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NORTHERN IRELAND

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The reform of Irish limited partnerships: in whose interest?

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ABSTRACT

The Irish Government's approach to the regulation of limited partnerships (LPs) has for many years prioritised the narrow economic interests of the powerful financial services sector over businesses more generally and the broader public interest. This has created two significant problems. First, non-financial services LPs have missed out on important reforms. Second, LPs have been left open to abuse by wrongdoers, facilitating financial and other criminal offences. Both problems need to be solved if the Government is to fulfil the aims of Project Ireland 2040 to support enterprise generally, create regional growth, and reduce inequality. This article explains how this can be done, taking account of the current law, the draft Registration of Limited Partnerships and Business Names Bill 2024, the extensive vulnerabilities of the LP vehicle to abuse, and the reforms necessary to improve partnership law for legitimate businesses beyond the financial services sector.

Keywords: partners; limited partnerships; beneficial owners; corporate partners; corporate transparency; money laundering; Project Ireland 2040; ECCTA 2023.

INTRODUCTION

The Irish Government's current Bill to reform limited partnership (LP) law, the Registration of Limited Partnerships and Business Names Bill 2024 (the Bill), provides an important opportunity to balance conflicting interests. On the one hand are the interests of businesses (and the state in its economic role) in promoting entrepreneurship and facilitating economic growth. On the other are the interests of the public (and the state in its social role) in protecting employees,

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creditors and other third parties who interact with the business, in equitable taxation, and in preventing wrongdoing.¹

Compelling arguments have been made for the desirability of firms taking into account the interests of all stakeholders whose support is required for a viable business – not only financiers, but also customers, suppliers, employees and communities.² These have been referred to variously as pluralism, stakeholder theory, and corporate social responsibility (CSR). Stakeholder management is

based on a moral foundation that includes respect for humans and their basic rights, integrity, fairness, honesty, loyalty, freedom to choose, and assumption of responsibility for the consequences of the actions a firm takes.³

Similarly, pluralist approaches require the firm

to serve a wider range of interests, not subordinate to, or as a means of achieving, [member] value ... but as valid in their own right. This ... inevitably involves a need to balance potentially conflicting interests ... without the interests of a single group ([members]) being overriding.⁴

CSR has been succinctly defined by the European Union (EU) as ‘the responsibility of enterprises for their impacts on society’.⁵

However, it is not enough to leave firms to determine their own social and ethical responsibilities; if left to self-regulate they will at best capture the concept of social responsibility and minimise public

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- 1 Archie B Carroll, ‘Carroll’s pyramid of CSR: taking another look’ (2016) 1(3) *International Journal of Corporate Social Responsibility* 1–8; Lorraine E Talbot, ‘Enumerating old themes – Berle’s concept of ownership and the historical development of English company law in context’ (2010) 33 *Seattle University Law Review* 1201–1219; Daniel R Fischel, ‘The corporate governance movement’ (1982) 35 *Vanderbilt Law Review* 1259–1318, 1273; UK Company Law Review Steering Group, ‘Modern Company Law for a Competitive Economic: Final Report’ URN 01/942 and URN 01/943, vol I, pt I, ch 1 and ‘Modern Company Law for a Competitive Economy: The Strategic Framework – A Consultation Document’ (February 1999) para 5.1.14.
 - 2 R Edward Freeman, *Stakeholder Theory* (Cambridge University Press 2010) 24 and 26.
 - 3 R Edward Freeman, Jeffrey S Harrison and Stelios Zyglidopoulos, *Stakeholder Theory: Concepts and Strategies* (Cambridge University Press 2018) 3.
 - 4 UK Company Law Review Steering Group, ‘Strategic Framework’ (n 1 above) para 5.1.13.
 - 5 EU Commission, ‘A Renewed EU Strategy 2011–14 for Corporate Social Responsibility’ (Communication) COM(2011) 681 final, para 3.1. See further Lára Jóhannsdóttir and Brynhildur Davídsdóttir, ‘A literature review of the history and evolution of corporate social responsibility’ (2019) 4(1) *Journal of Corporate Social Responsibility* 1–23.

expectations of their behaviour, and at worst do nothing.⁶ As has been argued, '[d]esign of the law needs to recognise the importance of ... wider ethical ... issues about the behaviour and standards of participants in [firms]' and 'accountability to wider audiences'.⁷ It is therefore essential that LP legislation incorporates non-economic values to reflect these other interests;⁸ LPs

should be organized and operated to serve the interests of society as a whole, and ... the interests of [its members] deserve no greater weight in this social calculus than do the interests of any other members of society.⁹

On registration an LP obtains a certificate of registration or authorisation,¹⁰ and, with either, a veneer of international and legal respectability. This 'public facilitation' of the firm is 'justified by the state's interest in promoting the general welfare'¹¹ and so it 'is not strictly private; it is tinged with a public purpose', which includes 'the making of a contribution to the public life of its communities'.

This article argues that the Irish Government has to date failed to balance the conflicting interests of firms and the wider community in LP law and policy so as to achieve justice and 'enable every member of society to realise their full potential'.¹² In particular, it has prioritised not just economic interests over social and ethical interests, but the narrow economic interests of a powerful special interest lobby¹³ at the expense of businesses more generally as well as the broader public interest.¹⁴ That public interest includes the following: facilitating

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- 6 Rami Kaplan, 'Who has been regulating whom, business or society? The mid-20th-century institutionalization of "corporate responsibility" in the USA' (2015) 13(1) *Socio-Economic Review* 125–155.
 - 7 UK Company Law Review Steering Group, 'Strategic Framework' (n 1 above) paras 5.1.2 and 5.1.7.
 - 8 Mike Feintuck, 'Regulatory rationales beyond the economic: in search of the public interest' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 39.
 - 9 Henry Hansmann and Reinier Kraakman, 'The end of history for corporate law' (2001) 88 *Georgetown Law Journal* 439–468, 441; and UK Company Law Review Steering Group, 'Strategic Framework' (n 1 above) para 5.1.15.
 - 10 LPA 1907, s 13; ILP Act 1994, s 8(6).
 - 11 William Allen, 'Our schizophrenic conception of the business corporation' (1992) 14(2) *Cardozo Law Review* 261–281.
 - 12 Ewan McGaughey, *Principles of Enterprise Law* (Cambridge University Press 2022) 4, 88, 90–92 and 686–689.
 - 13 Erik P M Vermeulen, *The Evolution of Legal Business Forms in Europe and the United States: Venture Capital, Joint Venture and Partnership Structures* (Kluwer Law International 2003) 61–62.
 - 14 Elspeth Berry, 'Limited partnership law and private equity: an instance of legislative capture?' (2017) 19(1) *Journal of Corporate Law Studies* 105–135.

the carrying on of lawful businesses generally; promoting and preserving economic ‘goods’, including employment and the supply of goods/services; maximising tax revenue; combating crime; and at least maintaining the country’s reputation overseas for probity and the rule of law. As the Organisation for Economic Co-operation and Development (OECD) has noted:¹⁵

[a]t times there may be monopoly of influence by those that are financially and politically powerful, at the expense of those with fewer resources ... Public policies that are misinformed and respond only to the needs of a special interest group can ultimately lead to policies that do not always benefit societies.

The special interest lobby is financial services,¹⁶ particularly overseas investors,¹⁷ the very wealthy (involved in tax planning or hiding assets), and their professional advisors.¹⁸ It is well established that business organisation legislation ‘is influenced by interest groups’, and indeed the economic theory of legislation

assumes that legal rules are demanded and supplied in much the same way as other products [so that] legislatures have no incentive to adopt efficient provisions for firms that lack sufficient resources to lobby for laws.¹⁹

As a result, only firms which are more powerful than others, or perform collective lobbying through a representative body, are able to procure favourable legislation, at the expense of micro, small and medium-sized enterprises (MSMEs).²⁰ Indeed the Irish Funds Industry Association (Irish Funds) boasts that it ‘has contributed to and helped shape the development of Ireland’s regulatory and legislative framework’.²¹ Yet,

[i]t is by no means certain that a ... framework that meets the perceived interests of professionals is efficient and equally beneficial to other business firms, and SMEs in particular.²²

As Ruairí Ó Murchú, Deputy to the Dáil (member of the lower house of the Irish Parliament), said, financial services is ‘one industry with its own needs and interests ... [which] are not shared by the majority

15 OECD Council, ‘Recommendation of the Council on Transparency and Integrity in Lobbying and Influence’, OECD/LEGAL/0379, 3.

