Reform Commission's consultation process and subsequently through engaging in discussion with Government on the resultant legislation to repeal and replace the ward of court system. The Government subsequently published the Assisted Decision-Making (Capacity) Bill 2013.[96] There was a consensus amongst civil society organisations that the revised Bill represented a 'significant improvement' on the Mental Capacity Bill 2008.[97] On publication of the 2013 Bill, the then Minister for Justice Alan Shatter considered that the Assisted Decision-Making (Capacity) Bill 2013 was sufficiently 'framed to meet Ireland's obligations under Article 12 of the Convention in line with the Government's commitment in the Programme for Government to introduce this legislation'.[98] However, the 2013 Bill has been described as 'an interesting mix of supports ... and substitute decision-making', falling short of the requirements of article 12.[99]

The debate surrounding article 12 of the CRPD significantly influenced the law reform process in Ireland. This is important context for understanding why it was decided to exclude 'best interests' as a

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94 'Second Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities' (June 2009) 96.

95 See, for example, 'Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality' (Centre for Disability Law & Policy, University of Galway August 2011).

96 For a discussion on the Bill, see Brendan Kelly, 'The Assisted Decision-Making (Capacity) Bill 2013: content, commentary, controversy' (2015) 184 Irish Journal of Medical Science 31–46.

97 See, for example, 'Equality, dignity and human rights: does the Decision-Making (Capacity) Bill 2013 fulfil Ireland's human rights obligations under the Convention on the Rights of Persons with Disabilities?' (Centre for Disability Law and Policy, University of Galway et al 2013).

98 See Alan Shatter, 'Speech by Minister for Justice, Equality and Defence at the Assisted Decision-Making (Capacity) Bill 2013' (Consultation Symposium, Printworks Conference Centre, Dublin Castle 25 September 2013).

99 Eilionóir Flynn and Anna Arstein-Kerslake, 'The support model of legal capacity: fact, fiction, or fantasy?' (2014) 32 Berkeley Journal of International Law 124, 134–143.

guiding principle in the ADMCA in favour of respecting the person's 'will and preferences'. Critics of the UN Committee on the Rights of Persons with Disabilities' interpretation of article 12 highlight disagreements within the broader UN system in support of their position.[100] For instance, bodies like the UN Human Rights Committee and the Subcommittee on Prevention of Torture have expressed views that diverge from the CRPD Committee's interpretation of legal capacity (article 12) and involuntary treatment (article 14).[101] These bodies have not yet fully endorsed the Committee's positions. Some academic commentators have also criticised the Committee's absolutist position, questioning the prohibition on substitute decision-making.[102] A lot of the debate revolves around the concept of 'legal capacity' and the principle of respecting the 'will and preferences' of persons with disabilities. Szmukler has argued that the terms 'will and preferences' remain ill-defined, which he sees as problematic.[103] Regardless of the ongoing academic debate, the shift from 'best interests' to 'will and preferences' better respects the principles of autonomy and self-determination, especially for adults with disabilities who have been at increased risk of having their decision-making questioned and denied.[104] The 'best interests' standard relies on the judgement of a third party as to what is best for a person, and this trumps the person's own views and limits their autonomy. This shift from 'best interest' to 'will and preferences' in the ADMCA is consistent with the human rights-based approach under the CRPD, allowing greater potential for persons with disabilities to exercise their legal capacity on an equal basis with others and warding off paternalism and substitute decision-making.

The Bill was enacted as the ADMCA. The ADMCA provides for substitute decision-making but also includes several provisions that support persons to make legally effective decisions. The provisions on substitute decision-making are at odds with the CRPD. Nevertheless, there is explicit recognition in the guiding principles of the centrality of respecting the will and preferences of the person. This inclusion in the guiding principles reflects the paradigm shift in thinking as discussed

100 Szmukler (n 67 above).

101 Ibid. For a discussion on the ethics perspective on the shift from 'best interests' to 'will and preferences', see Wayne Martin, 'Respect for the will of the person' in Michael Bach and Natalia Espejo-Yaksic (eds), *Legal Capacity, Disability and Human Rights* (Intersentia 2023) 31–48.

102 Freeman Melvyn Colin et al, 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2(9) The Lancet Psychiatry 844.

103 Szmukler (n 67 above).

104 See 'General Comment No 1' (n 58 above) 2.

above. In that regard the guiding principles do not contain the 'best interests' principle, which differs from the approach in the MCA (NI) as discussed above. The Committee on the Rights of Persons with Disabilities has further clarified that in instances where efforts fail to ascertain a person's will and preferences a 'best interpretation of will and preferences' is needed to replace 'best interests' determinations.[105] This is in the Committee's view essential in respecting the 'rights, will, and preferences' as required in article 12(4) of the CRPD.[106] The Committee is explicit that the 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. As Nilsson has explained, the Committee's view is that the 'personal views take precedence over generic accounts of best interests'.[107] This perspective ultimately won out in the law reform debate with the legislature accepting the need to move away from paternalism.

Therefore, the approach in the ADMCA is seen as a positive development that may facilitate interpretation of the legislation in a manner that recognises the person's legal capacity and defend against attempts to interfere with a person's decision-making. The provisions in the ADMCA on supported decision-making have the potential to support the exercise of legal capacity where a person's mental capacity has been called into question. The guiding principles underpinning the ADMCA represent a vast improvement on those originally envisaged in the Mental Capacity Bill 2008.

The framework contained in the ADMCA is more flexible and provides a more functional definition of capacity than the ward of court system.[108] The legislation provides that capacity is assessed only in relation to the matter in question and only at the time in question. If a person is found to lack decision-making capacity in relation to one matter, this will not necessarily mean that they lack capacity in another decision-making area. The legislation recognises that a person's mental capacity can fluctuate. Essentially, the ADMCA now offers three new categories of decision-making options. The three decision-making support options are that decisions can be made on personal welfare, property and finance or a combination of both. Assisted decision-making permits a person to appoint a decision-making assistant.[109] It is envisaged that a family member or support person will generally undertake this role. This support is managed through a

105 See Ibid 5.

106 Ibid.

107 Anna Nilsson, *Compulsory Mental Health Interventions and the CRPD: Legal Capacity, Mental Integrity and Human Rights* (Bloomsbury 2021) 28.

108 See s 3, ADMCA.

109 See Decision Support Service, *Code of Practice for Decision-making Assistants* (April 2023).

formal decision-making assistance agreement to support the person in accessing information to understand, make and express decisions. Importantly, decision-making responsibility remains with the person and the decision-making assistant will be supervised by the director of a new regulator called the Decision Support Service.

The second category of decision-making is co-decision-making.[110] Co-decision-making involves a person appointing a trusted family member or friend as a co-decision-maker to make decisions jointly with them under a co-decision-making agreement. Decision-making responsibility is shared jointly between the person and the co-decision-maker. The legislation regulates the performance of functions of co-decision-maker, registration of co-decision-making agreements, objections to registration, review of co-decision-making agreements, reports by the co-decision-maker and variation of co-decision-making agreements and revocation of co-decision-making agreements. Again, the co-decision-maker will be supervised by the Decision Support Service.

The third category is that of decision-making representative, a form of substitute decision-making which is at odds with article 12 of the CRPD.[111] It is envisaged that the decision-making representative provisions will apply to a small minority of persons who are not able to make decisions even with the provision of support. The ADMCA provides for the Circuit Court to appoint a decision-making representative. A decision-making representative makes decisions on behalf of the person but must abide by the guiding principles set out in section 8 of the ADMCA, which includes having regard to their will and preferences where known or reasonably ascertainable. Decision-making representatives must reflect the person's will and preferences, where possible. The functions of decision-making representatives are limited in scope and duration as is reasonably practicable. The decision-making representative is also supervised by the Decision Support Service.

The ADMCA also introduces for the first time provision for advance healthcare directives into Irish law.[112] The purpose of the advance healthcare directive is to enable a person to be treated according to their will and preferences and to provide healthcare professionals with important information about the person in relation to their treatment choices. The ADMCA permits a person to develop an advance healthcare

110 Decision Support Service, *Code of Practice for Co-decision Makers* (April 2023).

111 Decision Support Service, *Code of Practice for Decision-making Representatives* (April 2023).

112 Decision Support Service, *Code of Practice on Advance Healthcare Directives for Healthcare Professionals* (April 2023) and Decision Support Service, C*ode of Practice for Healthcare Professionals* (April 2023).

directive and appoint a designated healthcare representative to take healthcare decisions on their behalf when they are no longer considered to have the capacity to make decisions, in accordance with their specific treatment instructions and/or their will and preferences.[113] The directive maker can confer powers on the designated healthcare representative to refuse/consent to treatment including life-sustaining treatment. A specific statement must be included for the designated healthcare representative to have powers in relation to life-sustaining treatment. Again, the designated healthcare representatives will be supervised by the Decision Support Service. The status of advance healthcare planning under the ADMCA and the MCA (NI) will be discussed in greater detail below.

ADMCA 2022

It was expected that it would take several years for the ADMCA to be commenced, given the complexity of the legislation, the allocation of the resources required and the establishment of the new regulator, the Decision Support Service. The legislation was finally commenced on 26 April 2023. The significant delays in commencement of the ADMCA have been widely criticised by a range of stakeholders. Part of the delay can be explained with reference to the need for an amending piece of legislation to address issues identified after the enactment of the principal legislation. The Explanatory Memorandum to the amending legislation stated that its purpose was to 'streamline existing provisions in the ADMCA and will also improve safeguards, reduce bureaucracy for those using options under the Act and enable the Decision Support Service (DSS) to undertake its role more effectively'.[114] In preparing for the commencement of the original ADMCA to come into force, the Department of Justice and later the Department of Children, Equality, Disability, Integration and Youth had responsibility for the legislation and identified additional provisions that needed to be addressed in the amending legislation.

The ADMCA 2022 is extremely complex and provides for both technical and procedural amendments deemed necessary before ADMCA can be commenced. The ADMCA 2022 retains the provisions on assisted decision-making, co-decision making and for the appointment of a decision-making representative. The significant number of amendments required in the ADMCA 2022 underscore its

113 Decision Support Service, *Code of Practice for Designated Healthcare Representatives* (April 2023).

114 See 'Explanatory Memorandum: Assisted Decision-Making (Capacity) (Amendment) Bill 2022'.

intricacy and the implications its commencement has for a range of other pieces of legislation.[115]

DISTINCTIVE ELEMENTS: A COMPARATIVE ANALYSIS OF KEY PROVISIONS IN THE MCA (NI) AND ADMCA

This section considers the contrasting approaches to key provisions within the legislation in Northern Ireland and Ireland. This analysis will cover the different approaches in assessing mental capacity, the principles underpinning the MCA (NI) and the ADMCA and recognising advance healthcare directives. This comparative analysis underscores the significance of these different approaches from a human rights perspective, emphasising how legislative frameworks play a vital role in safeguarding individual autonomy and human rights. The discussion suggests that the approach in the ADMCA more effectively aligns with the ethos and requirements of article 12 of the CRPD than the MCA (NI). This analysis is useful as the models represented by both the MCA (NI) and the ADMCA are attracting international interest among academics, law reformers and policymakers. These frameworks are being closely observed as potential alternatives to traditional guardianship laws. As such, understanding the key differences is important.

Áine Flynn, the Director of the newly established Decision Support Service under the ADMCA, has noted that the model adopted in Ireland is attracting significant attention from different jurisdictions.[116] As

115 This is a list of other statutes affected by the 2022 Bill: Adoptive Leave Acts 1995 and 2005, Assisted Decision-Making (Capacity) Act 2015 (No 64), Carer's Leave Act 2001 (No 19), Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (No 13), Civil Service Regulation Acts 1956 to 2005, Companies Act 2014 (No 38), Data Protection Act 2018 (No 7), Data Sharing and Governance Act 2019 (No 5), Disability Act 2005 (No 14), Electoral Act 1992 (No 23), Ethics in Public Office Acts 1995 and 2001, Freedom of Information Act 2014 (No 30), Garda Síochána Act 2005 (No 20), Irish Human Rights and Equality Commission Act 2014 (No 25), Juries Act 1976 (No 4), Lunacy Regulation (Ireland) Act 1871 (34 & 35 Vict, c 22), Maternity Protection Acts 1994 and 2004, Minimum Notice and Terms of Employment Acts 1973 to 2005, National Disability Authority Act 1999 (No 14), Organisation of Working Time Act 1997 (No 20), Parent's Leave and Benefit Act 2019 (No 35), Parental Leave Acts 1998 to 2019, Paternity Leave and Benefit Act 2016 (No 11), Protection of Employees (Fixed-Term Work) Act 2003 (No 29), Protection of Employees (Part-Time Work) Act 2001 (No 45), Public Service Management (Recruitment and Appointments) Act 2004 (No 33), Redundancy Payments Acts 1967 to 2014, Succession Act 1965 (No 27), Terms of Employment (Information) Acts 1994 to 2014, Unfair Dismissals Acts 1977 to 2015.

116 Áine Flynn, 'Foreword' in Mary Donnelly and Caoimhe Gleeson (eds), *The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections* (Health Service Executive 2021) x.

discussed above, the fusion model in Northern Ireland is similarly attracting significant attention. Bodies responsible for capacity legislation in other jurisdictions have remarked on both the breadth and the ambition of the ADMCA model.[117] The initial reform proposals in Ireland were anchored in the work of the Law Reform Commission and leaned heavily on the medical model of disability. However, through the advocacy of human rights campaigners, activists and civil society organisations, there was a move away from the proposed model, which closely mirrored the Mental Capacity Act 2005 (England and Wales). The deliberate exclusion of the term 'mental capacity' from the legislation's title signified this important shift. Flynn elaborated that the inclusion of 'capacity' within parentheses in the ADMCA's title underscores this fundamental change in approach.[118] Rather than solely devising new methods for evaluating capacity or obtaining consent, the Act's primary aim is to empower people to exercise their legal capacity and make decisions that are respected and legally effective. Flynn also points out that, in its initial drafts, what is now known as the Decision Support Service was initially proposed to be called the 'Office of Public Guardian'.[119] The change in name to Decision Support Service should be seen as a conscious effort to move away from any paternalistic implications, aligning more closely with the Act's core principles and objectives around recognising legal capacity and providing support when needed.[120] The approach taken under the MCA (NI) distinguishes itself in the title of the legislation and in part 7 of the Act, which establishes the role of a Public Guardian.

As discussed above, the MCA (NI) in section 3 defines 'lacks capacity' as a situation where a person, due to an impairment of or a disturbance in the functioning of the mind or brain, is unable to decide regarding a specific issue at the time when a decision needs to be made. This definition emphasises the relevance of the incapacity to the specific moment and issue, rather than assessing a person's general ability to make decisions. Section 4 further details the criteria for determining an inability to make decisions, which include difficulties in understanding, retaining, using, or weighing information relevant to a decision, and communicating the decision. The approach in the MCA (NI) contrasts with the approach in Ireland under the ADMCA, which does not include a diagnostic stage in favour of a purely functional assessment of capacity.[121] Unlike the MCA (NI), the focus in the ADMCA is on how the person decides and the steps they take in the decision-making

117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
121 See ADMCA, s 3, 'Person's capacity to be construed functionally'.

process. The Decision Support Service is explicit in its guidance that 'capacity assessment must *only* consider the issue and circumstances in which the decision is being made at a specific point in time' (emphasis added).[122] Therefore, when assessing a person's capacity to make a specific decision, the assessor must consider whether the relevant person is able: to understand information and facts relevant to the decision; to retain that information long enough to make a voluntary choice; to use or weigh up that information as part of the process of making the decision; and to communicate the decision by any means, including by assistive technology.[123] The person will be considered to lack capacity if they fail to meet one or more of these criteria in relation to a specific decision.[124]

Therefore, under the ADMCA framework, a stronger emphasis is placed on the autonomy and rights of persons to make their own decisions, reflecting a greater commitment towards respecting individual autonomy, the human rights model of disability, and the jurisprudence of the Committee on the Rights of Persons with Disabilities than the corresponding legislation in Northern Ireland. As discussed above, the ADMCA also distinguishes itself from the Northern Ireland legislation by explicitly omitting the concept of 'best interests' as a guiding principle for decision-making on behalf of others. Instead, the ADMCA aligns more closely with article 12 of the CRPD, emphasising the importance of respecting the will and preferences of the person. This shift represents a significant departure from traditional models of substitute decision-making. The ADMCA also places emphasis upon a broader spectrum of support options designed to support people in making their own decisions.

There is now a discussion of the different approaches to advance healthcare directives (AHDs) under the ADMCA and the MCA (NI). It is noteworthy that in Ireland one of the most contentious issues that has arisen in the parliamentary process around the ADMCA 2022 related to AHDs. AHDs are essential in supporting persons to articulate their will and preferences in health treatment decision-making, including in mental health treatment decisions.[125] This is essential when a person's views may become unclear or unknown.[126] Under the ADMCA, people

122 Decision Support Service, *Code of Practice for Supporting Decision-Making and Assessing Capacity* (March 2023) 6.

123 Ibid.

124 Ibid 7.

125 Charles O'Mahony and Fiona Morrissey, 'Human Rights Analysis of the Draft Heads of a Bill to Amend the Mental Health Act 2001 Summary of Recommendations' (Mental Health Reform October 2021).

126 Mary Donnelly, 'Developing a legal framework for advance healthcare planning: comparing England and Wales and Ireland' (2017) 24 European Journal of Health Law 67–84.

who are involuntarily detained in hospital under part 4 of the Mental Health Act 2001 are specifically excluded from making legally binding AHDs. The ADMCA 2022 has expanded legally binding AHDs to people detained under section 3(b)(i) and (ii) of the 2001 Act, but still excludes people detained under section 3(a), the significant risk to self or other grounds. As such, persons under this category have no legal right to have their advance wishes respected, even though they had mental capacity to make decisions about their mental health care and treatment at the time of making their AHD. There is no other group of persons that are specifically excluded from this legal right under the ADMCA; an inadequacy that is clearly contrary to the CRPD. Essentially, AHDs as provided for in the ADMCA cover decisions regarding future healthcare treatment in the event the person is unable to communicate or make such decisions. This includes decisions regarding future mental health treatment. AHDs are considered a critical support to enable people to exercise their legal capacity in making treatment decisions and avoid the need for coercion and non-consensual treatment, which is prohibited under the CRPD. The research suggests that the process of developing an AHD confers recovery and capacity-building benefits for the person.[127] An international systematic review reported that AHDs reduced involuntary admissions by 23 per cent.[128] AHDs are also associated with a reduced need for readmission into hospital[129] and enhanced recovery.[130] This is particularly relevant in the Irish mental health system where 60 per cent of admissions are readmissions.[131]

In Ireland there is an ongoing law reform process to make significant changes to the Mental Health Act 2001, responsibility for which is vested in the Department of Health. This culminated in the publication of a Heads of Bill in 2021. In that Heads of Bill, it is proposed to amend section 57 of the 2001 Act to provide for 'designated healthcare representatives' as per section 88(1)(b)(ii) of the ADMCA. The explanatory note that accompanies section 57 states that this

127 Marvin Swartz and Jeffrey Swanson, 'Commentary: psychiatric advance directives and recovery-oriented care' (2007) 58(9) Psychiatric Services 1164.

128 Mark de Jong et al, 'Interventions to reduce compulsory psychiatric admissions: a systematic review and meta-analysis' (2016) 73(7) JAMA Psychiatry 657–664.

129 Claire Henderson et al, 'Effect of joint crises plans on use of compulsory treatment in psychiatry: single blind randomised controlled trial' (2004) 329(7458) British Medical Journal 136 and Chris Flood et al, 'Joint crisis plans for people with psychosis: economic evaluation of a randomised controlled trial' (2006) 333(7571) British Medical Journal 729.

130 Swartz and Swanson (n 127 above).

131 There were 16,710 admissions to Irish psychiatric units and hospitals in 2019: 60 per cent of these were readmissions and 14 per cent were involuntary: Health Research Board, 'National Inpatient Reporting System Bulletin' (Health Research Board 2020).

amendment seeks to introduce 'designated healthcare representatives' as per subsection 88(1)(b)(ii)' of the ADMCA. It notes that sections 85(7) and 136 of the ADMCA will need to be amended to ensure these provisions can operate and will ensure parity of treatment for those with mental health issues. Therefore, it appears that the intention in the Heads of Bill is to provide parity in terms of the application of AHDs in respect of both voluntary and involuntary categories: an approach that would align with the requirements of article 12 of the CRPD, at least in terms of non-discrimination in decision-making in general and mental health treatment.

As discussed above, under the ADMCA 2022, AHDs are not legally enforceable for people detained under section 3(a) and are considered a significant risk to self or others but are enforceable for people detained under section 3(b)(i) and (ii) (non-risk grounds). AHDs are legally enforceable for people admitted voluntarily for mental health treatment. While the exclusion would appear to only affect a small proportion of people, in practice it impacts all persons admitted to hospital for mental health treatment due to regrading powers under the 2001 Act to change a person's status from voluntary to involuntary and powers conferred on clinicians regarding the grounds on which a person is detained under section 3(a) or 3(b)(i) and (ii) or both. The exclusion impacts the legal enforceability of AHDs for everyone admitted to the mental health system given that a person may be regraded or the grounds for detention can be changed if the person refuses a proposed treatment, leaving the person at risk of human rights violations and forcible treatment.

An AHD can be taken into consideration, but it is not legally enforceable in these circumstances. The exclusion of persons detained under the 2001 Act violates the CRPD as it discriminates on the grounds of disability.[132] Similar legislative provisions were litigated as discriminatory under the Americans with Disabilities Act in the United States.[133] The Assisted Decision-Making (Capacity) Amendment Bill 2019 proposed to remove this exclusion from the ADMCA. The Bill reached Seanad stage (upper house of the Irish Parliament) but lapsed with the dissolution of the Irish Parliament in March 2020. The responsible minister stressed that this amendment 'was not the final word on this matter' and 'that more is needed to achieve full parity of care' and indicated that the legislation to reform the 2001 Act would

132 See 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities' (UN Committee on the Rights of Persons with Disabilities, adopted during the Committee's 14th session, held in September 2015).

133 *Hargrave v State of Vermont, No 2*: 99-CV 128 (2001); *Hargrave v State of Vermont*, 340 F 3d 27 (2nd Cir 2003).

further address this area.[134] However, the approach adopted in the ADMCA 2022 calls into question the Irish Government's commitment to realising the rights provided for in the CRPD. In addition, the proposed amending legislation to the 2001 Act retains involuntary detention and treatment of persons subject to the mental health legislation, which is at odds with article 14 and allied provisions in the CRPD. It is also in conflict with other rights in the CRPD, specifically article 12, the right to exercise legal capacity on an equal basis with others, article 15, the right to be free from torture, cruel and inhuman treatment, article 17, the right to physical and mental integrity, and article 25, the right to health.

The approach taken to advance planning in the new legislation for Northern Ireland has been described as 'delicately side-step[ping] the issue of advance decisions to refuse treatment by giving them statutory force, but not defining them save by the reference to the common law relating to such decisions'.[135] The law as it currently stands in Northern Ireland provides no statutory basis for advance health planning to consent or refuse treatment. Advance decisions in Northern Ireland have been determined by principles set down under English common law, which pre-dates the introduction of the Mental Capacity Act 2005 in England and Wales and the MCA (NI).[136] The MCA (NI) does not regulate this area. However, section 9 of the MCA (NI) does provide statutory recognition of advance decision-making. Unlike the ADMCA and the Mental Capacity Act 2005 (England and Wales) the MCA (NI) does not codify advance decisions 'preferring instead to be guided by jurisprudential development through the common law'.[137] The Department of Health for Northern Ireland's rationale for not codifying the law on advance directives is that, given that the evolving nature of fused approach adopted in the MCA (NI), it would be 'premature to fix it in statute at this point'.[138] Section 99 of the MCA (NI) provides guidance in respect of advance planning and the provisions on lasting power of attorney. It provides that an attorney giving or refusing consent to treatment is subject to any effective advance decision that was made at the same time or after the lasting power of attorney was made. Therefore, if the lasting power of attorney conferred authority to the attorney to consent to or refuse treatment and then the donor

134 Ibid.

135 Alex Ruck Keene and Catherine Taggart, 'A brave new (fused) world: the draft Northern Irish Mental Capacity Bill, 2014' (2014) Elder Law Journal 395–401.

136 Department of Health, 'Review of the law relating to Advance Decisions to Refuse Treatment: Mental Capacity Act (NI) 2016 section 284' (Presented to the Northern Ireland Assembly by the Department of Health on 14 June 2019).

137 Ibid 1.

138 Department of Health, 'Draft Mental Capacity Bill (NI) Consultation Document' (May 2014) 11.

makes an advance decision refusing consent to such treatment, the donor's later personal choice takes precedence. If an effective advance decision regarding treatment is already in place, section 99 provides that the advance decision is withdrawn by the making of the lasting power of attorney, which gives the attorney authority to consent to or refuse the treatment.

The approach adopted in the MCA (NI) can be considered problematical for a number of reasons. Codification eliminates inconsistent approaches and addresses ambiguities in the law, creating a uniform understanding of the law, an opportunity missed in the MCA (NI). The lack of consensus in the consultation on the MCA (NI) on codification of advance planning flags the potential difficulties in recognising persons' treatment decisions (particularly refusal in mental health settings) in practice. The foregoing discussion of the debate about the applicability of the ADMCA to persons involuntarily detained under the Mental Health Act 2001 highlights the potential for fragmentation in approaches in the capacity legislation in Ireland.

One of the key recommendations from the report of the Bamford Review was the creation of 'a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland'.[139] The rationale for this recommendation was that such an approach would support a reduction in stigma and prejudicial attitudes directed towards having separate mental health legislation, while simultaneously augmenting protections for persons considered to lack capacity and support them to make legally effective decisions relating to mental or physical health, personal welfare or financial decisions.[140] As such this overarching rationale of the fused legislation in Northern Ireland is undermined by not codifying and ensuring a unified approach to decision-making in both general health and mental health. While the Department of Health for Northern Ireland in its consultation document articulated the view that 'a doctor will no longer have the authority to override an effective advance decision to refuse medical treatment for a mental disorder (which can happen at present)' the lack of codification runs the risk of reducing the legal safeguards for decision-making by persons receiving mental health treatment.[141]

The approach in Ireland under the ADMCA, which excludes persons involuntarily admitted for mental health treatment, is discriminatory and stigmatising. While the approach in Northern Ireland under the MCA (NI) in not codifying the law on advance planning might in practice fail to shore up the decision-making of persons receiving

139 Ibid.
140 Ibid.
141 Ibid 12.

mental health treatment. No other area of healthcare in Ireland involves persons being given treatment without their consent (outside of emergency situations). As such this exclusion is discriminatory and feeds into the stereotype that people experiencing mental distress are a risk when in fact they are more likely to be the victims of violence than perpetrators.[142] There is no evidence to show any increased risk for this group yet they are not allowed to exercise their legal capacity and have their treatment wishes in their AHD respected on an equal basis with others in general healthcare.[143] Equal access to AHDs should be provided for in both the ADMCA and in the legislation amending the 2001 Act and should be codified in the MCA (NI). AHDs are a critical support measure which should be made equally available to everyone, particularly those who are involuntarily detained. The research exploring this area in Ireland suggests that the group who need AHDs the most to increase trust and respect in healthcare are excluded from the legislation.[144] The retention of this exclusion could lead to further discrimination and alienation for a group of people who live in fear of being subjected to unwanted treatment with serious long-term side effects should they become unwell again in the future, leaving this group at high risk of human rights violations. Therefore, it is essential that AHDs should be provided for all persons on an equal basis and the legislation requires further amendment. Similarly, the MCA (NI) should codify this area of law to ensure that the advance healthcare planning of persons is respected in the future. The failure to do so is at odds with the obligations under article 12 of the CRPD and allied rights as discussed above.

SHARED LEARNINGS ON THE DEVELOPMENT OF CAPACITY LAWS IN NORTHERN IRELAND AND IRELAND

Both legislative models seek to move away from regimes that have placed a premium on substitute decision-making by enacting a range of provisions that support persons to a greater extent to make legally effective decisions with regards to health decisions, personal welfare and financial decisions etc. Both jurisdictions also retain substitute

142 Karen Hughes et al, 'Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies' (2012) 379(9826) The Lancet 1621–1629.