16 Mr S Brennan, Minister of State at the Department of Enterprise and Employment, Seanad Éireann debate, Tuesday 5 July 1994, vol 140, no 19.

17 Rialtas na hÉireann Government of Ireland, ‘[Ireland for Finance](#)’ 13.

18 Vermeulen (n 13 above) 67; and Richard L Abel, ‘Toward a political economy of lawyers’ (1981) *Wisconsin Law Review* 1117–1187, 1185.

19 Vermeulen (n 13 above) 61–62.

20 Ibid 63.

21 Irish Funds, ‘[Why Ireland](#)’ (March 2025).

22 Vermeulen (n 13 above) 67.

of [Irish] constituents'.²³ Equally, professional advisors are often financially dependent on such clients, and so self-interest may outweigh their obligations to society when persuading the legislature to act – or refrain from acting.²⁴

This imbalance has created two specific and significant problems, both of which need to be solved if the Government is to fulfil the aims of Project Ireland 2040 (principally comprising the National Planning Framework²⁵ and the National Development Plan 2021–2030),²⁶ which the Government describes as a

long-term overarching strategy to make Ireland a better country for all ... [that] supports business and communities across all of Ireland in realising their potential.²⁷

In particular, Project Ireland 2040 aims to:

- i) create a strong economy and support enterprise generally;²⁸
- ii) create 'more balanced growth' by strengthening rural economies, ensuring that regional cities grow sufficiently to function as realistic alternatives to Dublin and reversing the decline of rural areas and the shift of jobs and people towards the Dublin area;²⁹ and
- iii) reduce social disadvantage and inequality and improve the quality of life, including the quality of public services.³⁰

The Government has acknowledged that although 'Ireland has been outstandingly successful in attracting major foreign investment', in future it must 'give equal priority to a local enterprise economy'.³¹

23 [Dáil Éireann debate](#), Thursday 12 November 2020, vol 1000, no 6.

24 Abel (n 18 above) 1185; and Vermeulen (n 13 above) 65.

25 Rialtas na hÉireann Government of Ireland, '[Project Ireland 2040: Draft First Revision to the National Planning Framework](#)' (July 2024) and '[Updated Draft Revised National Planning Framework](#)' (November 2024) (see also the original 2008 version) ('Planning Framework').

26 Rialtas na hÉireann Government of Ireland, '[National Development Plan 2021–2030](#)' ('Development Plan').

27 Rialtas na hÉireann Government of Ireland, '[Project Ireland 2040](#)'.

28 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) 5–7, 161–163 (163–165 in the 'Draft First Revision' due to a pagination error) and 'Development Plan' (n 26 above) 6–7, 21–22, 91–95 and 167–168.

29 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) 3, 5–7, 9, 16, 19–20, 25, 65–67 and 154–155 (156–157 in the 'Draft First Revision'); 'Development Plan' (n 26 above) 6–7 and 67–70 and '[Project Ireland 2040: Building Ireland's Future](#)' 3 and 5–6.

30 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) 5–7, 9–10, 21, 81–97, 169–171; 'Development Plan' (n 26 above) 6–7, 20, 55–57, 137–157, and 'Building Ireland's Future' (n 29 above) 2–10.

31 Rialtas na hÉireann Government of Ireland, 'Building Ireland's Future' (n 29 above) 6.

This means diversifying away from Dublin-focused financial services to support businesses in other sectors, particularly MSMEs. The possibility of a united Ireland by 2040,³² may also have implications for achieving the aims of Project 2040³³ and thus for resolving the problems created by the unbalanced development of LP law.

The first problem caused by the domination of policymaker and legislator time and attention by financial services³⁴ is that non-financial services LPs (and indeed general partnerships) have missed out on important reforms. This is despite the fact that the leading textbook on Irish partnership law noted in both 2000 and 2019 that the Limited Partnerships Act 1907 (LPA 1907) ‘would benefit from a substantial overhaul’.³⁵ This has disadvantaged both existing partnerships and potential entrepreneurs who might have formed or expanded a partnership had the law been reformed and is thus contrary to the aims of Project Ireland 2040.

The second problem caused by the prioritisation of financial services is that – unwittingly and indirectly, but very importantly – neglect of other interests has left loopholes in LP regulation.³⁶ This has enabled wrongdoers to abuse LP vehicles to facilitate crimes and other wrongdoing which, as the Irish Government itself has acknowledged,³⁷ is economically and socially harmful, and contrary to the aims of Project Ireland 2040 as set out above. Wrongdoers can use LPs to facilitate a variety of criminal activities, while bestowing no real economic benefit on Ireland. In recent years, LPs in Ireland and the United Kingdom (UK) have been used for criminal activities on an industrial

32 In the context of Project 2040, unification has been described as a ‘strong possibility’: Rural Policy Hub, ‘[Response to Ireland 2040 National Planning Framework Public Consultation Document](#)’ 3; ‘a possible reality’, Seán O Riordáin, ‘[Ireland 2040: An Island of Regions?](#)’ (Local Government Information Unity 7 March 2024); and ‘plausible’, Ivan Yates, ‘Irish unity is but a will-o-the-wisp ... the internal politics of Northern Ireland are chalk and cheese’ *Belfast Telegraph* (Belfast Tuesday 20 February 2018).

33 Rural Policy Hub (n 32 above) 3 and 15; Yates (n 32 above); O Riordáin (n 32 above).

34 Berry (n 14 above).

35 Michael Twomey, *Twomey on Partnership*, Maedhbh Clancy (ed) (Bloomsbury Professional 2019) para 28.11; Michael Twomey, *Partnership Law* (Butterworths 2002) para 28.12.

36 Elspeth Berry, ‘Partnership law: used, misused or abused’ (2021) 32(2) *European Business Law Review* 207–250.

37 An Roinn Dlí agus Cirt Department of Justice, ‘Review of structures and strategies to prevent, investigate and penalise economic crime and corruption: report of the Review Group’ (2020) 19.

and international scale,³⁸ including money laundering,³⁹ bribery and corruption,⁴⁰ tax evasion,⁴¹ child pornography,⁴² and drug and arms trafficking.⁴³ These abuses should concern both government and civil society, due to the impact of dirty money⁴⁴ on the property market, political influence and national security;⁴⁵ of the diversion or non-payment of tax; and of criminal activities such as terrorist financing⁴⁶ and drug trafficking on the streets of Ireland as well as overseas. As the International Monetary Fund (IMF) has warned: ‘Ireland faces significant and increasing threats from foreign criminal proceeds.’⁴⁷

The prioritisation of financial services, the resulting imbalance in regulation, and the abuses facilitated, are all paralleled in the UK where the relevant legislation has, until recently, been in almost identical terms to that of Ireland. This is important not only because Ireland may be able to learn from the UK’s experience and *vice versa*, but also because the wrongdoers have been able to switch easily between the two jurisdictions and so regulatory action – or inaction – in one jurisdiction may impact on the other. For example, the abuses started in Scotland,⁴⁸ presumably because Scottish LPs, unlike those in the rest of the UK or Ireland, possess separate personality and the advantages which flow from it (discussed in Section 4).⁴⁹ However, after the UK Government introduced a requirement for Scottish LPs to disclose their beneficial owners (known in the UK as ‘people with significant

38 Berry (n 36 above).

39 Transparency International and Bellingcat, ‘Offshore in the UK: analysing the use of Scottish limited partnerships in corruption and money laundering’ (*Bellingcat* 24 June 2017).

40 Caelainn Barr, ‘The Scottish firms that let money flow from Azerbaijan to the UK’ *The Guardian* (London 4 September 2017).

41 Nicholas Shaxson, *The Finance Curse* (Bodley Head 2018); An Roinn Fiontar, Trádála agus Fostaíochta Department of Enterprise, Trade and Employment (DETE), ‘Regulatory Impact Analysis: General Scheme of the Registration of Limited Partnerships and Business Names Bill 2024’ (RIA) (31 May 2024) s 1.1.