143 John Monahan et al, *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (Oxford University Press 2001).

144 Fiona Morrissey, 'The introduction of a legal framework for advance directives in the UN CRPD era: the views of Irish service users and consultant psychiatrists' (2015) 1 Ethics, Medicine, and Public Health 325–338.

decision-making provisions which they anticipate will be used only after all supports are exhausted. Despite this appetite for law reform, both jurisdictions have seen considerable delays in developing, enacting and commencing the new legislation. Part of the delay with the commencement of the legislation in both jurisdictions can be attributed to the complex nature of the legislation, particularly so in Northern Ireland with the intricacies of designing and delivering a fused model. A disjointed approach in Ireland to developing the mental health and capacity law partly explains the delay. The Department of Health has responsibility for the amending legislation to the Mental Health Act 2001, while the Department of Justice and later the Department of Children, Equality, Disability, Integration and Youth led on the enactment of the ADMCA. This approach has certainly led to delays, inefficiencies and a fragmented approach, as illustrated by the conflicting provisions on AHDs. In contrast one government department in Northern Ireland (the Department of Health) was vested with responsibility for the legislation. Nonetheless, there have also been long delays in enactment of this legislation.

The Bamford Review identified that confusion arose as a result of having legislation covering mental illness and another piece of legislation covering mental capacity.[145] Therefore, it considered it desirable for:

> one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust ... the Review considers that Northern Ireland should take steps to avoid the discrimination, confusion and gaps created by separately devising two separate statutory approaches, but should rather look to creating a comprehensive legislative framework which would be truly principles-based and non-discriminatory.[146]

Another key difference between the legislation in both jurisdictions is that the MCA (NI) provides for persons aged 16 and over, while in Ireland the ADMCA applies to persons aged 18 and over, meaning a lack of safeguards for 16- and 17-year-olds who wish to avail of decision-making supports under the ADMCA. This concern was shared by the Subcommittee on Mental Health in its Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001.[147] The Committee recommended that the ADMCA should be

145 Legal Issues Committee, 'A Comprehensive Legislative Framework. Belfast: Bamford Review of Mental Health and Learning Disability (Northern Ireland)' (2007) 36.

146 Ibid.

147 Subcommittee on Mental Health, Report on Pre-legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001 [2022] Oireachtas, 33/HO/04, 58.

amended to cover 16- and 17-year-olds. The CRPD places a premium on recognising the evolving capacity of the child and this certainly is a serious lack of rights protection for persons aged 16 and 17 in Ireland whose decision-making capacity is disputed.

As discussed above, part 1 of the MCA (NI) emphasises the key principles underpinning the legislation and includes the notion of 'best interests'. In contrast, the ADMCA deliberately omitted the inclusion of 'best interests' in the legislation, reflecting the requirements of the CRPD. As discussed above, rationale for the inclusion of 'best interests' in the MCA (NI) is that it insulates third parties from both civil and criminal liability when making decisions on behalf of a person. This runs the risk that the legislation will be interpreted and applied in a paternalistic manner, denying persons subject to the legislation their legal capacity through the imposition of substitute decision-making. As both legislative regimes are implemented and applied in practice, future research would usefully explore to what extent the concept of best interests impacts the rights of persons subject to the legislation in Northern Ireland. Similarly, in Ireland exploration of how the courts understand, interpret and apply the notion of 'will and preferences' will be useful in determining whether the Irish courts depart from the paternalistic impulses that have permeated their adjudication of cases decided under the Mental Health Act 2001 on the basis of the 'best interests' principle.[148] Similarly, the assessment method for capacity provided for in the MCA (NI), incorporating both a diagnostic and functional test, embeds the medical model in the legislation, an approach at odds with article 12 of the CRPD. It can be argued that this aspect of the MCA (NI) is disablist, a repackaging of the medical model, which measures a person against a standard of 'normalcy' rather than embracing the human rights model. In contrast, the ADMCA relies solely on a functional assessment of capacity, which arguably moves closer to compliance with the CRPD as it does not embed the medical model to the same extent.

Another key difference in the approaches in Northern Ireland and Ireland relate to the provisions regulating deprivation of liberty. As mentioned above, the MCA (NI) is being implemented in stages. The MCA (NI) provides for deprivation of liberty safeguards (DoLS), which were implemented in stage one. DoLS essentially provide for a new process regulating deprivation of liberty.[149] In Ireland it was recognised that the ADMCA required provisions regulating deprivation

148 For a discussion on the paternalistic interpretation of the Mental Health Act 2001, see Department of Health, 'Report of the Expert Group on the Review of the Mental Health Act 2001 (2015) 12.

149 The research provisions came into operation on 1 October 2019 and the DoLS and money and valuables provisions came into operation on 2 December 2019.

of liberty of persons considered to lack mental capacity. This was seen as essential to meet Ireland's obligations under the CRPD and the European Convention on Human Rights. It was anticipated that the amending legislation to the ADMCA would address this omission in the principal legislation. However, this was not the case. The explanation from Government for this omission was given that this was such a complex area '[i]t is not possible for the General Scheme to address all of the issues which arise in such a fundamental reform of the law on capacity'.[150] It was suggested that the applicable safeguards for persons deprived of their liberty will be dealt with in separate legislation, legislation prepared by the Department of Health.

A final point on the different approaches in both jurisdictions is that the United Kingdom of Great Britain and Northern Ireland has ratified both the CRPD and its OP. This allows the Committee on the Rights of Persons with Disabilities to hear complaints from individuals or groups affected by the MCA (NI) who allege violations of their rights under the CRPD. In contrast, Ireland's failure to ratify the OP has left a significant gap in oversight and accountability. Ratification of the OP would address this disparity.

CONCLUSIONS

The right of autonomy and self-determination are central principles in allowing everyone to participate as members of society. In that regard, the law in both Northern Ireland and Ireland has been wholly insufficient in facilitating persons requiring support to make legally effective decisions and has operated for generations to deny the legal capacity of persons whose mental capacity has been called into question. The slow development of law reform proposals and their subsequent implementation in Ireland and Northern Ireland requires closer comparative examination, particularly due to the unique social, legal and political arrangements for the island of Ireland. Cross-border movement for Irish and British citizens adds complexity to legal protections for persons subject to these legislative provisions.

The approach in Northern Ireland differs from the approaches in other jurisdictions of the UK. The MCA (NI) places the impairment of mental capacity and the requirement to act in the person's best interests at the centre of the new system, while also recognising advance healthcare planning to respect decision-making. The approach in the ADMCA underscores a broader shift in legal and societal attitudes towards persons with disabilities and their rights and autonomy. By

150 Joint Committee on Children, Equality, Disability, Integration and Youth, Debate, Wednesday 16 February 2022.

prioritising respect for a person's will and preferences and providing an array of supports to facilitate decision-making, Ireland's legislation endeavours to empower and respect human rights and autonomy in a manner that aligns with the principles set forth in the CRPD. This contrasts with the more paternalistic approach in Northern Ireland, where the 'best interests' principle underpins the legislation.

While it can be argued that the MCA (NI) better aligns with the requirements of article 12 of the CRPD, it is clear that it falls short of what is required. The MCA (NI) employs a combination of diagnostic and functional assessment to determine if a person lacks capacity. However, this dual assessment approach conflicts with article 12 of the CRPD. Article 12 emphasises the equal recognition of all persons before the law, advocating for supported decision-making rather than substituted decision-making based on assessments of capacity. The concern is that the MCA (NI)'s reliance on diagnostic and functional tests is paternalistic, based on the medical model and, at least in some cases, could lead to decisions being made for persons rather than supporting them to make their own decisions. While there has been broad support for the experimental fusion model within Northern Ireland, the delayed implementation is regrettable. Given the complexity of the legislation, delayed implementation and its conflict with the requirements of the CRPD, it is hard to accept that the approach in Northern Ireland is a CRPD-compliant one. As this legislation is commenced, it will be crucial to apply rigorous scrutiny to determine whether it indeed fulfils its goal of better respecting human rights, ensuring that it does not merely promise reform but actively promotes and protects the autonomy and dignity of persons subject to its provisions.

Ireland was one of the first state parties to sign the CRPD when it opened for signature in 2007 and the last EU member state to ratify it in 2018. Despite firm commitments from successive governments, the delayed enactment of the legislation has jeopardised the rights of persons governed by the outdated framework of wardship. Recognising the legal capacity of persons with disabilities is paramount, as it serves as a gatekeeper right that unlocks access to a spectrum of other human rights. The commencement of the ADMCA marks an important moment, offering substantial enhancements over both the old system and earlier reform proposals. This legislation marks a significant advancement, reinforcing the rights of persons with disabilities (and others) to make legally effective decisions and ensuring their decision-making is respected, notably through support mechanisms like advance planning for healthcare decisions. However, similarly to the legislation in Northern Ireland, it falls short of its goal of complying with article 12 of the CRPD, although the model arguably moves closer than the MCA

(NI). It is contended that the supported decision-making provisions in the ADMCA have the potential to provide safeguards against substitute decision-making and the denial of legal capacity. Conversely, it is argued that the provisions on substitute decision-making may undermine other positive provisions on supported decision-making. It is hoped that the guiding principles, with their inclusion of the will and preferences of the person, will ensure that the paradigm shift required in article 12 will guide the effective implementation and interpretation of the legislation.

It is surprising that the development of new legislation in both jurisdictions has not yielded more comparative analysis of the models adopted. Given the substantial interest in Ireland's legislation and the fusion model adopted in Northern Ireland it is clear that these approaches are coming to the forefront of international discussions on reforming capacity legislation. The attraction of these models to policymakers and law reformers in other jurisdictions underscores the urgency and relevance of these discussions in the context of article 12 of the CRPD. The models implemented in Ireland and Northern Ireland represent innovative attempts to align domestic law with international human rights standards. The ADMCA's model, with its focus on decision support mechanisms, and the fusion model's integrated approach both aim to enhance autonomy and move beyond guardianship laws, which are often more restrictive systems. The growing attention to these frameworks indicates they could potentially be used as models or points of reference for other jurisdictions looking to develop or reform their capacity laws.[151] However, their actual effectiveness in practical application is still to be fully assessed. There is a need for comprehensive research to scrutinise these models, examining their impact upon the lives of persons they aim to support, their operational challenges and their overall effectiveness in realising the requirements of the CRPD. This research could significantly enrich our understanding of how to implement article 12 of the CRPD, offering insights beyond the island of Ireland.

151 See Domański Maciej and Lackoroński Bogusław (eds), *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)* (Routledge 2023); Nilsson (n 107 above) 48–49; and NSW Law Reform Commission, 'Background Paper: Review of the Guardianship Act 1987' (NSW Law Reform Commission, 2018) 21.

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 790–805
Commentaries and Notes DOI: 10.53386/nilq.v75i4.1156

Ouroboric devolution: *In Re Scottish Ministers' Petition*

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INTRODUCTION

The boundaries between the powers of the United Kingdom (UK) Government and those of the devolved administrations are complex, imprecise and asymmetric. On one level, this should not be a surprise: the laws which apply in the UK have been enacted by multiple legislatures throughout history and were sometimes changed, repealed and superseded by different legislatures to those which enacted them. A recent example involved the ban on the use of any language other than English in legal proceedings in Northern Ireland – originally enacted by the Parliament of Ireland,[1] it was repealed by the UK Parliament.[2] Consequently, there is a considerable degree of overlap between the scope of the powers of the UK Government and those of its devolved counterparts. However, where the boundaries between them are demarcated (however imprecisely) in statute, the sometimes invidious task of policing such boundaries falls on the courts. In late 2023, the Outer House of the Court of Session found itself carrying out precisely this task. This is a critical analysis of the opinion of Lady Haldane in *Re Scottish Ministers' Petition*,[3] concerning the unprecedented exercise by the UK Government of its power under the Scotland Act 1998 (as amended) (SA) to intervene in the Scottish Parliament's law-making. As the first such decision, it has the potential to colour the way such powers are framed, exercised and scrutinised. As will become clear in this comment, the Outer House's framing was at times problematic – with the SA appearing to devour itself in the process.

This comment is divided into four main sections. The first section explores the relevant factual and legal backdrop to the petition; the second section sets out the petitioners' and respondent's arguments; the third section explores some key elements in the court's decision and

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1 Administration of Justice (Language) Act (Ireland) 1737, s 1.

2 Identity and Language (Northern Ireland) Act 2022, s 4. Note: s 4 is not in force at the time of writing.

3 *Re Scottish Ministers' Petition* [2023] CSOH 89.

the final section sets out what I argue ought to be the proper scrutiny of the power at issue. In sum, my argument explores what I set out (in greater detail below) to be a major shortcoming in Lady Haldane's opinion: the effective framing of the entire issue as one merely of the interpretation and enforcement of a statute, rather than the interpretation and enforcement of a statute embodying a *constitution*.

BACKGROUND

Introduction

I begin this section with an exploration of the relevant aspects of the legal framework governing devolution in Scotland before turning to the factual circumstances of the petition. This is because the legal framework allowed the factual controversy to occur, and, what's more, the framework allows this kind of petition to *recur*. Thus, the *Scottish Ministers* case was not by itself so unique as to be unlikely to appear again. On the contrary, depending on Whitehall's attitude to devolution, petitions such as this may even be more frequent.

The Scottish devolution settlement

The SA is a complex statute. This is unsurprising, given the complex nature of governance and the purpose of the SA to provide for effective government in Scotland. The institutions established by the SA mirror much of the institutions at Whitehall and Westminster: the Scottish Parliament makes laws for Scotland and holds the Scottish Government to account, with the Scottish Government holding office only with the confidence of the Scottish Parliament.[4] Important differences between these two models (Holyrood on the one hand and Westminster on the other), such as the differences in methods of election,[5] the unicameralism of Holyrood and the bicameralism of Westminster and the fundamental character of each legislature's law-making powers (Westminster remains sovereign while Holyrood is not) do not fundamentally alter the similarities in the relationship between each legislature–executive pair.