42 Kate Devlin, ‘Crackdown on tax haven firms after Herald investigation’ *The Herald* (Dublin 16 November 2016); David Leask, ‘Bid for talks to stop gangsters zero tax firms’ *The Herald* (Dublin 9 November 2016).

43 Beau Donnelly and Brian Mahon, ‘Law changes needed to rein in limited partnerships, warns Leo Varadkar’ *The Times* (London 22 June 2022).

44 John Devitt, ‘Is Ireland a “safe haven” for the world’s dirty money?’ (*Transparency International Blog* 18 March 2021).

45 TI Ireland, ‘Illicit finance: implications for national security and the need for a new strategic response’ (21 March 2024).

46 IMF, ‘Ireland: Financial Sector Assessment Program – Technical note on anti-money laundering/combating the financing of terrorism’ (2022).

47 Ibid.

48 See, for example, Transparency International and Bellingcat (n 39 above).

49 Partnership Act 1890 (UK), s 4(2).

control' or PSCs),⁵⁰ the wrongdoing migrated to other parts of the UK, and to Ireland.⁵¹ The Companies Registration Office (CRO) reported that the number of LPs being registered was 'abnormally high':⁵² only 1000 Irish LPs were created between 1907 and 2014, but 2400 were created from 2015 to 2021,⁵³ and while 87 LPs were registered in Ireland in 2015, as PSC legislation was brought in for Scottish LPs, this increased to 531 in 2016 and 676 in 2016, resulting in a doubling of the total number in four years.⁵⁴ Investigative journalist Richard Smith described this as 'an ominous development ... [and] strongly synchronised with a similar rise in abusive LP structures in Britain',⁵⁵ and Alison Thewliss MP queried whether the soaring registrations of Irish LPs meant that 'those who are looking to exploit the system were just chasing round for the structures that they need'.⁵⁶

The worst may therefore be yet to come for Ireland because the UK's Economic Crime and Corporate Transparency Act 2023 (ECCTA 2023) has introduced a much more substantial range of restrictions on LPs (coming into force in stages up to 2027), and the likely impact is a further migration of criminality to Irish LPs.

Meanwhile, the Irish Government is playing catch-up. It only started to consider LP reforms in 2019,⁵⁷ and the Bill did not appear until mid-2024, delays which have undoubtedly contributed to the spread of abuses to Ireland. Furthermore, as this article will demonstrate, the Bill omits many of the reforms necessary to combat those abuses – although so does the UK's ECCTA 2023, so the comparative advantage for wrongdoers may be minimised. Of course, many of the issues have a wider global resonance:

50 Alison Thewliss MP, HC Deb, 13 October 2022, vol 720, col 301.

51 Devitt (n 44 above); Ross Higgins and Beau Donnelly, 'Inside the secretive world of Irish limited partnerships' (*Bellingcat* 18 June 2022); Colm Keena, 'Partnership structure a shield against scrutiny' *Irish Times* (London 4 October 2021); 'Pandora papers: Ireland used as de facto "offshore" location' *Irish Times* (Dublin 4 October 2021); and 'Ireland marketed in Russia as offshore location with "impeccable reputation"' *Irish Times* (Dublin 8 October 2021); Daniel Murray, 'State draws up new legislation to reform Limited Partnerships' *Business Post* (Dublin 3 November 2019); and DETE (n 41 above) s 1.2.

52 CRO, 'Annual Report' (2018) 12; (2019) 11; and (2020) 17. Despite acknowledging a reduction in registrations from the high of 2017, CRO continued to repeat its concerns, and annual numbers of registrations have only decreased slightly since 2020, to 149 in 2024, still a significant increase from 87 in 2015.

53 Higgins and Donnelly (n 51 above).

54 Daniel Murray, 'Fast-track law could create more secret hiding places for dirty money' *Business Post* (Dublin 9 June 2019).

55 Quoted in Murray (*ibid*).

56 Alison Thewliss MP, Economic Crime and Corporate Transparency Bill, HC Deb, 25 October 2022, col 12.

57 Murray (n 51 above).

the increase in recent years of the number of partnership-type entities offering limited liability can be attributed to the legislatures' responsiveness to the interest group activities of professional services actors.⁵⁸

Yet there has been little attention paid in the legal literature in Ireland (or the UK) to the problems or their underlying causes, let alone to the possible solutions. This is despite the risk of harms having been recognised long ago; for example, UK law reformers noted in 1999 that

[i]n the course of generating wealth [firms] may cause various kinds of external harm of which society disapproves ... abuse damages efficiency and the credibility of business and of the productive system.⁵⁹

This article seeks to remedy this gap in the literature. Its focus is on Ireland, given the abuses there and the impending Bill, but comparison with the UK will also be included, principally because most LPs in both countries are governed by the Partnership Act 1890 as amended by the LPA 1907. These Acts were both enacted before Irish independence from the UK and have been retained by successive Irish governments. Amendments to the UK's version of the LPA 1907 in 2017, to produce an LP specific to the investment industry (the private fund limited partnership (PFLP)), had parallels in Ireland's Investment Limited Partnerships Act 1994 (ILP Act 1994). It is only with the reforms made by UK's ECCTA 2023 that the LPA 1907 has begun to look very different in the two countries.

What Ireland needs to do, therefore, is rebalance these competing interests by adopting reforms, both reforms to deter abuses and reforms to benefit all users of the partnership vehicle. These reforms are essential if the aims of Project Ireland 2040, as discussed above, are to be achieved.

This article will explain how this can be done, taking account of the current law, the Bill, and the reforms adopted in the UK. It first outlines the key features of the two types of Irish LP, and then, second, assesses the impact of the preference shown to the financial services sector. Third, it analyses the extensive vulnerabilities of the Irish LP to abuse, and proposes a range of solutions. Fourth, other reforms necessary to improve partnership law for legitimate businesses beyond the financial services sector will be discussed. Finally, a conclusion is drawn as to the most urgent legislative priorities for the Irish Government.

58 Vermeulen (n 13 above) 65, and see also 31.

59 UK Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: The Strategic Framework – A Consultation Document' (n 1 above) paras 5.1.40 and 2.6.

1 LPS IN IRELAND

LP vehicles exist across the world and are said to be ‘ubiquitous throughout common law jurisdictions’.⁶⁰ However, LP regulation is carried out almost exclusively by national authorities, and thus countries such as Ireland engage in regulatory competition to make their version of the LP vehicle the most attractive to investors.⁶¹

Ireland has two types of LP: an ordinary LP and an ILP.⁶² Ordinary LPs are governed by the Partnership Act 1890 as amended by the LPA 1907.⁶³ ILPs are governed by the Partnership Act 1890 and the ILP Act 1994; the LPA 1907 does not apply.⁶⁴

Both are formed of two or more persons carrying on business with a view of profit, at least one of whom must be a general partner and one a limited partner.⁶⁵ General partners manage the business and have unlimited personal liability for the debts of the partnership.⁶⁶ Limited partners’ liability is limited to their capital contribution, in return for them being prohibited from taking part in management of the LP.⁶⁷ An LP is ‘tax transparent’ – the LP itself pays no tax⁶⁸ and its profits are only taxed in the hands of its partners, through income or corporation tax.⁶⁹

An ordinary LP may carry on any trade, occupation or profession⁷⁰ and is formed by registration at CRO,⁷¹ although very little information has to be registered. Its limited partners are required to make a

60 DETE, ‘Update 7 June 2019: Submissions on the Review of the Limited Partnerships Act’ (*‘Responses’*) William Fry, 3.

61 Ocorian, ‘A guide to setting up your fund in Europe’ (nd).

62 There is some potential confusion on terminology because the acronym ‘ILP’ is sometimes used to denote an ordinary Irish LP rather than investment LP. Ireland also has a vehicle called an LLP but its use is restricted to partnerships of lawyers and it will therefore not be considered in this article.