Nevertheless, there are important differences in the limits to what each government can do. For Whitehall, the supervision of the

4 SA, ss 45(2), 47(3)(c) and 49(4)(c).

5 The Scottish Parliament comprises two types of members: those elected as constituency members under first-past-the-post (see SA, s 1(2)) and those who are returned from regions under the additional member system of proportional representation (see SA, s 1(3)). The House of Commons of the UK Parliament, meanwhile, comprises only members who are elected under first-past-the-post (see the Representation of the People Act 1983, sch 1, para 18).

common law aside, any statutory fetters or conditions on its ability to govern can (at least in theory) be undone by moving a Bill through favourable parliamentary arithmetic. In Holyrood, however, there being limits to the Scottish Parliament's legislative competence, the Scottish Government has to work within certain legal strictures which cannot be undone (in Holyrood, at least).[6]

More importantly, Whitehall can intervene in the legislative business of Holyrood in a way which is not reciprocated in the SA. The Secretary of State for Scotland may in certain cases make an order preventing a Bill passed by the Scottish Parliament from being submitted for royal assent.[7] *Scottish Ministers* concerned the first exercise of this power, preventing the Gender Recognition Reform (Scotland) Bill (GRR)[8] from being submitted for royal assent. For the purposes of this comment, I categorise this power as pre-assent intervention (PAI). The reason for this categorisation is that, far from being unique, PAI has been a widespread and longstanding feature of constitutional settlements which Westminster has enacted in respect of virtually every territory, region or nation under its jurisdiction over time (except, of course, the UK as a whole). I return to this point further below in my analysis of how the Court of Session construed the power in question.

The GRR Bill

The GRR was moved to significantly alter the process of gender recognition. The present process under the Gender Recognition Act 2004 (GRA) is open to those over 18 years of age who satisfy a Gender Recognition Panel (comprised of legal and medical members)[9] that they have or have had gender dysphoria, have lived in their acquired gender for a period of two years prior to making an application to the Panel, intend to live in their acquired gender until death and various evidential requirements (including relevant and prescribed medical evidence)[10] for the application to be valid.[11]

The GRR Bill would lower the eligibility age for applicants to 16 and replace the requirements for medical evidence and the satisfaction of a Panel with a statutory declaration to the Registrar General for Scotland that the applicant has lived in the acquired gender for three months

6 For example, by delisting international relations from the list of reserved matters, so that Scotland may be in complete control of its own foreign policy. See SA, sch 5, para 7.

7 SA, s 35.

8 SP Bill 13B, Gender Recognition Reform (Scotland) Bill [as passed] Session 6 (2022).

9 GRA, sch 1, para 1(2).

10 Ibid s 3(1)–(3).

11 Ibid ss 2 and 3. Note that there are alternative grounds for granting applications under the GRA, but these will not be explored in detail in this comment.

prior to making the application if aged at least 18 years, or has lived in the acquired gender for six months prior to making the application if aged 16 or 17 years.[12] Importantly, the GRR Bill contains a three-month reflection period which would begin once the Registrar General notifies the applicant that their application has been received.[13] At the end of this period, the Registrar General would determine the application and grant either a full or interim gender recognition certificate (GRC).[14]

At this stage, I set out an important *caveat*. I do not explore the merits (or otherwise) of the GRR Bill or its underlying policy objectives beyond their relevance to the PAI which was the subject of the court's supervisory jurisdiction. My sole concern is to explore the merits of the court's reasoning in *Scottish Ministers*, the majority of which (as I set out below) explore the PAI and the proper scrutiny to which it should be subject.

The Scottish Secretary's intervention

The GRR embodied the Scottish Government's policy to reform the process of gender recognition in Scotland. In her opinion, Lady Haldane set out the history of the Bill, from its policy origins to the research and consultations carried out prior to its introduction as well as during its passage through the Scottish Parliament.[15] In the weeks preceding its final vote in the Scottish Parliament, the UK Minister for Women and Equalities, Kemi Badenoch MP, wrote to the (then) Cabinet Secretary for Social Justice, Housing and Local Government (in the Scottish Government), Shona Robison MSP, outlining a number of concerns about the GRR – specifically around the potential for divergence in gender recognition regimes between Scotland (as a consequence, *inter alia*, of the GRR Bill removing the requirement for an applicant to have or have had gender dysphoria) and the rest of the UK, and the knock-on impact this divergence may have for laws around equal treatment which apply beyond Scotland.[16] A meeting took place between Ms Badenoch and Ms Robison, even as the Bill progressed in the Scottish Parliament and was finally passed on 22 December 2022. The same day, the Scottish Secretary publicly stated that he was considering intervention

12 GRR (n 8 above), cl 2 and 4. Note that there are exceptions, eg see cl 6A.
13 Ibid cl 3.
14 Ibid cl 6.
15 *Scottish Ministers* (n 3 above) [3]–[4].
16 See Oliver Wright and Kieran Andrews, 'SNP's self-identity Bill could "harm women's rights in England"' *The Times* (London 9 December 2022)

in respect of the GRR,[17] which he did by letter to the Presiding Officer of the Scottish Parliament on 16 January 2023.[18]

THE CHALLENGE AND RESPONSE

The challenge

The power in section 35 has two core aspects to it. First, the section outlines the applicable conditions for its exercise – when the Scottish Secretary believes that a Bill of the Scottish Parliament would either be incompatible with international obligations, defence or national security interests; or make modifications to the law as it applies to reserved matters which would adversely affect the operation of that law.[19] Second, the section lists the procedural requirements for the validity of an order made pursuant to it, both in terms of the content of such an order[20] as well as the timeframe within which it should be made.[21]

In *Scottish Ministers*, the section 35 order was made under the second condition above. In other words, the Scottish Secretary claimed to have reasonable grounds to believe that the GRR would make modifications to the law as it applied to reserved matters which would adversely affect the operation of that law. The petitioners challenged the order's validity under both limbs of this condition – claiming that the GRR Bill did not make modifications of the law as it applied to reserved matters, far less that it adversely affected the operation of that law. The petitioners also claimed that the order did not identify the provisions of the GRR Bill in respect of which it had been made, and neither did it state proper reasons for having been made, in breach of the procedural requirements of section 35.[22] On the first of these grounds, the Lord Advocate (for the petitioners) stated that the GRR Bill did nothing affecting a GRC – those individuals who would obtain such a certificate under the GRR would be in the same legal position as those who have obtained and continue to obtain them under the GRA.[23]

17 Lewis McKenzie, 'Holyrood will "vigorously contest" Westminster gender reform block' (*STV News* 23 December 2022)
18 Scotland Office, 'Gender Recognition Reform (Scotland) Bill: statement from Alister Jack' (16 January 2023).
19 SA, s 35(1).
20 Ibid s 35(2).
21 Ibid s 35(3).
22 *Scottish Ministers* (n 3 above) [17].
23 Ibid [18].

The Lord Advocate then detailed the petitioner's challenge on the assumption that section 35 was engaged, under five distinct headings: error of law, irrationality, adverse effects, irrelevant considerations and the lack of proper reasons.[24] In reality, these headings largely overlapped with one another. The reasoning behind the order states that the GRR would modify the GRA (by de-medicalising gender recognition) and thus adversely impact the operation of the law as it applied to reserved matters *inter alia*, by necessitating the creation of a dual system for tax and social security systems, in order to account for the differences in eligibility under the GRR and the GRA (those who could obtain a GRC under the GRR may not be eligible under the GRA, resulting in a person with a different legal sex in different parts of the UK),[25] a higher risk of fraudulent applications[26] and adverse impact on the operation of the Equality Act 2010, including in areas such as single-sex associations,[27] the public sector equality duty[28] and equal pay.[29] The Lord Advocate criticised these reasons as disclosing an aversion to divergence under the GRR *per se*, rather than revealing adverse impact,[30] that such aversion was founded on speculation[31] and irrelevant considerations,[32] that the Scottish Secretary had essentially vetoed the democratic will of the Scottish Parliament because he had disagreed with the expression of that will (ie the GRR),[33] and that he had put forward insufficient or improper reasons for making the order.[34]

It was a significant part of the petitioner's case that the power in section 35 was intended to be an exceptional power, the mere existence of which 'should be sufficient to ensure consultation between Whitehall and Edinburgh such that the power ought never in practice to be used'.[35] In this context, the petitioner's framing of the section 35 order as emanating essentially from political disagreement between the UK Government and the Scottish Parliament called the order's

24 Ibid [19].
25 See Scottish Secretary, *Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill* (Equality Hub and the Scotland Office) [20]. Also, see Scottish Ministers (n 3 above) [21].
26 Scottish Secretary (n 25 above) [22]–[28].
27 Ibid [31]–[36].
28 Ibid [37]–[40].
29 Ibid [41]–[47].
30 *Scottish Ministers* (n 3 above) [20]–[21].
31 Ibid [27].
32 Ibid [28]–[29].
33 Ibid [24].
34 Ibid [30].
35 Ibid [15].

validity into question while simultaneously arguing for the exercise of the section 35 power to be subject to exacting scrutiny.[36]

The response

The Scottish Secretary opened by attempting to bring section 35 from the stratospheric heights of constitutional exceptionality and last-resort-ism down to the *terra firma* of constitutional ordinariness. In contrast to the petitioners, the Scottish Secretary's framing was that section 35 was 'part of the scheme' of the SA, that it was 'meant to work together' with the other parts of that Act and was far from being an unusual provision.[37] Indeed, the Scottish Secretary contended that 'section 35 was as much a part of the constitutional framework as any other provision in the [SA]'.[38]

The Scottish Secretary then took up the issue of the proper intensity of review – contending that the appropriate standard was rationality, subject only to the duty to be properly informed and that the court should not stray into a merits review of the order so that the court should not step into the Scottish Secretary's shoes.[39]

In addressing the criticism that the order had been made essentially due to policy disagreement rather than due to any adverse impact (as section 35 requires), the Scottish Secretary denied that this was the case. Instead, he contended that *inter alia* the designation of a person with a different legal sex in different parts of the UK had a materially adverse impact on the *operation* of the law as it applied to reserved matters – including information technology systems (which 'exist to serve the purpose of the [relevant] legislation') – which the petitioners had wrongly downplayed.[40]

THE COURT'S ASSESSMENT

The court dismissed the petitioner's challenge in what was ultimately a relatively short section of its opinion. However, there are four important aspects of the court's reasoning which deserve further and detailed examination. My main argument, developed further below, is that the court paid insufficient attention to the nature of the power in section 35, when seen in its proper context – the entire landscape of devolution in Scotland. Consequently, I argue that the court's scrutiny of the section 35 order was insufficiently exacting.

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36 Ibid [24].
37 Ibid [38](iii).
38 Ibid [42].
39 Ibid [49]–[50].
40 Ibid [56].

First, Lady Haldane begins by stating: 'The power contained in the section of the Scotland Act 1998 that lies at the heart of this case has never before been invoked.'[41] This is true, but on a narrow framing of the power itself. As previously set out, the power under section 35 allows the Scottish Secretary to intervene by preventing a Bill validly passed by the Scottish Parliament from being granted royal assent and thus enacted. This sort of PAI is not unfamiliar to the UK Parliament, which it has frequently conferred on Crown officials over the centuries. Prominent examples include, chronologically, powers in respect of New Zealand,[42] Canada,[43] Australia,[44] the Union of South Africa,[45] Northern Ireland,[46] the Irish Free State[47] and British India.[48] The failed Scottish devolution settlement in 1978 also included PAI which closely resembled the modern section 35 power.[49] Within the UK, PAI was controversially invoked against a Bill passed by the nascent Northern Ireland Parliament in 1922 to abolish the single transferable vote in local authority elections. Stormont strongly protested and the UK Government, fearing instability, relented, allowing the Bill to be enacted.[50] This potted history of PAI will become more relevant further below. However, it suffices to say at this point that the novelty

41 Ibid [63].

42 New Zealand Constitution Act 1852, s 56. Note: this power no longer applies, given the repeal of the statute.

43 British North America Act 1867, s 55.

44 Commonwealth of Australia Constitution Act 1900, s 58.

45 South Africa Act 1909, s 64. Note: this power no longer applies, given the repeal of the statute.

46 Government of Ireland Act 1920, s 12(2). Note: this power no longer applies, given the repeal of the statute.

47 Irish Free State Constitution Act 1922, sch 2, art 41. Note: this power no longer applies, given the repeal of the statute.

48 Government of India Act 1935, s 32(1). Note: this power no longer applies, given the repeal of the statute.

49 Scotland Act 1978, s 38.

50 The Northern Ireland Government at the time viewed this reservation as a 'very grave step' and resolved to tender its resignation if the then Northern Ireland Prime Minister Sir James Craig did not persuade then UK Colonial Secretary Winston Churchill to recommend that assent be granted: see Northern Ireland Cabinet Minutes 27 July 1922 (contained in CAB/4/50 in the Public Records Office Northern Ireland). Churchill on his part found the Bill 'unfortunate', in part due to a protest against the Bill lodged by then Irish President of the Executive Council (of the Irish Free State) W T Cosgrave (see note of a telephone message between Churchill and Craig, 31 August 1922, contained in CAB/4/50) but ultimately relented, recommending assent (see letter dated 9 September 1922 from Churchill to Craig, contained in CAB/4/50). See generally, David Torrance and Doug Pyper, 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill' (House of Commons Library CBP9705) 12–13.

of the *power* contained in section 35 is, broadly speaking, perhaps overstated.

Second, the court observes:

> Perhaps self-evidently, if this power had been invoked purely in response to, or as a result of, a policy disagreement between the respective legislatures, then that would be an end of matters. The conditions for the making of an Order under section 35 would clearly not be met.[51]

This effectively adopts the framing of both the petitioners and the respondent, albeit in the respondent's favour (by implicitly accepting that there was adverse impact). This is, however, an important point to remember. The touchstone for the second condition in section 35 is adverse impact on the operation of the law as it applies to reserved matters. It is just as conceivable for policy divergence to have no such impact (or negligible impact) as it is for policy divergence to have adverse impact. The question is not whether there is disagreement between Whitehall and Edinburgh on the policies which govern a given matter in Scotland – the question is whether any such policy which the Scottish Parliament wishes to enact may have adverse impact. Thus, even though there plainly was disagreement in *Scottish Ministers*, the question for the court was whether the relevant order was made as a result of adverse impact.