63 LPA 1907, s 7.

64 ILP Act 1994, s 4(1) and (2).

65 Partnership Act 1890, s 1(1); the LPA 1907, s 4(2); and the ILP Act 1994, s 5(4).

66 LPA 1907, s 4(2); ILP Act 1994, s 6.

67 LPA 1907; ss 4(2) and 6(1); ILP Act 1994, s 6.

68 An LP which supplies taxable goods or services and whose turnover exceeds the threshold limits must register as a taxable entity for value added tax (VAT) purposes, and is then accountable for the VAT: Revenue C  in agus Custaim na h  ireann Irish Tax and Customs, ‘Who should register for VAT?’

69 Revenue C  in agus Custaim na h  ireann Irish Tax and Customs, ‘Notes for Guidance – Taxes Consolidation Act 1997 Finance Act 2025 edition: Part 43 Partnerships and European Economic Interest Groupings (EEIG)’ (December 2025); and ‘Collective investment vehicles’.

70 Partnership Act 1890, ss 1(1) and 45. The maximum limit of 20 partners is lifted for certain professions, including solicitors: Companies Act 2014, s 1435(c).

71 LPA 1907, s 5.

capital contribution, though there is no minimum amount.⁷² The LP's principal place of business must be in Ireland, but only at the time of first registration. The legislation contains only minimal rules for how LPs are run, and these can be overridden by contrary agreement of the partners. Ordinary LPs have barely benefited from modernising reforms until the advent of the current Bill, unlike ILPs.

An ILP's business must be the investment of its funds in property.⁷³ It must be registered with the Central Bank of Ireland⁷⁴ rather than CRO, and must supply more information than an ordinary LP in order to obtain registration, including its partnership agreement⁷⁵ and details of its beneficial owners.⁷⁶ It must also file an annual report, including audited accounts.⁷⁷ It must maintain its principal place of business and registered office in Ireland.⁷⁸ Its limited partners are not obliged by law to contribute capital and do not remain liable for any withdrawn capital.⁷⁹ An ILP must also be authorised by the Central Bank,⁸⁰ which requires it to have a depositary to safeguards assets,⁸¹ and for at least one general partner to either be authorised as a fund manager by the Bank or satisfy the Bank as to their competence and probity.⁸²

As will be explained in the next section, ILPs have enjoyed a number of advantages over ordinary LPs from the outset and have benefited from reforms since then, as a result of the influence exerted by the financial services industry and its professional advisors over several decades.

⁷² Ibid s 4(2).

⁷³ ILP Act 1994, s 5(1)(a).

⁷⁴ Ibid s 10.

⁷⁵ Ibid ss 5(1)(a) and 11.

⁷⁶ Ibid s 27A and the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 SI 110/2019 (extended to ILPs by Investment Limited Partnerships (Amendment) Act 2020).

⁷⁷ ILP Act 1994, s 16.

⁷⁸ Ibid s 12.

⁷⁹ So long as the partnership has a positive net asset value at the time of withdrawal: *ibid* s 20(1)(a).

⁸⁰ Ibid ss 5(1)(f).

⁸¹ Ibid ss 5(1)(c) and 11.

⁸² ILP Act 1994, s 8.

2 THE POLICY AND LEGISLATIVE PRIORITY GIVEN TO THE FINANCIAL SERVICES SECTOR

LPs have been described as ‘the legal basis of Ireland’s venture capital and private equity industry’⁸³ and, as has rightly been said, ‘there’s no interest group more rich and powerful than the rich and powerful’.⁸⁴

The policy

As discussed in the introduction to this article, the policy of the Irish Government has been to gain a competitive advantage by encouraging overseas investment and promoting financial services,⁸⁵ often without sufficient care for either genuine and wide economic benefit, or probity.⁸⁶ The leading textbook on Irish partnership law noted as early as 2000 that the number of LPs had increased ‘dramatically’ due to their popularity as investment vehicles,⁸⁷ and subsequently that one-quarter of all LPs registered by the end of 2017 had been registered during that year.⁸⁸ All but one of the responses to the Government’s 2019 consultation on LPs⁸⁹ came from representatives of the investment funds community and their professional advisors, and all of those asserted the economic value of financial services – though the one ‘independent’ response, from a statutory advisory expert body, did not.⁹⁰

The results of this policy include low registration fees for all business vehicles, reduced regulation and transparency of LPs themselves and of trust or company service providers (TCSPs), and the ability to use both corporate and overseas partners. All of this is attractive to many legitimate businesses – but also to wrongdoers.

Despite Irish LPs in Ireland having been widely used to facilitate criminal activities as explained in the introduction, the Government’s

83 DETE (n 60 above) Irish Venture Capital Association (IVCA), Q1.

84 James S Henry, ‘The price of offshore revisited’ (Tax Justice Network July 2012), quoted by Oliver Bullough, ‘*Pandora’s depressing déjà vu*’ (*Coda Oligarchy* 6 October 2021).

85 Twomey (2019) (n 35 above) paras 28.17, 28.76; and Rialtas na hÉireann Government of Ireland, ‘Ireland for Finance’ (n 17 above) 2.

86 Berry (n 14 above), 112; cf DETE (n 60 above) Arthur Cox (referring to job creation at para 1.3 and economic value at para 2.2) and Irish Funds (2–3).

87 Twomey (2019) (n 35 above) para 28.13.

88 Ibid para 28.12.

89 An Roinn Gnó, Fiontar agus Nuálaíochta Department of Business, Enterprise and Innovation (DBEI), ‘*Review of Limited Partnerships Act 1907*’ (2019).

90 Submission of the Statutory Committee of the Company Law Review Group to the Minister for Business, Enterprise and Innovation in Response to the Consultation Paper of January 2019 on the Review of the Limited Partnerships Act 1907, 28 February 2019, app A3 to the 2018 Annual Report of the Company Law Review Group (CLRG).

focus on the investment industry has meant that the reforms necessary to combat these abuses have not been made. Indeed, the Irish Government's own national risk assessment complacently asserted that '[t]he overall risk of money laundering and terrorist financing associated with Irish [LPs] is judged to be comparable to or somewhat lower than in other jurisdictions', and that any such risk 'is mitigated as [LPs] must be registered', despite the fact that the registered information is minimal (as discussed in Section 3).⁹¹

Yet, as the IMF has noted, Ireland's growth as an international financial centre increases both the scale and the complexity of the risks.⁹² Transparency International Ireland (TI Ireland) commented similarly that 'Ireland does not have a clear assessment of the threat from corruption to its economic well-being, social cohesion or national security', as a result of which attempts to combat money laundering and corruption are 'more likely to be reactive and expedient'.⁹³ The chief executive of TI Ireland warned that 'weak rules' and transparency and regulatory oversight left Ireland vulnerable to money laundering, and that it was likely that Irish LPs were being used to launder the proceeds of the global drugs trade, tax evasion, sanctions-busting and corruption.⁹⁴

This policy has also meant that modernising reforms to LPs have focused on ILPs rather than ordinary LPs, and indeed some potential reforms have not been made at all due to a lack of interest, or actual opposition, from the financial services sector.

What is needed is for this policy to be properly balanced against the needs of other businesses and the community. As explained in the introduction to this article, the aims of Project Ireland 2040⁹⁵ include creating a strong economy and supporting enterprise generally, creating more balanced growth, and reducing inequality and improving the quality of life. This means that LP law must benefit all types of business, not just financial services, and that the wrongdoing facilitated by LP law must be combated.

91 An Roinn Airgeadais Department of Finance, '[National Risk Assessment Ireland: Money Laundering and Anti-Terrorist Financing](#)' (April 2019) 76–77.

92 IMF (n 46 above).

93 TI Ireland, '[Safe Haven? Targeting the Proceeds of Foreign Corruption in Ireland](#)' (2020) 22.

94 Donnelly and Mahon (n 43 above).

95 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) and 'Development Plan' (n 26 above).

The legislation

The ILP Act 1994

Turning from the policy to the resulting legislation, the priority given to the financial services industry can clearly be seen in the creation of the ILP in 1994, which was ‘developed in consultation with the IFSC’⁹⁶ (the Dublin International Financial Services Centre). This was set up in 1987 as a location for a range of internationally traded financial services,⁹⁷ offering tax incentives⁹⁸ and light-touch regulation,⁹⁹ and has developed as a location for international fund administration.¹⁰⁰ ‘IFSC’ is now often used also as a generic term to refer to Ireland’s international financial services industry.¹⁰¹

Yet the risks of the prioritisation of financial services were already recognised in 1994, with the IFSC itself described as ‘more ... a tax shelter than an indigenous financial industry where skills are developed’¹⁰² and enabling money laundering.¹⁰³ Furthermore, there was ‘no way of measuring how many of the projects have been relocated there from elsewhere in the country and what tax is lost as a result’. The ILP legislation in particular was criticised as providing ‘inordinate possibilities for abuse’ and conferring no real economic benefit:

the last thing we need to encourage in terms of industrial policy is further incentives to invest in property or fixed assets as compared to investment in enterprise or risk projects.¹⁰⁴

Despite this, the ILP was accorded significant advantages over an ordinary LP from the outset¹⁰⁵ and has since been described as ‘the vehicle of choice for private capital’.¹⁰⁶

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- 96 Minister of State at the Department of Enterprise and Employment Mr S Brennan, Dáil Éireann debate, Tuesday 21 June 1994, vol 444, no 1.
- 97 ‘Ireland’s International Financial Services Centre’ (IFSC); and the Institute of Bankers in Ireland (IOB), ‘The Irish funds industry – a history’ 6.
- 98 Laurence Murphy, ‘Financial engine or glorified back office? Dublin’s International Financial Services Centre going global’ (1998) 30(2) *Royal Geographical Society* 157–165, 160 and 162–163; Fiona Reddan, *Ireland’s IFSC: A Story of Global Financial Success* (Mercier Press 2008) 70–71 and 226–227; IOB (n 97 above) 8, 13 and 18; and Nik Pratt, ‘25 years of Irish Funds’ (*Funds Europe* 14 November 2016).
- 99 Murphy (n 98 above) 157 and 160; and Reddan (n 98 above) 71 and 255–256.
- 100 Murphy (n 98 above) 160; and Reddan (n 98 above) 151–156 and 160.
- 101 Finance Dublin.com, ‘The IFSC story’.
- 102 Deputy Mr Rabitte, Dáil Éireann debate, Tuesday 21 June 1994, vol 444, No 1.
- 103 Deputy Mr R Bruton, Dáil Éireann debate, Tuesday 21 June 1994, vol 444, no 1.
- 104 Minister of State at the Department of Enterprise and Employment Mr S Brennan, Dáil Éireann debate, Tuesday 21 June 1994, vol 444, no 1.
- 105 IOB (n 97 above) 14.
- 106 Murray (n 54 above).

The advantages include, first, that there are no restrictions on the number of partners, whereas most ordinary LPs are subject to a 20-partner limit.¹⁰⁷

Second, little ILP information registered with the Central Bank is disclosed publicly, unlike information registered by ordinary LPs at CRO. Secrecy is a key vulnerability of LPs to abuse (as discussed further in Section 3).

Third, an ILP can continue in existence despite a change in the general partners,¹⁰⁸ whereas any such change will dissolve an ordinary LP.¹⁰⁹

Fourth, an ILP limited partner who takes part in the conduct of the business, and who in an ordinary LP would therefore lose the benefit of limited liability, only does so if the third party with whom they dealt believed them to be a general partner.¹¹⁰ Limited liability makes LPs vulnerable to abuse (as discussed in Section 3).

Fifth, limited partners in an ILP (but not an ordinary LP) benefit from the protection of a 'safe harbour' list of activities, which are stated not to constitute taking part in the conduct of the business (discussed further in Section 4). Limited partners who do take part in the conduct of the business lose their limited liability,¹¹¹ and so this provision enables them to participate in the listed activities without this risk.¹¹²

Sixth, the ILP Act 1994 expressly provides that a partnership may be an ILP limited partner¹¹³ – something which, in the absence of equivalent express provision for ordinary LPs, is not possible for their limited partners. This is because an LP can only be formed 'between persons',¹¹⁴ and partnerships do not have legal personality. Again, this creates a vulnerability to abuse because partnerships themselves lack transparency (as will be discussed in Section 3).

107 LPA 1907 s 4(4). There are a number of exceptions to the limit; see s 1435(1)(c)(iv), CA 2014.

108 ILP Act 1994, s 37.

109 Partnership Act 1890, s 32 as amended by the LPA 1907, s 6.

110 ILP Act 1994, s 6(3).

111 Ibid s 6(2).

112 Ibid s 6(4).

113 Ibid s 5(2).

114 Partnership Act 1890, s 1. The Partnership Act and the LPA 1907 apply in both the UK and Ireland. Although both Acts were enacted prior to the establishment of the Irish state, both were carried over into the laws of Ireland (Twomey (2019) (n 35 above) paras 1.24, 1.26 and 28.2) and pre-1922 case law of the UK courts is treated as binding on Irish courts (*Murphy v Power* [1923] 1 IR 68; *MacCathaigh v Daly* [1985] IR 73; and Twomey (2019) (n 35 above) paras 1.27–1.32) unless it conflicts with the Irish Constitution or, in the case of pre-1890 case law, with the 1890 Acts itself, since the Act was not intended to be a complete codification of the predating case law.

The 2020 reforms to the ILP Act 1994

The prioritisation of financial services meant that the Government's 2019 consultation on LP reforms¹¹⁵ initially resulted in reforms only to the ILP Act 1994,¹¹⁶ not the LPA 1907, even though the consultation applied to all LPs¹¹⁷ and even though the resulting reforms in 2020 included a significant number which could have been, but were not, extended to all LPs. The Irish Funds Industry Association (IFIA) 'lobbied heavily' on the reforms,¹¹⁸ and the Department of Finance announced them as furthering Ireland 'as a top-tier global location choice for financial services' and 'allow[ing] Ireland to better compete for global private equity investment'.¹¹⁹

The reforms gave ILPs yet more advantages over ordinary LPs, and led to a considerably increased uptake of ILPs; of the 58 ILPs currently registered, 54 have registered since 2022.¹²⁰ These advantages include, first, the lifting of the statutory obligation on limited partners to contribute capital¹²¹ and, second, the expansion of the safe harbour list for ILP limited partners.¹²² Third, in the absence of contrary agreement, amendments to an ILP agreement may now be made by majority, instead of unanimity as remains the position for ordinary LP agreements.¹²³

The proposed reforms to ordinary LPs

Although the Bill applies to ordinary LPs, it reflects the well-established influence of the financial services sector. For example, as will be discussed in Section 3, its provisions on the disclosure of an LP's 'beneficial owners' – the people who ultimately own or control the LP – are restricted in scope, and the information which is to be disclosed will not be publicly available. This reflects the desire of the financial services industry for secrecy. The Bill also includes a provision that a corporate body may be a general partner, whereas the current legislation only

115 DBEI (n 89 above).

116 Investment Limited Partnerships (Amendment) Act 2020.

117 DBEI (n 89 above).

118 Murray (n 54 above).

119 An Roinn Airgeadais Department of Finance, 'Investment Limited Partnership (Amendment) Bill 2020 passes all staged of Oireachtas following approval by Dáil Éireann' (Press Release 18 December 2020). See also Maedhbh Clancy, 'Limited partnerships – time for long-awaited reform' (2020) Commercial Law Practitioner 192, 193.

120 Central Bank of Ireland, 'Registers of Alternative Investment Funds: Authorised Investment Limited Partnerships, Investment Limited Partnerships Act, 1994 as at 26 May 2025'.

121 ILP Act 1994, s 20.

122 Ibid s 6(4).

123 Ibid s 11.

provides that a corporate body may be a limited partner.¹²⁴ This would benefit the financial services industry by confirming the lawfulness of the practice of using corporate bodies as general partners in financial structures (to manage tax liabilities and the risk of personal liability, and to provide secrecy for the participants).

The impact

The influence of the policy to favour financial services has meant both that the serious abuses of LPs have not been combated, and that law-abiding LPs have missed out on reforms which could benefit ordinary businesses. It is true that the consultation process ahead of the draft Bill attracted only one response not from the financial services industry or its professional advisors. However, there were relatively few responses, and interests beyond financial services, for example family businesses who often utilise LPs for succession and tax planning, are inevitably difficult to mobilise effectively.