Third, in determining whether the GRR made any modifications to the law as it applied to reserved matters, Lady Haldane focused on one of the Bill's explicit purposes – to modify the meaning of 'full gender recognition certificate' within Scotland to embody a de-medicalised and administratively simpler process. This, in Lady Haldane's opinion, constituted a modification within the meaning of section 35, thereby engaging the section.[52] Modification, therefore, has a broader meaning than simply the explicit amendment of statutory text – section 35 can be engaged by modification of statutory meaning and effect as well as by modification of text. While this may seem concerningly broad, it is important to recall that section 35 does not allow for intervention in response to modification *per se* – only when that modification also has adverse effects.

Fourth, the court determined that the making of a section 35 order is subject to a largely traditional *Wednesbury* review, albeit subject to the restrictions or qualifications contained within section 35 itself.[53] This lies at the heart of *Scottish Ministers* and was the outcome of two related issues: the constitutionally 'intrinsic' nature of section 35[54]

51 *Scottish Ministers* (n 3 above) [64].
52 Ibid [67].
53 Ibid [71].
54 Ibid [70].

and the inapplicability of the principle of legality to the order under scrutiny.[55] I deal with each issue in turn.

The power in section 35 is 'intrinsic' in the same way that every provision in the SA is intrinsic – they all form part of the statute as a whole. But, ultimately, 'intrinsic' does not unpack the nature of section 35. It is on any view a very particular statutory creature: a power allowing a government which is *not* responsible to the Scottish Parliament – an institution with a direct democratic mandate in Scotland – to intervene in its legislative business in areas over which it *undoubtedly* has the competence to legislate.[56] It is neither normal nor common for Whitehall to look over Holyrood's shoulders; to do so would render devolution itself superfluous.

Constitutional settlements in the Westminster tradition sometimes contain provisions which allow national governments to intervene (directly or indirectly) in regional law-making or administration. These provisions can fairly be described as intrinsic to these constitutional settlements but might also (equally fairly) be described as outrageous in the upset they cause to the normal functioning of the relevant constitution. They are tolerated (however much under protest) precisely because of their extraordinary nature.

The tension is illustrated starkly in the case of *The State of Punjab v Secretary to the Governor of Punjab (No 2)*[57] determined by the Indian Supreme Court. In that case, the Punjab Legislative Assembly had passed four Bills in a special session of the Assembly. The Bills were then submitted to the Governor with a recommendation from the Government that they be granted assent. The Governor of an Indian State is constitutionally permitted to assent, withhold assent or reserve a Bill for consideration by the President of India, and must reserve a Bill which would, if enacted, 'so derogate from the powers of the High Court as to endanger the position which that court is by this Constitution designed to fill'.[58] The Governor effectively sat on the Bills and later, in response to repeated queries by the Government, stated that he considered the special session of the Assembly to have been unlawfully summoned, with the result that he would not now assent to four invalid Bills. In the Supreme Court, the Chief Justice of India Dr D Y Chandrachud strongly criticised the Governor's conduct, rejected his claim that the special session had been unlawful and ordered him

55 Ibid [71].

56 Lady Haldane notes, at various points throughout her opinion, that the parties were agreed that the GRR Bill was within the Scottish Parliament's competence, see ibid [11], [36], [38](ii) and [68].

57 *State of Punjab v Secretary to the Governor of Punjab (No 2)* 2023 INSC 1017, [2023] 15 SCR 777.

58 Constitution of India 1950, art 200.

to make a decision in accordance with the options constitutionally available to him.[59]

While this case may appear factually and legally different to *Scottish Ministers* at first blush, there are important parallels between the two cases: both in terms of the relevant power (of the Governor) as well as the Supreme Court's view of federalism in India. First, Indian Governors are appointed by the Indian President, who is constitutionally bound to follow the advice of her ministers in Raisina Hill.[60] In other words, Indian Governors are effectively political appointees of the Federal Government. This at times causes intense political friction between Federal and State Governments of different political hues, with the Federal Government unable to shake the suspicion of constitutional chicanery through indirect control of state governance.[61] Second, although the Indian Constitution appears to allow a governor to withhold assent without qualification,[62] the Supreme Court in *Punjab* held that the only course of action open to the Governor should he wish to withhold assent is to return the relevant Bill to the Assembly with one or more recommended amendments for the Assembly's (unqualified) consideration.[63] In the Chief Justice's view, this was an essential reading of the Governor's powers, as the alternative would allow

> the Governor as the *unelected* Head of State [to] be in a position to virtually veto the functioning of the legislative domain by a duly *elected* legislature by simply declaring that assent is withheld without any further recourse. Such a course of action would be contrary to fundamental principles of a constitutional democracy based on a Parliamentary pattern of governance. (emphasis supplied)[64]

If the capitalisation of 'parliamentary' evokes connections with Westminster, that is precisely the Chief Justice's point. The repeated references to the unelected nature of the gubernatorial office in contrast with the direct democratic legitimacy of the Punjab Legislative Assembly is in part anchored to the thread of responsible government

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59 Ibid [44].

60 Constitution of India 1950, art 155 (Appointment of Governor) and art 74(1) (Council of Ministers to aid and advise President). Raisina Hill is a metonym for the Federal Government, due to the presence of some of the most important federal institutions on or within a certain radius of Raisina Hill in the heart of New Delhi.

61 See eg Gautam Bhatia, 'Do we need the office of the Governor?' (*The Hindu* 24 May 2018).

62 Constitution of India 1950, art 200 (Assent to Bills).

63 *Punjab* (n 57 above) [24].

64 Ibid [25].

which runs through the Indian Constitution – a direct influence from Westminster.[65]

Third, although the Indian Governor is a political appointment whereas the Scottish Secretary is an elected MP, the exertion of national control by each is far from a coincidence. Deeply resentful of British control over elected provincial government, retained through Crown-appointed governors,[66] when India's constitution framers inscribed its independent Constitution, their concern with the risk of nascent India's disintegration led them back to the very governors against whom they had bridled.[67] In the Scottish context, although the present Scottish Secretary is indeed directly elected from a Scottish constituency, he is, like Indian governors, not responsible to the legislature in respect of which he may intervene. It is against this backdrop that the Indian Supreme Court insisted on narrowly reading gubernatorial powers. The risk of the alternative scenario in *Punjab* was the stagnation of its democratically elected legislature through the actions of a non-responsible official. A similar risk arises if the court is called upon to interpret section 35 – or indeed the SA – as 'any other' statute.[68] It should be trite law for the SA to be considered for what it embodies – a constitutional settlement.

The above mini-excursion into comparative constitutional history and practice leads me to Lady Haldane's second point I highlighted above: that the principle of legality does not apply to the dispute in *Scottish Ministers*. In the Lord Ordinary's view, this inapplicability was because the question at the heart of the case was not 'whether the executive is using a statutory power to interfere with a fundamental or constitutional right'.[69] Indeed, the section 35 order did not interfere with a fundamental or constitutional right. But that is only part of the content of the principle of legality. The fuller version of the principle can be found in Lord Steyn's meticulous exploration of it in *R v Home Secretary ex parte Pierson*.[70] Lord Steyn located the principle firmly in the presumption that the UK Parliament does not legislate in a vacuum, but within pre-existing rules which undergird the general system of

65 Ibid [16].

66 Constituent Assembly Debates (India), vol 8, 8.94.108 (30 May 1949). The relevant Westminster statute was the Government of India Act 1935, s 48(1).

67 Constituent Assembly Debates (n 66 above) vol 8, 8.94.176.

68 *Scottish Ministers* (n 3 above) [38](i).

69 Ibid [71],

70 *R v Home Secretary ex parte Pierson* [1998] AC 539 (HL). Of note, Lady Haldane referred to *Ex parte Pierson*, but only a few selected passages quoted in *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787: see *Scottish Ministers* (n 3 above) [71].

law, displacing such rules only with 'irresistible clearness'.[71] Properly understood, therefore, the presumption against casual, cursory or unintended displacement of fundamental rights is a manifestation of this broader principle, without being the entirety of it.

In *Scottish Ministers*, the broader principle of legality would have necessitated an exploration of PAI as it once existed, and why and how the language of section 35 clearly displaces pre-existing rules around how PAI functioned. This clear displacement would raise yet further questions as to the proper scrutiny of the section 35 Order, when considered in light of the scrutiny afforded to the exercise of PAI in previous avatars. When PAI manifested as reservation powers throughout the British empire,[72] their complete lack of substantive qualification meant that scrutiny was extremely light. The Canadian Supreme Court, for example, held that, procedural compliance aside, there were no limitations on the power of Canada's Lieutenant-Governors to reserve Provincial Bills for the Governor General.[73] The substantive qualifications in section 35 must therefore bear consequentially upon the question of scrutiny. Indeed, engaging the broader principle of legality would *ipso facto* demand a higher level of scrutiny than the Lord Ordinary had held in *Scottish Ministers*. But what might this scrutiny entail?

A BREAKDOWN OF SECTION 35

In two typically erudite posts on the UK Constitutional Law Association blog, Michael Foran[74] and Paolo Sandro[75] present opposite appraisals of *Scottish Ministers*. For Foran, arguments about the separation of powers are properly focused – not on the devolved plane – but at Westminster. In other words, *Scottish Ministers* was not a case about Whitehall's interference with Holyrood's domain, but about the boundaries of that domain as determined by Westminster.

71 *Pierson* (n 70 above), Lord Steyn quoting *Maxwell on Interpretation of Statutes* 12th edn (Sweet & Maxwell 1969) 116.

72 See Anurag Deb, 'Lessons from the age of empire: the UK Internal Market Act as a rupture in the understanding of competence' (2024) 75(1) Northern Ireland Legal Quarterly 106–139, 117–118.

73 *Reference re the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province* [1938] SCR 71, 79, per Duff CJ.

74 Michael Foran, 'Section 35 and the separation of powers: on the role of unwritten constitutional principles in the interpretation of the Scotland Act' (*UK Constitutional Law Association* 13 December 2023).

75 Paolo Sandro, 'Devolution and the phantom menace: an alternative view on the appropriate intensity of judicial scrutiny of the s 35 Scotland Act 1998 order' (*UK Constitutional Law Association* 20 December 2023).

Seen in this light, the Scottish Secretary's power under section 35 is not some usurpation, but simply an 'instantiation' of the balance between Whitehall and Edinburgh which Westminster enacted in the SA. In response, Sandro cautions against a 'centralist vision of the constitutional division of labour between UK and devolved institutions' which he says informed the Lord Ordinary's scrutiny in *Scottish Ministers*. For Sandro, the stated intention of the UK Government at the time of enacting the SA – that section 35 is a power designed to be effective through existence rather than use – is highly relevant, both to the use of the power as well as the scrutiny with which the courts should examine its use.

In discussing my view on the proper scrutiny of the section 35 order, I set out what I hope is a path which can be navigated using both Foran's and Sandro's visions of the SA. Assuming the Scottish Parliament passes a Bill which makes modifications (of whatever character) of the law as it applies to reserved matters, the word on which both the petitioners and respondent focused in *Scottish Ministers* is 'adverse'. This is understandable, but it somewhat glosses over the word 'operation'. Of course, the court did not exhaustively define what either 'adverse' or 'operation' meant (and it would be myopic to embark on such a course). But the word 'operation' is interesting when considered against the reasons proffered by the Scottish Secretary. The reasons are grouped into three parts: adverse effects of different GRC regimes across the UK; adverse impacts resulting from increased risk of fraudulent applications; and adverse effects in relation to the operation of the Equality Act 2010. The first part is detailed mainly in terms of the effect of GRC divergence: on tax and social security administration (in terms of cost and capacity); the increased burden on employers, especially from the operation of the bar on disclosing protected information relating to a person's acquired gender in respect of a greater cohort of GRC holders; and divergence in the criteria for overseas applicants to obtain a GRC in the UK. The point here is not to ask whether these reasons are evidentially supported – but rather whether these reasons relate to the *operation* of the law as it applies to reserved matters. If an increase in the *costs* (time, resources, capacity, etc) associated with the operation of a law – whether on the public or private sector – is elided with the operation of a law *per se*, then section 35 effectively warns the Scottish Parliament not to increase the operational costs of the law as it applies to reserved matters. The second part of the Scottish Secretary's reasoning – the scale of fraudulent applications – is also ultimately a question of the costs associated with mitigating that risk, whether through the increase in penalties for such applications or the enforcement of such penalties across a larger scale (assuming that the risk of fraudulent applications is indeed increased). The final part of

the reasoning – the effects of the GRR on the operation of the Equality Act 2010 – is, by the framing of the reasoning itself, an 'exacerbation of existing issues'; again, a question of scale and the costs associated with accommodating that scale. In *Scottish Ministers*, the elision between the operation of the law as it applies to reserved matters and the cost of that operation is perfectly captured by Lady Haldane when she says:

> The law operates and is delivered in many different ways, one of which may be by the use of IT systems. Therefore a concern about an adverse effect of divergence is, on the face of it, a legitimate one.[76]

Here, adverse effect pertains to the operational cost *as* the operation of the law. Critics may dismiss this as pedantry because an increase in the operational cost of a law can fairly be classified as an adverse impact on the operation of that law. But if this is the potential of section 35, then it extends across much if not most of the Scottish Parliament's legislative competence, including areas in which divergence has a conceivably much greater numerical impact – such as divergence in income tax rates between Scotland and the rest of the UK.[77] Seen in this light, section 35, a power which was described as a 'safeguard',[78] has the ouroboric potential to devour much of ordinary law-making, transgressing the domain of the Scottish Parliament well beyond what the UK Parliament enacted. This potential is, ultimately, why a close reading of the language of section 35 is necessary and why the Lord Ordinary's light-touch scrutiny of the provision was a missed opportunity. With respect to Foran's analysis, heightened scrutiny does not (*pace* Foran) delegitimise section 35 as unconstitutional. Rather, it tries to precisely understand the relationship between Whitehall and the Scottish Parliament, which is – lest it should be forgotten – an institution entrusted by Westminster to make laws for Scotland. Applying Sandro's analysis, heightened scrutiny accords the Scottish Parliament proper respect given its democratic legitimacy.

CONCLUSION

The temptation to cast the SA as an ordinary statute and section 35 as an ordinary part of an ordinary statute is understandable when one considers its sheer complexity, length, the number of times it has been amended – incrementally and on a case-by-case basis – and the many questions it leaves unanswered. But this is, in many ways, the nature of a constitution – prescriptiveness can often be an obstacle to effective government. A constitution, is, moreover, by nature an extraordinary

76 *Scottish Ministers* (n 3 above) [77].
77 SA, s 80C.
78 HC Deb 12 May 1998, vol 312, col 267.

law. Leaving aside the socio-political and cultural importance of a constitution, a law which enables law-making and administration could not be ordinary.