First, as already discussed, the Government's LP reform agenda in recent decades has focused on introducing, and then updating, ILPs, at the behest of the financial services industry. As Deputy Ruairí Ó Murchú noted of the 2020 reforms:

It was strange that this legislation found its way into the programme for Government at a time of ... so many other pressing social issues ... That this legislation made it to the front of the queue, and given the revolving door between power and industry, questions are obviously raised ... that is why lobbying legislation must be overhauled, updated and improved ... This is not an industry in need of help at this critical [Covid pandemic] time.¹²⁵

However, although the financial services industry is much less interested in ordinary LPs, many of the ILP provisions could and should be applied to ordinary LPs, either to benefit LPs beyond the investment industry, or to combat the abuses of LPs. Examples of the former include the removal of the 20-partner limit, continuity on a change of general partner instead of automatic dissolution of the LP, and the protective provisions for limited partners known as 'safe harbour' provisions. Provisions which could combat the abuses include disclosure of beneficial owners, requiring a registered office and principal place of business in Ireland, and the appointment of inspectors to investigate an LP where fraud or other wrongdoing is suspected. These will be discussed further in Sections 3 and 4.

¹²⁴ Bill, Head 17(4), and LPA 1907, s 4(4).

¹²⁵ Dáil Éireann debate, Thursday, 12 November 2020, vol 1000, no 6, on the Investment Limited Partnerships (Amendment) Bill 2020 (Seanad): Second Stage. See also Berry (n 14 above).

Second, some potential reforms have been omitted entirely, either because the financial services sector objects to them or, at least, because it is not interested in them, for reasons which will be considered in sections 3 and 4. They include both provisions which would combat abuses, for example restrictions on the use of corporate partners; and provisions which would benefit ordinary LPs, for example granting them separate personality and enabling winding-up in the event that there is no general partner to do so. Financial services objections were clear when the UK first proposed ECCTA 2023 to combat abuses; ‘the important collateral damage that might harm ... legitimate ... users’ needs to be weighed in the balance’,¹²⁶ including ‘the time [and] ... unnecessary compliance costs’ and the effect on ‘the competitiveness of the UK and its attractiveness as a location for investment’.¹²⁷

Third, some of the advantages given to ILPs could in fact facilitate abuses by them. Although it must be hoped that ILPs, being regulated directly by the Central Bank, are less prone to abuse, this is simply not clear. The Bank discloses little information about the ILPs that it has registered, and ILPs are ‘yet another complex investment vehicle with vulnerability to tax exploitation and even money laundering’.¹²⁸ As Deputy Ged Nash noted during the debate on the 2020 ILP reforms:

rules are one thing but enforcement is another. We know only too well where turning a blind eye here and applying a light touch there can bring our society and economy.¹²⁹

For example, ILPs, unlike ordinary LPs,¹³⁰ are permitted to use partnerships as their limited partners.¹³¹ This reduces transparency and thereby facilitates wrongdoing because only minimal information about partnerships is publicly available (as discussed in Section 3). This is particularly concerning as the Bill appears to extend this provision to ordinary LPs.¹³² The risks are demonstrated by two Scottish LPs

126 Simon Witney, ‘[Travers Smith’s alternative insights: Changes to UK limited partnership law](#)’ (2 December 2022).

127 British Private Equity and Venture Capital Association (BVCA), ‘BVCA response to BIS Discussion Paper “Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business”’ (July 2013).

128 Murray (n 54 above).

129 Dáil Éireann debate, Thursday 12 November 2020, vol 1000, no 6, on the Investment Limited Partnerships (Amendment) Bill 2020 (Seanad): Second Stage.

130 Partners in ordinary LPs (and general partnerships) must be ‘persons’ (Partnership Act 1890, s 1) and thus partnerships cannot be partners because they lack legal personality.

131 ILP Act 1994, s 5(2).

132 Bill, Head 34.

alleged to be associated with corruption in Uzbekistan¹³³ which declared two Irish LPs as their beneficial owners.¹³⁴ Similarly, Irish LPs have been found to have Scottish LPs as their beneficial owners, resulting in ‘a nesting doll of different companies, and we can never get to the centre of it and find out who really is in charge’.¹³⁵

3 COMBATING THE ABUSES: VULNERABILITIES AND SOLUTIONS

As this section will explain, there are vulnerabilities to abuse both in Ireland’s business framework generally, and in its regulation of LPs in particular. However, one of the main factors behind both is the prioritisation of financial services. In order to combat the abuses, it is therefore necessary to rebalance the competing interests of the financial services industry as against other businesses and the wider public, to reduce the influence of the former and increase that of the latter. Indeed, the existence of the Bill shows that the Government has recognised the need for rebalancing in the light of the aims of Project Ireland 2040.¹³⁶

There are, of course, trade-offs inherent in achieving a balance between what is good for businesses, and what is good for the wider community; ‘the same factors that make [a country’s business] framework successful make it attractive to exploitation’.¹³⁷ But both Project Ireland 2040 and the extent of the abuses means that rebalancing is now a matter of urgency, and this section will propose a range of solutions to the vulnerabilities which could achieve this rebalancing.

Irish business organisations generally

CRO’s limited powers and insufficient fees

There are two vulnerabilities associated with CRO. One is that the registrar has no powers or duties to query suspicious filings for ordinary

133 Kristian Lasslett and Uzbekistan Forum for Human Rights, ‘*Out of the cauldron, into the fire?: Risk and the privatisation of Uzbekistan’s cotton sector*’ (*UzInvestigations* June 2020) 16 and 18.

134 Richard Smith, ‘*Never mind the Pandora papers: why secrecy still rules in the UK*’ (*OpenDemocracy* 6 October 2021).

135 HL Deb, 2 December 2021, vol 704, col 1140.

136 Rialtas na hÉireann Government of Ireland, ‘Planning Framework’ (n 25 above) and ‘Development Plan’ (n 26 above).

137 UK HM Treasury, ‘*National risk assessment of proliferation financing*’ (23 September 2021).

LPs,¹³⁸ or to verify the identity of partners or TCSPs who are filing information. This means that the register is liable to be unreliable, which facilitates wrongdoing¹³⁹ because it reduces transparency for those doing business with the LP, as well as investigators and enforcement agencies.

The Bill does propose increased powers to enable the registrar to challenge the veracity of registered information, but no duties on it to do so.¹⁴⁰ It also enables a limited degree of identity verification; all partners and anyone registering information must supply an Irish Personal Public Service Number (PPSN) or ‘such other information concerning their identity as stands determined by the Registrar’.¹⁴¹ More rigorous proof of identification could be required, for example a notarised sample of the general partner’s signature;¹⁴² and there is also a potentially ‘significant’ problem of inconsistencies between the details attached to a PPSN and the details already held by CRO.¹⁴³ The transposition of a recent EU Directive¹⁴⁴ will also require CRO to exercise more control over the information registered by ordinary LPs; the state must provide a procedure for a ‘legality check’ which includes ‘the formal and substantive control of the documents required under national law for the formation of such [LPs]’.¹⁴⁵

The other vulnerability is Ireland’s exceptionally low registration fee of €2.50, compared to £71 in the UK and an EU average of €300. The meaningful exercise of even the limited powers in the Bill and the Directive would require a substantial increase in this.

138 The registrar only has power to reject documents which do not comply with the requirements of the CA 2014 or another relevant enactment (s 898), and this is a discretion rather than a duty.

139 John Mulligan, ‘CRO to be quizzed by Oireachtas committee as fake firms revealed’ *Irish Independent* (Dublin Friday 2 July 2021).

140 Bill, Heads 12 and 13.

141 Ibid Head 14.

142 John Mulligan, ‘Fraudulent company registrations and the state’s response’, 25, in Transparency International Ireland, ‘[Weak links: Irish corporate structures and illicit financial flows](#)’ (9 December 2024).

143 KPMG, ‘[Companies and their directors’ identity](#)’ (29 June 2022).

144 Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law, OJ L 2025/25.