The extraordinary nature of a constitution, however, requires careful handling and careful interpretation. Nuance, not simplicity, is the virtue here. The Scottish Parliament is not just a delegated lawmaker, the Scottish Secretary is not just a UK minister and the relationship between them is not just a technical artefact tucked away in the dry verbiage of a long statute. Instead, the SA enables not merely devolution, but the possibilities inherent within devolution. In this, it is no different to devolution in Wales and Northern Ireland, both of which have as yet uninvoked PAI powers.[79] Consequently, *Scottish Ministers* has relevance beyond Scotland and ultimately to the position and future of devolution within the UK.

No matter how one frames devolution – as a gift from Westminster or as a democratic right which Westminster only helped to realise – we owe it to ourselves to look deeper and understand better. Otherwise, we may one day helplessly watch safeguards become straitjackets as 'ordinary' provisions devour extraordinary constitutions.

79 Government of Wales Act 2006, s 114. Note: for Northern Ireland, this refers to the Northern Ireland Act 1998 (s 14(5)) and not, as previously explored in this comment, the Government of Ireland Act 1920.

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 806–817
Commentaries and Notes DOI: 10.53386/nilq.v75i4.1127

Bridges v South Wales Police and emerging privacy concerns

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ABSTRACT

This article explores the landmark case of B*ridges v South Wales Police*, a pivotal legal challenge concerning the use of facial recognition technology by law enforcement. Edward Bridges, a civil liberties campaigner, contested the deployment of automated facial recognition (AFR) technology by the South Wales Police (SWP), arguing it infringed his privacy rights. The Court of Appeal of England and Wales ruled in favour of Bridges, finding that the SWP's use of AFR was unlawful and breached privacy rights under article 8 of the European Convention on Human Rights, data protection laws and equality laws. This analysis reviews the facts, legal issues and reasoning behind the court's decision, emphasising the broader implications for privacy law and the regulation of emerging technologies.

Keywords: facial recognition technology; automated facial recognition; law of privacy; article 8 of ECHR; misuse of private information; public authority.

INTRODUCTION

The case of *Bridges v South Wales Police* marks a significant moment in the legal examination of facial recognition technology (FRT) used by law enforcement.[1] Edward Bridges, a civil liberties campaigner, challenged the deployment of automated facial recognition (AFR) technology by the South Wales Police (SWP), alleging that its use in public spaces infringed on his privacy rights. On 11 August 2020, the Court of Appeal of England and Wales overturned a previous dismissal by the Divisional Court (DC), ruling that the use of AFR by the SWP was unlawful. The court found that the deployment breached privacy rights under article 8 of the European Convention on Human Rights (ECHR), violated data protection laws and failed to comply with equality laws. This note delves into the factual background of the *Bridges* case, the key legal issues raised and the detailed reasoning of the Court of Appeal. By analysing the court's decision and its implications, this

1 *R (on the Application of Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037.

article aims to provide a comprehensive understanding of the legal challenges associated with FRT. It also reflects on the broader impact of this judgment on the future regulation of emerging surveillance technologies and the balance between public safety and individual privacy rights.

REVIEW OF THE CASE

Factual backgrounds

Edward Bridges, the appellant, is a civil liberties campaigner residing in Cardiff. The Chief Constable of SWP, the respondent, leads the national trial of AFR technology, akin to FRT, designed for face identification and verification.[2] AFR involves six stages: 'compiling a watchlist, facial image acquisition, face detection, feature extraction, face comparison, and matching'.[3]

AFR Locate refers to a specific application or deployment of technology used by law enforcement agencies. In deployments of AFR Locate for crime prevention, digital facial images of members of the public are collected from live CCTV feeds and converted into real-time facial biometric information. This information is compared to police-uploaded watchlist data to determine if two facial images depict the same person. The SWP deployed AFR about 50 times between May 2017 and April 2019.

Two incidents were pertinent to Mr Bridges' claims. Firstly, on 21 December 2017, AFR was deployed in Cardiff with 10 possible matches, resulting in two false matches and two arrests. Mr Bridges, in close proximity, alleged the lack of obvious signage indicating that AFR was in operation.[4] Secondly, on 27 March 2018, AFR was used at the Motorpoint Arena during a defence exhibition. Although no arrests

2 AFR is an advanced technology designed for the automated identification and verification of individuals based on their facial features. It operates through a multi-stage process that includes compiling a watchlist of facial images, capturing images from live CCTV feeds, detecting faces within these images, extracting unique facial features, comparing them against a database of known individuals, and determining potential matches in real-time. AFR technology is used by law enforcement agencies and other entities for various purposes, including enhancing security, identifying suspects, and managing public safety. Its deployment has sparked significant legal and ethical debates regarding privacy rights, data protection and the regulation of surveillance technologies in public spaces.

3 *Bridges* (n 1 above) [8].

4 Ibid [26]–[27].

occurred, Mr Bridges, protesting nearby, claimed unawareness of AFR in operation and that no information was provided by SWP officers.[5]

Issues

Mr Bridges contended that due to (1) the improper application of AFR Locate against him on the two occasions detailed above and (2) the continuous use of AFR Locate in his residential area, there was an inherent heightened risk of the technology being employed against him again.

Consequently, Mr Bridges initiated a legal challenge against SWP's adoption of AFR, citing three grounds: (1) infringement of the right to respect for private life as per article 8 of the ECHR; (2) violation of data protection laws, specifically the Data Protection Acts (DPAs) 1998 and 2018; and (3) breach of the public sector equality duty (PSED) provided for in section 149 of the Equality Act 2010. This note will primarily address the first two grounds of his challenge, as they are directly relevant to privacy law.

Procedural history

This case was initially heard in the DC in Cardiff by Haddon-Cave LJ and Swift J, who dismissed Mr Bridges' judicial review claim on all grounds. The DC, in addressing the article 8 ECHR right to respect for private life, recognised the complexity of defining 'private life'[6] but held that article 8 was engaged. AFR-derived biometric data is important personal information with 'intrinsically private character',[7] and it is sufficient if biometric data is captured, stored and processed even momentarily. However, the court rejected the argument that the use of AFR by the SWP lacked a sufficient legal framework, citing existing legislation, secondary regulations and SWP policies.

The DC applied the four-stage proportionality test from *Bank Mellat*,[8] finding that the use of AFR Locate on two occasions struck a fair balance and was not disproportionate.[9] Concerning data protection claims, the DC determined that the use of AFR on two occasions met the conditions of lawfulness and fairness under the DPA 1998.[10] It

5 Ibid [29].

6 *R (on the Application of Bridges) v Chief Constable of South Wales* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672, [47].

7 See *S and Marper v the United Kingdom* (2009) 48 EHRR 50 (ECtHR, 2008); *Von Hannover v Germany* (2006) 43 EHRR 7 (ECtHR 2005).

8 *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, 39, [2014] AC 700.

9 *Bridges* (n 6 above) [100]–[101].

10 Ibid [127].

acknowledged the issue of sensitive processing under DPA 2018, but deferred judgment on the sufficiency of the SWP's policy document.[11]

Regarding section 64 of the DPA 2018, the DC rejected Bridges' claim that the SWP had failed to conduct an impact assessment, finding that relevant assessments were in place.[12] In relation to the PSED, the DC dismissed the claim, stating that the SWP could not have predicted indirect discriminatory effects of the licensed NeoFace Watch software. The court concluded that the equality impact assessment (EIA) demonstrated the SWP's due regard to the PSED criteria.[13]

THE REASONING OF THE COURT OF APPEAL

Bridges was granted permission to appeal on five grounds, Sir Terence Etherton MR, Dame Victoria Sharp PQBD and Lord Justice Singh delivered the leading judgment:

1. The DC erred in concluding that the interference with Mr Bridges' rights under article 8(1) of the ECHR was in accordance with the law for the purpose of article 8(2) (*sufficient legal framework*).
2. The DC erred in concluding that the interference with Bridges' right within article 8(2) was not disproportionate (*proportionality*).
3. The DC wrongly held that the SWP's data protection impact assessment (DPIA) was in accordance with the requirements of section 64 of the DPA 2018 (*section 64, DPA 2018 – DPIA*).
4. The DC should not have declined to deliver a conclusion as to whether SWP had in place an 'appropriate policy document' within the meaning of section 42 of the DPA 2018 (*appropriate policy document*).
5. The DC wrongly held that SWP complied with the PSED under section 149 of the Equality Act 2010, since SWP's EIA was 'obviously inadequate' and failed to recognise the potential risk of indirect discrimination (*PSED*).

Sufficient legal framework

The DC addressed the first ground by evaluating the adequacy of the legal framework for AFR use. It concluded that AFR's use is sufficiently foreseeable and accessible, meeting the 'in accordance with the law'

11 Ibid [139]–[141].
12 *Bridges* (n 1 above) 51.
13 *Bridges* (n 6 above) [157]–[158].

requirement.[14] However, the Court of Appeal disagreed, distinguishing AFR from conventional police practices like photography or CCTV use. They highlighted AFR's novelty, its mass collection of digital information on the public, the sensitive nature of facial biometric data and its automated processing.[15]

The Court of Appeal rejected the DC's view that the legal framework was sufficient,[16] identifying 'fundamental deficiencies' in the 'who' and 'where' aspects. They argued that individual police officers had excessive discretion in determining watchlist entries and deployment locations.[17]

Analysing the legal framework layers, the court found the DPA 2018 to be crucial but insufficient alone.[18] The Surveillance Camera Code of Practice[19] should specify watchlist inclusion criteria and deployment locations. Assessing the SWP's local policy,[20] the court expressed concern about its broad categories, allowing discretion in determining watchlist entries and deployment locations. Consequently, the court allowed the appeal on this ground.

Proportionality

The issue of proportionality did not need to be considered after it had been determined that the use of AFR was not in accordance with the law. Nonetheless, the Court of Appeal chose to evaluate whether the DC's assessment on proportionality was erroneous. The appellant did not address the first three stages of the *Bank Mellat* four-stage test but contended that the DC erred in assessing whether a fair balance had been struck.

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14 General principles summarised by the DC are (1) the impugned measure in question must meet two requirements of 'accessibility' and 'foreseeability', namely it must have 'some legal basis in domestic law' and must be 'compatible with the rule of law'; (2) accessible means that it must be published and comprehensible, foreseeable means it must be possible for a person to foresee its consequences for them and the discretion cannot be so broad that its scope relies upon the will of those who apply it; (3) the law must afford adequate legal protection against arbitrariness and sufficiently indicate the scope of discretion; (4) discretionary power does not need an over-rigid regime which does not contain the flexibility to ensure the fundamental rights being protected, it just requires safeguards that could prevent overbroad discretion resulting in arbitrariness; (5) the rules governing the scope and application of measures do not need to be statutory; (6) the requirement for reasonable predictability does not mean the law should codify answers to every issue.

15 *Bridges* (n 1 above) 84.

16 Ibid [90].

17 Ibid [91].

18 Ibid [104].

19 Home Office, 'Surveillance Camera Code of Practice' (2013/2021).

20 Ibid [123].

Regarding the benefit side of proportionality, the appellant argued that anticipated benefits,[21] not just actual results, should be considered. On the cost side, the DC only considered the impact on Mr Bridges, whereas the appellant asserted that the interference with article 8 rights should be considered for all members of the public.[22] Citing *R (Tigere) v Secretary of State for Business, Innovation and Skills*,[23] the appellant argued for a broader consideration. However, the court emphasised that human rights questions should be addressed on legal principles rather than semantics,[24] pointing out that *Tigere* dealt with a general measure affecting a group,[25] unlike *Bridges*' case which focused on specific AFR deployments.[26] The court concluded that the impact on other members of the public in analogous situations to Bridges was as negligible as on Mr Bridges, stating that an impact with little weight does not gain significance simply because others were affected.[27]

Section 64 of the Data Protection Act 2018 – data protection impact assessment

The third aspect of this appeal centred on the adequacy of SWP's comprehensive DPIA. Mr Bridges argued that the DPIA had three key shortcomings. Firstly, it failed to acknowledge that AFR involves processing the personal data of individuals not on watchlists. Secondly, it failed to recognise the engagement of article 8 rights for such individuals. Thirdly, it remained silent on potential risks triggered by AFR, including the rights to freedom of expression and assembly under articles 10 and 11 of the ECHR.[28]

Counsel for the Information Commissioner's Office (ICO) criticised the DPIA for lacking assessments on privacy, personal data and safeguards. It also failed to acknowledge AFR's collection of data on a blanket and indiscriminate basis. The DPIA overlooked the risk of false-positive results leading to prolonged retention periods instead of immediate deletion. Additionally, it failed to identify potential gender and racial bias resulting from AFR.[29]

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21 Ibid [135].
22 Ibid [136].
23 *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] [2015] UKSC 57, [2015] 1 WLR 3820.
24 *Bridges* (n 1 above) [139].
25 *Tigere* (n 23 above) [6].
26 Ibid.
27 Ibid [143].
28 Ibid [147].
29 Ibid [149].

The Court of Appeal recognised certain issues raised, including the DPIA's acknowledgment of article 8's relevance, but dismissed these concerns.[30] Its decision was rooted in the determination that the use of AFR was inherently unlawful as per the first ground, highlighting that the DPIA's shortcomings hindered a thorough evaluation of risks to data subjects' rights and freedoms and lacked adequate measures to mitigate these risks.[31] Therefore, the appeal on this specific ground was upheld.

Appropriate policy document

To fulfil the requirement of the first data principle, the data controller needs to satisfy the conditions outlined in section 35(5) of the DPA 2018. Specifically, the SWP was required to have an appropriate document in place when carrying out the processing. Section 42(2) of the DPA 2018 specifies the necessary contents of this document. The appellant argued that the DC was obligated to determine whether SWP's November 2018 Policy Document[32] complied with section 42, and also argued that the DC should have found that it did not.[33] The court rejected this argument, stating that the two instances of AFR deployment took place before the official enforcement of the DPA 2018, and there was no alleged failure to comply with the DPA 1998.[34] Moreover, the policy document is considered to be an evolving document, and controllers are duty-bound to periodically review and update it in accordance with section 42(3) of the DPA 2018. At the time of the DC hearing, the ICO had not issued guidance on the contents of the section 42 document. The ICO considered that the November 2018 Policy Document ideally should be more detailed but satisfied section 42(2).[35] The court deemed it appropriate for the DC not to make a final judgment, allowing the SWP the opportunity to revise its document in light of future guidance from the ICO.

The public sector equality duty

The Court of Appeal held that no satisfactory response to the challenge based on the PSED had been provided. There had been no analysis of 'the racial or gender profiles of the total number of people who were captured by the AFR but whose data was then almost immediately

30 Ibid [151].
31 Ibid [153].
32 Cited in *Bridges* (n 1 above) [50] and see the SWP's Policy on Sensitive Processing for Law Enforcement Purposes, under Part 3 Data Protection Act 2018 (September 2022).
33 *Tigere* (n 23 above) [157].
34 Ibid [159].
35 Ibid [161].

deleted'.[36] Dr Anil Jain, in his witness statement, highlighted the impact of various variables, including 'training datasets', on the performance of AFR technology. He underscored that 'the accuracy of an AFR system depends to a considerable extent on the training dataset'.[37] Concerning the NeoFace Algorithm used by the SWP, Dr Jain stated that:

> he cannot comment on whether AFR Locate has a discriminatory impact, simply because he did not have access to the datasets on which the system is trained. A thorough evaluation needs to be done of the demographic composition of the NeoFace algorithm training dataset to determine whether the training dataset is biased or may be.[38]

The court concluded that as the SWP did not take reasonable steps to check if the software has an unacceptable level of bias, the PSED was not satisfactorily fulfilled.

The Court of Appeal allowed the appeal on grounds (1), (3) and (5) but dismissed grounds (2) and (4). The SWP has confirmed it will not appeal the decision, making the Court of Appeal's judgment final.

COMMENTARY

Bridges marks the world's first legal challenge related to FRT. The significance of this judgment can be assessed from three key perspectives. Firstly, *Bridges* transcends the mere examination of FRT's legality; it introduces a constructive legal strategy. This strategy aims not only to establish the lawfulness of FRT but also to propose a framework aligning it with article 8 rights and DPA law. Consequently, public authorities are prompted to reconsider the existing legal framework for AFR, revisiting policies, reassessing DPIA adequacy and retesting the inherent biases of AFR software. The deficiencies in the current legal framework may necessitate parliamentary intervention.

Secondly, the judgment identifies two crucial legal shortcomings – the 'who question' and the 'where question'. These deficiencies, by expanding police discretion, can have detrimental effects on society, adversely impacting law-abiding citizens and potentially eroding public support, leading to the 'de-legitimisation of police'.[39] The recognition that legal predictability does not require codified answers to every conceivable situation acknowledges the broad and varied nature of

36 Ibid [191].

37 Ibid [193].

38 Ibid [197]–[198].

39 Ben Bowling and Coretta Phillips, 'Disproportionate and discriminatory: reviewing the evidence on police stop and search' (2007) 70(6) Modern Law Review 936–961.

policing.[40] Excessive legal constraints might alter the essence of policing, diminishing its effectiveness, particularly in responding to serious crimes and terrorism.

Thirdly, post-*Bridges*, the SWP affirmed its intention to continue using FRT after addressing specific defects highlighted by the Court of Appeal.[41] The Surveillance Camera Commissioner (SCC), disputing the Court of Appeal's judgment's fatal impact on FRT, suggested ministers refrain from any 'self-generated' plan to merge the roles of SCC and the Biometric Commissioner into a single commission.[42] The Court of Appeal's decision marks the commencement, rather than the conclusion, of legal standards challenging AFR. Commissioners should conduct an independent review of the legal framework governing overt surveillance.

The focal point of *Bridges* revolves around determining whether the existing legal framework in the United Kingdom (UK) effectively prevents the arbitrary use of AFR through police discretionary authority. The Court of Appeal's judgment, influenced by certain objective factors, did not encompass all facets of FRT. Consequently, this note highlights specific issues that merit additional scrutiny and consideration.

The uniqueness of the facial recognition technology and the reasonable expectation of privacy

Firstly, as the court noted, 'bias has been found to be a feature of common AFR systems'.[43] Without a specific dataset, the Court of Appeal emphasised the SWP's failure to fulfil the PSED to assess whether the demographic composition of the training dataset is biased. However, the judgment did not discuss whether the AFR technology itself is intrusive or biased, and to what extent the manufacturers can eliminate such inbuilt bias. Indeed, this raises interesting questions about new technologies and administrative law – do supposedly impartial systems incorporate biases?[44]

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40 *R (on the Application of Catt and Others) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065, [11].

41 'Response to the Court of Appeal Judgment on the Use of Facial Recognition Technology' (11 August 2021).

42 'Surveillance Camera Commissioner's Statement: Court of Appeal Judgment (R) Bridges v South Wales Police – Automated Facial Recognition' (*Gov.UK* 11 August 2020).

43 *Bridges* (n 1 above) [197].

44 See Jennifer Cobbe, 'Administrative law and the machines of government: judicial review of automated public-sector decision-making' (2019) 39 Legal Studies 636–655.

Regarding the use of FRT, in *Bridges*, the court's reasoning was mainly based upon the authority of *S v UK*,[45] that article 8 will be engaged once an individual's personal data has been stored by the police. The court did not assess in the context of the deployment of the FRT, whether Bridges had a reasonable expectation that his facial biometrics would be stored, processed and further discarded. An anonymised person in a public place may still have a reasonable expectation of privacy in respect of information like name, home address and so on. Likewise, even though Bridges knowingly and intentionally involved himself in activities that might be recorded by the surveillance technology, he should have foreseen that his facial appearance would be observed by passers-by, the police and even CCTV, but Bridges still enjoyed a reasonable expectation that his biometric information behind the face would not be stored and processed, especially in the context that: a) he was of good character and was not engaged in any reprehensible or criminal activities; b) the intrusive nature of the FRT; and c) the sensitivity of biometric data.

Proportionality issue

Mr Bridges' core argument on the proportionality issue is the DC's failure to consider the cumulative interference with the privacy rights of all those whose facial biometrics were captured as part of the deployment of FRT. The Court of Appeal separated *Bridges* from challenges to 'a general measure, for example a policy or a piece of legislation', such as in *Tigere*, where the Supreme Court considered the criteria for eligibility for student loans.[46] A case concerned with 'general measure' will require the court to balance 'the impact on every person who is affected by the measure and the interest of the community'.[47] However, the Court of Appeal did not accept the use of FRT as a general measure, but chose merely to assess the impact of FRT on Mr Bridges himself, especially two deployments of FRT on two specific occasions. The Court of Appeal's conclusion was based on the specific facts and grounded in the infringement of Mr Bridges' article 8 rights. Thus, as Purshouse and Campbell have stated, 'it is regrettable that the ground on proportionality was not framed in more general terms'.[48] And the courts did not really come close to the core debate over the use of FRT and consider the wider societal impact it brings.

It would have been very interesting if the Court of Appeal had considered the use of FRT as a general measure to further assess its

45 *S v UK* (n 7 above) [50].

46 *Tigere* (n 23 above) [1].

47 *Bridges* (n 1 above) [140].

48 Joe Purshouse and Liz Campbell, 'Automated facial recognition and policing: a bridge too far?' (2022) 42(2) Legal Studies 209–277, 223.

general impact as, firstly, its use affected not only Mr Bridges but also anyone who was present in particular places in Cardiff during particular times. Although FRT identifies targeted people based upon the specified watchlist, its way of collecting public biometric data *en masse* is still general and unselected. According to Strasbourg jurisprudence, 'a wide margin of appreciation is usually allowed to the state under the Convention when it comes to general measures of political, economic or social strategy, and the court generally respects the legislature's policy choice unless it is "manifestly without reasonable foundation"'.[49] Thus, if the use of FRT as a general measure had been considered, the likelihood is not high that the court would have found a breach of the Convention.

The Court of Appeal stated that 'this was not a question of simple multiplication, but rather an exercise of judgment'.[50] However, the controversial aspect lies in the court's omission to expound on the nature of such judgment and why considering others affected by the measure is not characterised as 'simple multiplication'. Alternatively, one could argue that Parliament might be better positioned to assess the broader impact of FRT than the court.[51] It is pertinent to note that a Bill seeking to prohibit the use of automated FRT in public spaces is currently undergoing its second reading in the House of Lords. The existing scenario places significant discretion in the hands of public authorities, who may not be the most suitable entities to determine whether the use of FRT strikes a fair balance.

Moreover, irrespective of the court's evaluation of Mr Bridges' personal experience, a crucial inquiry remains regarding the extent to which the proportionality of future FRT use can be adequately assessed solely by referencing its impact on a single individual.

Bridges draws clear parameters as to use, regulation and scrutiny of AFR. From a wider perspective, we may consider how the algorithm of law can catch up with new emerging technologies promptly, namely, whether there should be a specific legal framework for the police (or the other data controllers) to routinely deploy novel biometrics including AFR but also voice recognition, gait analysis, iris analysis or other new biometric technologies as they emerge.[52] The European Union Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention 108) has already published detailed guidelines on using

49 See *Stec v UK* [2006] 43 EHRR 47, [52].

50 *Bridges* (n 1 above) [143].

51 Purshouse and Campbell (n 48 above) 224.

52 Biometrics Commissioner, 'Automated facial recognition' (*Gov.UK* 10 September 2019).

FRT,[53] and the European Commission similarly issued a White Paper on 'Artificial intelligence: a European approach to excellence and trust', which situated FRT in a broader context of technological change.[54] We may also wonder if it is true that, when laws and regulations develop constraints for each aspect of new emerging technologies, those technologies can then be used absolutely safely.

CONCLUSION

In conclusion, the *Bridges* case signifies a critical juncture in the legal scrutiny of emerging technologies, particularly in the realm of civil liberties and privacy. The judgment's multifaceted implications extend beyond the immediate concerns of the appellant, Edward Bridges, to broader considerations of societal impact, legal frameworks and the evolving landscape of technological surveillance. While the Court of Appeal has offered clarity on certain legal deficiencies, fundamental questions persist regarding the intrusive nature of FRT, the adequacy of regulatory frameworks, and the need for comprehensive legislative guidance in governing novel biometric technologies. As technology continues to advance, this case sets a precedent for ongoing debates surrounding the intersection of individual rights, law enforcement practices, and the regulatory response to rapidly evolving technologies.

53 'Guidelines on facial recognition' (*Council of Europe* 28 January 2021).

54 See 'Artificial intelligence: a European approach to excellence and trust' (European Commission COM(2020)65 final 19 February 2020) and the European Data Protection Supervisor response at Opinion 4/20 (29 June 2020).

Northern Ireland
Legal Quarterly
Vol. 75 No. 4 (2024) 818–826
Commentaries and Notes DOI: 10.53386/nilq.v75i4.1153

Author-meets-readers: *Irregular Migrants and the Right to Health* by Stefano Angeleri

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ABSTRACT

On 16 May 2023, the launch of Dr Stefano Angeleri's book, *Irregular Migrants and the Right to Health*,[1] in which we all participated, developed into an enriching discussion on the need to challenge a restrictive and selective human rights approach to the health of migrant populations. On that occasion, we came up with the idea of drafting a short 'author-meets-readers' piece which is a format that allows a more dynamic engagement than a book review, helping to demonstrate not just the quality of a book being published but also the different responses to it and how they prompt ideas for future research. Therefore, the structure of this review is as follows: the first three sections feature critical feedback on the book's topical issues from Professor Felipe González Morales, Dr Claire Lougarre and Dr Sarah Craig respectively. In the fourth section, Dr Angeleri provides a brief engagement with these perspectives.

* Professor González served as the UN Special Rapporteur on the Human Rights of Migrants from 2017 to 2023.

1 S Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press 2022).

A HUMAN RIGHTS-BASED CALL FOR CHANGING THE TUNE AND TRULY PROTECTING MIGRANT RIGHTS

Felipe González Morales

As the United Nations (UN) Special Rapporteur on the human rights of migrants from 2017 and 2023, I witnessed firsthand how state regulations and practices often fall short of aligning with international standards when addressing the health of irregular migrants. Angeleri's book compellingly underscores another critical dimension: stark disparities in how international human rights bodies interpret the scope of the right to health of irregular or undocumented migrants, revealing a fragmented and inconsistent approach that demands urgent attention. The restrictive stance adopted by certain human rights tribunals often fails to consider the myriad factors that compel many individuals to remain in an irregular migratory status. These include the *insufficiency of current regular pathways to migrate*, *limited availability of regularisation schemes* in most countries and *undue limitations on the right to seek asylum*, all fuelled by the invocation of state sovereignty disguising discriminatory approaches when adopting migration policies.

One of the main purposes of the six-year-old Global Compact for Safe, Orderly and Regular Migration was precisely to enhance such pathways for regular migration.[2] However, many would agree that its impact in this regard has been a limited one, with some countries even experiencing a regression on this matter by enacting stronger barriers to migration.

As for the availability of schemes that allow irregular migrants to regularise their status and obtain a residence permit, though some countries have recently adopted such measures, they are rather the exception than the rule. As pointed out in one of my recent reports to the UN Human Rights Council, this perpetuates irregularity of status for thousands and sometimes millions of migrants, preventing them from enjoying full-fledged human rights, including the right to health.[3] Another ongoing trend affecting the rights of people on the move is that the right to seek asylum has been constrained in many countries, in violation of the 1951 Refugee Convention. These restrictions include banning entrance to the country to request asylum or raising the standard for being granted asylum in excess of international

2 Global Compact for Safe, Orderly and Regular Migration (19 December 2018) UNGA Res 73/195.

3 Felipe González Morales, 'Report of the Special Rapporteur on the human rights of migrants (focus: how to expand and diversity regularization mechanisms and programmes to enhance the protection of the human rights of migrants)' (2023) A/HRC/53/26.

regulations.[4] The net result of this practice is that thousands of asylum-seekers *are pushed into irregular migrant status*, leading to precarious or impaired enjoyment of human rights.