145 Art 10(3) of Directive (EU) 2017/1132 (n 144 above) of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) OJ L 169/46, as amended by Directive (EU) 2025/25 (n 144 above). Art 10 is applied (by Art 7 as amended) to the companies listed in annex IIB, which lists Irish LPs (comhpháirtíochtaí teoranta).

Inadequate regulation of TCSPs

TCSPs have extensive power to market, form and operate LPs. Yet even the Irish Government has acknowledged that they are not robustly regulated,¹⁴⁶ because they

are often built using the same secretive procedures they employ on behalf of clients. They register in offshore tax havens, disguise their ownership, and set up offices that serve as nothing more than mailing addresses. The combination weaves a cloak of anonymity that makes business activity hard to track.¹⁴⁷

This creates a vulnerability because TCSPs are often complicit in forming or operating wrongdoing LPs:¹⁴⁸

high levels of competition in the TCSP sector likely creates vulnerabilities through the need to provide rapid registration services to customers, and the potential for poor [customer due diligence] this implies. The lack of resources available for [customer due diligence] training and [anti-money laundering] decisionmaking in smaller TCSPs exacerbates this problem.¹⁴⁹

Inadequate TCSP regulation is compounded by the minimal registration requirements for LPs. These make it easy for TCSPs to form multiple LPs on the same day,¹⁵⁰ and indeed some of the same TCSPs are implicated in multiple LP formations in both Ireland and the UK, including wrongdoing LPs.¹⁵¹ Most of the significant increase in registrations has been from a small group of TCSPs;¹⁵² over 1250 LPs formed between 2015 and 2021 operate from only three addresses.¹⁵³

146 Rialtas na hÉireann Government of Ireland, 'Trust or Company Service Providers Risk Assessment: Update of Ireland's National AML/CFT Risk Assessment', ss 3 and 4.

147 Graham Stack, Jason Papakheli and Jonny Wrate, 'Behind the Curtain' (OCCRP 15 May 2019) and Rialtas na hÉireann Government of Ireland (n 137 above) 37–38; Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) 37–38.

148 Simon Carswell, 'Over 2,000 offshore firms set up from home in Ranelagh, Dublin' *Irish Times* (Dublin 14 June 2013).

149 HM Treasury and Home Office, 'National risk assessment of money laundering and terrorist financing 2020', paras 11.22–11.23; see also Rialtas na hÉireann Government of Ireland, 'Trust or Company Service Providers Risk Assessment' (n 146 above) 16–17, 45 and 49–50.

150 Indeed, in the UK, ECCTA 2023 has potentially worsened the situation by mandating that only TCSPs can form, and file on behalf of, LPs (ECCTA 2023, s 145).

151 Higgins and Donnelly (n 51 above).

152 DETE (n 60 above) CLRG, 7.

153 Beau Donnelly and Ross Higgins, 'Irish partnerships "have become a mask for shady dealings"' *Sunday Times* (London 19 June 2022) and 'Has Ireland become a haven for scammers, launderers and pornographers?' *Sunday Times* (London 19 June 2022).

The Department of Finance has acknowledged that TCSPs provide ‘complex services’ which

are attractive to those seeking to launder the proceeds of crime as they enable access to the financial system and can obscure the source of funds and the beneficial ownership of funds.¹⁵⁴

In one case, a TCSP acted as the initial limited partner of an LP on behalf of a client, an Asian national with business interests in Switzerland and the Cayman Islands, and another TCSP became a partner in its capacity as trustee for a company registered in the British Virgin Islands; even ‘[t]he TCSP could not adequately explain the reasons for the complexity of the arrangements’.¹⁵⁵ Despite this, TCSPs made only 15 out of 52,222 suspicious transaction reports (STRs) submitted to the Financial Intelligence Unit (FIU) in 2023.¹⁵⁶

Current regulation of TCSPs through anti-money laundering (AML) supervision – in the financial sector by the Central Bank, in the legal and accountancy sectors by their professional bodies, and otherwise by the Department for Justice (DJE) – is clearly inadequate to prevent abuses. It closely mirrors the well-established failings of the UK system, with a multiplicity of regulators operating inconsistent systems without sufficient expertise – or, in the case of the default state regulator, funding – to fulfil their mandate.¹⁵⁷ Indeed, the default regulator in Ireland (the DJE) charges TCSPs significantly less for supervision than its UK counterpart (HM Revenue and Customs (HMRC)).¹⁵⁸ The Financial Action Task Force (FATF),¹⁵⁹ the United Nations Office on Drugs and Crime (UNODC),¹⁶⁰ and TI Ireland have all raised concerns about the ability of the DJE and the professional bodies to assess risk and take enforcement action.

The Bill therefore needs to include improved substantive regulation of TCSPs, including ensuring that TCSPs are registered with an AML supervisor at the time of filing any documentation at CRO and that the

154 An Roinn Airgeadais Department of Finance (n 91 above) 55.

155 Rialtas na hÉireann Government of Ireland, ‘Trust or Company Service Providers Risk Assessment’ (n 146 above) annex 2, 49.

156 FIU Ireland, ‘STRs received at FIU (1995 to 2023)’.

157 Accountancy AML Supervisors’ Group (AASG), ‘AML alert: high risk behaviours and typologies associated with the TCSP sector’ (June 2023).

158 €130 total in Ireland, compared to £300 for each of the TCSP’s premises plus £150 for each staff member in the UK, and authorisation lasts for three years with the DJE, but only one with HMRC.

159 FATF, ‘Anti-money Laundering and Counter-terrorist Financing Measures: Ireland – Mutual Evaluation Report’ (2017).

160 UNODC (2021), ‘Country Review Report of Ireland: Review by Austria and Liechtenstein of the implementation by Ireland of Chapters II (articles 5–14) and V (articles 51–59) of the United Nations Convention against Corruption for the review cycle 2016–2021’, 114.

supervisor effectively supervises and enforces AML regulation. Both UNODC¹⁶¹ and TI Ireland¹⁶² have also recommended a single unified AML regulator for non-financial services TCSPs, and the IMF has noted that supervision is fragmented and thus inconsistent.¹⁶³ Indeed, the UK Government is now proposing a single TCSP AML regulator to take over from professional bodies and HMRC.¹⁶⁴

Unfortunately, the Bill merely requires a TCSP acting on behalf of an LP to provide its business address and evidence of registration with an AML supervisor.¹⁶⁵ The Regulatory Impact Analysis (RIA) for the Bill asserts that the provision of the address alone ‘ensur[es] compliance with relevant [AML] provisions’,¹⁶⁶ which is patently untrue; and even evidence of registration with an AML supervisor provides insufficient guarantees, as FATF, UNODC, the IMF and TI Ireland have all reported. For example, FATF has expressed ‘concerns as to the frequency and intensity of [DJE’s] inspections and its limited resources’ and noted that even the DJE ‘is aware that a number of entities within the sectors falling under its remit [including] ... TCSPs ... are not being supervised for AML ... purposes’.¹⁶⁷ The IMF has noted that ‘given the considerable expansion of the financial sector, an augmentation of resources and personnel would be necessary to maintain the current depth of supervisory engagement’, ‘suspicious transaction report (STR) filings in the sector remain dismally low’, and ‘[t]he supervision of professional gatekeepers is not commensurate with risk levels in the sector’.¹⁶⁸

Limited partnerships specifically

LP legislation enshrines a minimalist approach, imposing little regulation¹⁶⁹ beyond the requirements to register and have at least one general and one limited partner, the prohibition on management by limited partners, and the imposition of a general duty of good faith

161 Ibid 9 and 115.

162 TI Ireland (n 93 above) 33.

163 IMF (n 46 above) 5 and 14–15.

164 HM Treasury, ‘Reform of the Anti-Money Laundering and Counter-Terrorism Financing Supervision Regime: Consultation Response’ (October 2025) paras 2.9–2.12, and ‘Anti-Money Laundering/Counter-Terrorism Financing (AML/CTF) Supervision Reform: Duties, Powers, and Accountability Consultation’ (6 November 2025).