The restrictive regulations described in this book highlight a weakened international law, often failing to reconcile sovereignty with human rights in the context of migrant health. While democratic nations rarely invoke their sovereignty to limit human rights, they frequently do so regarding migration, sometimes assimilating the entrance of migrants and asylum-seekers to a military invasion. This approach severely undermines migrants' rights, leading to harsh migration policies and to irregular migrants being criminalised, stigmatised and left indefinitely in the shadow.

Over the past two decades, many scholars have explored this overall subject, chapter 1 of this book stands out for its concise yet insightful analysis of the complex normative tension between sovereignty and migrant rights, offering a sharp review of how different rights frameworks have grappled with this enduring challenge. To tackle restrictive approaches, the book then refers to the equity-based concept of vulnerability (or we should say *vulnerabilities*) as a key normative tool to interpret existing international instruments and determine an expanding scope of the right to health for this group (and subgroups) of people. In all substantive chapters, inside and outside the context of migration control, the author places at the forefront the existence of a too wide protection gap between the UN human rights system and procedures – with empowering anti-discrimination and public health arguments – and the European system – where access to healthcare is guaranteed as a matter of other fundamental rights and considerations, and which, in any case, remains exceptional for irregular migrants. While this treatise of migrant health rights is rigorous and systematic, it would have, however, benefited from a greater focus on the cutting-edge jurisprudence of the Inter-American human rights system. Within this framework, vulnerability, non-discrimination, the international *corpus juris* and a pro-persona approach have led to the development of highly protective standards that can bridge the protection gap between civil rights and social rights for the most disadvantaged populations, including migrants.[5]

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4 Eg National Immigrant Justice Center, 'New Biden Executive Action Further Eviscerates the Right to Seek Asylum: Frequently Asked Questions about the Latest Anti-immigrant Policy' *NIJC Commentary* (5 June 2024); Colin Yeo, 'The new, higher standard of proof doesn't apply to human rights claims', *Free Movement Asylum Hub* (18 June 2024).

5 Armin von Bogdandy et al (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford University Press 2024).

Angeleri's work offers valuable insights into the intersection between health rights and migration, blending legal analysis with interdisciplinary approaches. It should serve as a crucial foundation for further discussions on the limitations of the jurisprudence of the European human rights system in this field, thus fostering more inclusive and effective supranational legal orders.

MIGRATION, GENDER AND THE RIGHT TO HEALTH

Claire Lougarre

Building on the arguments put forward by Professor González above, I would add that this book invites readers to ponder upon the tensions between human rights legal theory and states' practice. Whilst various scholars have discussed migrants' health in their work,[6] few have done so through the lens of the human right to health, and even fewer by focusing on undocumented migrants,[7] with most recent contributions crystallised in short journal articles. This book, therefore, provides substantial ground for discussions. It also represents a timely contribution to the literature: economic crises such as the 2007 Great Recession and the 2020 Covid-19 pandemic have polarised debates on migration and social welfare and created real challenges for key human rights principles such as that of non-discrimination.

The disconnect between the purpose of human rights law (dignity for all) and the tolerance of states' practices protecting undocumented migrants' right to health to a lesser level than the rest of their populations is significant in the context of *gender*. As summarised by the International Organization for Migration:

> Gender is a significant factor shaping every aspect of human mobility – from the decision to migrate, transiting across borders, to settling in the country of destination, or choosing to return home. Access to services, the labour market or other opportunities and benefits depend on migrants' gender too.[8]

When analysing the relationship between gender and undocumented migrants' right to health, two issues are particularly worth noting.

6 Eg H Legido-Quigley et al, 'Healthcare is not universal if undocumented migrants are excluded' (2019) 366 British Medical Journal l4160; or N Sahraoui, *Borders across Healthcare: Moral Economies of Healthcare and Migration in Europe* (Berghahn Books 2020).

7 Eg A C Vargas, C Quagliariello and L Ferrero, *Embodying Borders: A Migrant's Right to Health, Universal Rights and Local Policies* (Berghahn Books 2021); P Pace, *International Migration Law N°19 – Migration and the Right to Health: A Review of International Law* (International Organization for Migration 2015).

8 International Organization for Migration, Thematic brief – women and girls on the move: a snapshot of available evidence (IOM Issue NR 2, March 2023).

Firstly, adequate access to sexual and reproductive health services being at the heart of gender equality in health, human rights law recognises states' obligation to provide such services to undocumented migrants, specifically women, girls and transgender persons.[9] However, undocumented migrants' first-hand experience is often different, as noted by Bouaddi and colleagues: restricted access to sexual and reproductive health services, interrupted care or negative interactions with health staff, as well as gender-based violence, all result in adverse health outcomes.[10] Secondly, gender also impacts undocumented migrants' ability to access healthcare, especially for domestic workers, the overwhelming majority of whom are women. As recognised by human rights law, domestic work does not always result in documented migration status and, therefore, prevents individuals from obtaining health insurance and from seeking healthcare through fear of deportation.[11] However, states often leave domestic workers at the margin of labour law,[12] thereby failing to monitor and redress their precarious living conditions, as well as ensure their access to healthcare. These situations are aggravated by the lack of a clear stance against discrimination on the ground of migration status in human rights law, as argued by Angeleri, since some treaties allow differential treatments based on citizenship (despite them failing to echo human rights standards such as non-discrimination or proportionality or international rules of treaty interpretation, I would argue).

To conclude, human rights law acknowledges the need to further protect undocumented migrants' rights and the significant impact of gender on the realisation of their right to health. Nevertheless, human rights bodies should clarify their stance regarding differential treatments based on citizenship and legal status; to encourage more firmly states to monitor and improve the often-poor levels of health observed among undocumented migrants. Without sufficient political and legal will, the gap will not be bridged, including and perhaps especially in the context of gender.

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9 UN Committee on Economic, Social and Cultural Rights, 'General Comment No 22 on the right to sexual and reproductive health' (2016) UN Doc E/C.12/GC/22.

10 O Bouaddi, S Zbiri and Z Belrhiti, 'Interventions to improve migrants' access to sexual and reproductive health services: a scoping review' (2023) 8(6) BMJ Global Health e011981. See also Y Y B Chen, 'International migrants' right to sexual and reproductive health care' (2022) 157(1) International Journal of Gynaecology and Obstetrics 210–215.

11 UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, 'General Comment No 1 on Migrant Domestic Workers' (2011) UN Doc CMW/C/GC/1.

12 V Mantouvalou, *Structural Injustice and Workers' Rights* (Oxford University Press 2023).

EU MIGRATION AND REFUGEE POLICY: MULTIFACETED POLICY AND PROTECTION GAPS?

Sarah Craig

At the very heart of this book is a critical and timely reflection on the inherent hurdles those with a lived experience of migration face on a daily basis. The synergies to discussions within this book are apparent across many facets of migration and refugee law, not least the questions of *solidarity*, *protection shortcomings* and *policy coherence* within the European Union (EU) framework of the Common European Asylum System (CEAS). These questions continue to be pivotal in light of the new legislative and non-legislative measures contained within the new EU Pact on Migration. Arguably, the above concerns are still ongoing with protection framed or pitted against the EU's migration management objective without recognising the repeated human rights violations and human costs often involved.[13]

Taking a lead from a core point raised by the author early in the book concerning the 'selective approaches'[14] to human rights, this resonates clearly with broader questions of solidarity[15] and protection gaps within the EU protection framework. As mentioned by González above, as access to asylum becomes more stringent and progressively delimited, there is unfortunately a stark divide between those able to benefit from protection and those outside the remit. It is clear that nuanced and reflective questions need to be asked of whether current legislative frameworks, and policy responses, are currently capable of working in a manner which truly meets protection needs. The structural hurdles and multidimensional tensions for human rights law to normatively shape the field of irregular migration and health, which Angeleri succinctly outlines, are similarly true when discussing solidarity and protection deficits for persons seeking international protection. With asylum responsibilities disproportionately shared between EU member states, the human cost is inevitably borne by asylum seekers themselves who are often considered *transferable* by the legislation and politicians alike.[16] The pervading state sovereignty

13 S Peers, 'The new EU asylum laws: taking rights half-seriously' (2024) Yearbook of European Law 1–71 (advanced online copy).

14 Angeleri (n 1 above) 2.

15 For detailed discussions on solidarity within the EU CEAS, see V Moreno-Lax, 'Solidarity's reach: meaning, dimensions, and implications for EU (external) asylum policy' (2017) 24(5) Maastricht Journal of European and Comparative Law 740–762.

16 It must be noted this is not solely an EU issue either. The post-Brexit policy of the United Kingdom (UK) remains particularly troubling and further strains any hope of humane policies for those seeking international protection.

issues, which Angeleri notes of particular concern insofar as arguing that European human rights law jurisprudence is 'somewhat deferential to States',[17] are also present, if not considerably heightened, within the EU CEAS arena. Inevitably, state interests and selective participation by states[18] all too often take precedence over the human dignity and the lives of those who are forced to seek asylum. As such, it is worth reinforcing the multidimensional vulnerabilities, inclusive of health concerns, and precarious status of those *within* the formal protection space, specifically, seeking international protection insofar as the structural process of seeking asylum can also create vulnerability.[19]

Similar concerns surrounding the global apprehension of migratory healthcare policies are replicated more broadly when considered in light of solidarity tensions whereby the EU and member states continue to effectively thwart meaningful protection through policies of deterrence, shifting protection responsibilities both internally and externally and routine rights-based violations of refugees and asylum seekers.[20] The migration process itself, at various stages, exposes and can compound migrants to significant health risks, such as stringent border control policies and detention practices.[21] As the protection space is becoming increasingly fragmented, policy coherence is therefore pivotal insofar as ensuring the implementation of policy and legislative measures do not compound vulnerabilities further. In a similar vein to discussions above on solidarity, a comparable argument can be made that dignified, equitable and cohesive responses can in turn aid the health landscape of the communities where migrants are predominantly situated. It reinforces the principled stance that migrant health cannot and should not be dealt with in an isolationist approach nor as an afterthought, with the book laying the groundwork for contesting these policies.

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17 Angeleri (n 1 above) 265.

18 See E L Tsourdi, 'Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667–686.

19 For a critical discussion on the approach of the CEAS framework on vulnerabilities within asylum procedures, see C Costello and E Hancox, 'The recast Asylum Procedures Directive 2013/31/EU: caught between the stereotypes of the abusive asylum seeker and the vulnerable refugee' in V Chetail, P De Bruycher and F Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff 2016) 375–445.

20 See V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) which traces the numerous ways in which the EU regulates its borders.

21 See J Smith, 'Human rights and health failures in immigration detention exemplify the UK's hostile environment' (*RLI Blog* 12 December 2022) for recent discussions on the UK.

The work within this book incapsulates the synergies between migrant human rights and public health principles. However, the layered protection gaps and troubling state practices, which are the inherent trend across the book, have also been noted in many intersections of themes by the discussants. As such, it is a timely reminder of the need for advocating for a rights-based, meaningful and dignified protection landscape for migrants and the need for interdisciplinary voices to highlight the myriad of intersecting protection gaps.

A LAW BOOK FOR TRANSFORMATIVE ACTION

Stefano Angeleri

I am deeply grateful to the three outstanding colleagues who have so generously engaged in this conversation. Your insightful and critical reflections offer me the opportunity to further consider the imperative of uniting efforts to address the complex health and displacement challenges well beyond the scope of this book.

Overall, my aim was to systematise international and European human rights law on this critical topic, drawing from perspectives from public health and disability studies. By doing so, I sought to identify several legal consistency and protection gaps, with the hope that this work could serve as a foundation for broader, interdisciplinary dialogue and action. I agree with Professor González that there is a lot to be gleaned from Inter-American human rights law which, by adopting a very strict approach to the principle of non-discrimination on the ground of migrant status[22] and incorporating progressive UN human rights law in the regional interpretation of health rights,[23] boldly stated:

> Every migrant has the right to enjoyment of the highest attainable standard of physical and mental health and to the underlying determinants of health … regardless of migration status or origin, (and) has the right to receive the same health care as nationals …[24]

However, to avoid overly broad conclusions across varying contexts and continents, this book juxtaposes UN human rights standards – progressive, yet requiring greater internal coherence and

22 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, IACtHR Series A no 18 (17 September 2003) paras 112–114.

23 *Poblete Vilches et al v Chile* (IACtHR 2018) Series C No 349, paras 111-117.

24 IACmHR, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking* (IACmHR) Res 04/19, 7 December 2019, para 35.

systematization – with the European standards – more conservative and landlocked, but generally consistent in this area. Dr Lougarre identifies salient points on gender as a structural driver of inequality, intricately linked with exploitative employment conditions and irregular migratory status. In the book, I explored the urgency of tackling these and other factors of discrimination, precariousness and vulnerability affecting undocumented individuals through the public health framework of *social determinants of health* (SDH). This paradigm underscores how the best attainable standard of health – both individual and collective – emerges from the interplay between structural forces and living conditions[25] that human rights law should contribute to addressing. By integrating SDH principles into human rights law, we gain a valuable lens for fostering what Dr Craig describes as 'policy coherence' around health, migration and refugee protection. I reckon mobility and human rights challenges demand intersectoral, right-based and inclusive policies (and other state and non-state measures) to address the diverse health vulnerabilities of migrants, asylum seekers, refugees and their subcategories. In essence, this book calls for interdisciplinary efforts to transcend narrow interpretations of human rights law, advancing research and possibly benefiting advocacy and community empowerment through human rights literacy.[26] It challenges structural discrimination and normalised forms of 'precarious inclusion',[27] urging the legal field to confront the realities of a mobile world shaped by shrinking social budgets, growing inequalities, escalating xenophobia and the weaponisation of political othering.

25 World Health Organization – Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health: Final Report of the Commission on Social Determinants of Health* (World Health Organization 2008); M Marmot et al, 'Fair society, healthy lives: the Marmot Review' (Department for International Development 2010) 104.

26 S Angeleri and T Murphy, 'Parsing human rights, promoting health equity: reflections on Colombia's response to Venezuelan migration' (2023) 31(2) Medical Law Review 1–18; Margaret Satterthwaite, 'Critical legal empowerment for human rights' in G de Búrca (ed), *Legal Mobilization for Human Rights* (Oxford University Press 2022).

27 M A Karlsen, *Migration Control and Access to Welfare: The Precarious Inclusion of Irregular Migrants in Norway* (Routledge 2021).

Articles

Commentaries and Notes