165 Bill, Head 23(4).

166 DETE (n 41 above) s 2.

167 FATF (n 159 above) para 314.

168 IMF (n 46 above) 4.

169 DETE (n 60 above) Law Society of Ireland, para 2.4; Irish Funds, 3–4; Maples Group para 1.1; Arthur Cox para 2; and Simmons & Simmons, 5.

between partners.¹⁷⁰ Although there is somewhat more statutory intrusion into ILPs (as discussed in Section 1), the legislation is still relatively minimal when compared with the Companies Act 2014 (CA 2014).

This lack of regulation provides considerable flexibility, but also creates loopholes which make LPs vulnerable to misuse by wrongdoers. The following sections examine these loopholes, and analyse ways in which they could be closed or reduced.

No disclosure of beneficial owners

One of the most significant vulnerabilities of an ordinary LP is that it is not required to disclose its beneficial owners – the people who ultimately own or control the LP.

This allows beneficial owners to avoid scrutiny by creditors, regulators, tax authorities, enforcement agencies, journalists, or civil society so they cannot be held accountable for wrongdoing by the LP and their assets are unavailable to creditors or enforcement agencies.¹⁷¹

Unsurprisingly, the absence of mandatory beneficial ownership disclosure is a selling point; for example, one TCSP advertises that:

Upon the registration of most of business entities in the United kingdom [sic], you will require to register information about the person with the significant control ... Anyway, when you set-up a limited partnership in Republic of Ireland [sic], you are exempt from such rules. You do not need to file information about the beneficiary owners [sic] or person with the significant control of your business.¹⁷²

In fact, secrecy of beneficial owners is by no means essential to legitimate businesses; not only are LPs in many other jurisdictions, including Scotland, Gibraltar and Malta, required to disclose their beneficial owners, Ireland itself requires ILPs to register their beneficial ownership details.¹⁷³ More importantly, it is liable to be disproportionately attractive to wrongdoers and tax avoiders.

FATF recommends that partnerships should be obliged to disclose their beneficial owners because of the associated risks of money laundering and terrorist financing, especially where there are corporate partners in overseas jurisdictions.¹⁷⁴ The inability to identify beneficial

170 *Flynn v Breccia* [2017] IECA 74, para 99.

171 Transparency International, 'CPI 2023: Trouble at the top' (30 January 2024).

172 Coddan, 'Limited partnership registration in Republic of Ireland'.

173 ILP Act 1994, ss 27A–27C, 28A–27C and 46–59.

174 FATF, 'Guidance on beneficial ownership of legal persons (recommendation 24)' (March 2023) 19.

owners is also a fundamental difficulty in the way of international action against tax havens.¹⁷⁵ As the head of TI Ireland has noted:

[t]here are few reasons to keep the real owners of investments secret other than to lend assurance to money launderers, corrupt officials and tax evaders that their money is safe ... Opaque structures like LPs and ILPs have the potential to attract a lot more dirty money into the jurisdiction.¹⁷⁶

The Bill therefore needs to include an obligation on LPs to disclose their beneficial owners – rather than just those of some of their partners. The effectiveness of such a requirement in combating wrongdoing can be seen in the significant reduction in the numbers of Scottish LPs being registered¹⁷⁷ and associated reports of wrongdoing after they were forced to disclose their beneficial owners.

The UK Government has advanced the nonsensical argument that since LPs (unlike companies) are not legally separate from their owners (discussed in Section 4), they cannot have beneficial owners or controllers. But, of course, all businesses must be owned and controlled by someone if they are to exist at all, and the Irish Government has accepted this logic by requiring ILPs to disclose their beneficial owners.

Unfortunately, the Bill only requires LPs to register the beneficial owners of non-European Economic Area (EEA) corporate partners,¹⁷⁸ and not of other corporate partners, or indeed of the LP itself.¹⁷⁹ The RIA for the Bill asserts that beneficial owners of EEA corporate partners are ‘ascertainable’,¹⁸⁰ but corporate bodies often fail to

175 Peter Alldridge, *What Went Wrong with Money Laundering Law?* (2016 Palgrave Macmillan) 70.

176 Murray (n 54 above) quoting John Devitt, Head of Transparency International Ireland.

177 Diogo Augusto, ‘[Revealed: the Edinburgh offices linked to secretive Scottish limited partnerships](#)’ (*The Ferret* 17 October 2021).

178 Bill, Heads 34–37.

179 Cf the requirements for corporate entities and trusts to register their own beneficial owners (European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 SI No 110/2019 and European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021 SI No 194/2021). The underlying EU Regulation defines a beneficial owner as ‘any natural person who ultimately owns or controls a legal entity or an express trust or a similar legal arrangement’ (Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 2024/1624, Art 2, para 1(28)), and the terms ‘legal entity’ or ‘similar legal arrangement’ might be interpreted as including LPs. See also the imposition of beneficial ownership disclosure obligations on ‘corporate and other legal entities’ in 4 AMLD (n 188 above) Art 30.

180 DETE (n 41 above) s 2.

register accurate information¹⁸¹ and, in any event, finding this information on an overseas register creates an additional obstacle for Irish regulators and enforcement agencies, as well as creditors and civil society. Furthermore, an LP may have its own beneficial owners which are different to the beneficial owners of its partners.

The Bill's proposed beneficial ownership regime therefore needs to be extended to the beneficial owners of the LP itself and of all corporate partners.

The Bill should also ensure that the regime for LPs does not transpose the failings of the regime currently applicable to ILPs (and other business organisations).

First, the beneficial ownership registers, including the Bill's new 'Register of non-EEA Partners of a Limited Partnership'¹⁸² to be held by the Registrar of Beneficial Ownership of Companies and Industrial & Provident Societies, may not reliably disclose even the limited number of beneficial owners which are required to be registered because it is not clear that they are verified rigorously or at all. Ireland needs to demonstrate that it meets its obligations under EU law to 'put in place mechanisms' to ensure that its beneficial ownership register is 'adequate, accurate and current',¹⁸³ and under the UN Convention Against Corruption 2004 to 'institute a comprehensive ... regulatory and supervisory regime for ... beneficial ownership identification'.¹⁸⁴

Second, public access to the beneficial ownership registers¹⁸⁵ in Ireland must be increased. At present, members of the public must demonstrate that they have a 'legitimate interest' in an access request. This was a response to an EU Court of Justice ruling that unlimited public access to beneficial ownership information breached

181 Transparency International, 'Searching for owners: what we found when we cross-analysed company and real estate ownership data in France' (5 July 2023).

182 Bill, Heads 35–37.

183 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (4th Anti-Money Laundering Directive/4 AMLD), OJ L 141/73, Art 30.

184 United Nations Convention Against Corruption 2004, Art 14; see also Art 52.

185 Beneficial owners of ILPs are registered on the Beneficial Ownership Register of Certain Financial Vehicles (CFV) held by the Central Bank. Those of other entities are registered on the Central Register of Beneficial Ownership of Companies and Industrial & Provident Societies (RBO).

data protection,¹⁸⁶ but Ireland ‘moved with curious haste’¹⁸⁷ to take a ‘highly restrictive approach’.¹⁸⁸ Its definition of ‘legitimate interest’ – engagement in the prevention, detection, or investigation of money laundering or terrorist financing offences – is consistent with the 6th Anti-Money Laundering Directive (6 AMLD) which is due to be transposed into Irish law by 10 July 2026.¹⁸⁹ However, Ireland additionally requires that accessing the information serves this purpose, and that the subject of the request either is connected with persons convicted of an offence involving money laundering or terrorist financing, or holds assets in a high-risk third country.¹⁹⁰ Not only does 6 AMLD not impose these hurdles, it deems certain members of the public to have a legitimate interest, including journalists and civil society organisations, and those likely to enter into transactions with the subject of the request.¹⁹¹

The fact that a fee is charged to search the register also limits public access¹⁹² and, although the Bill also requires an LP to keep its own register of the beneficial owners of any non-EEA corporate partners, access to this is limited to state authorities.¹⁹³

186 C-37/20 and C-601/20 ECLI:EU:C:2022:912 *WM and Sovim SA v Luxembourg Business Registers*, para 8.4.4.

187 TI Ireland, ‘Corruption Perceptions Index 2022 – “No room for complacency” as Ireland perceived to be less affected by corruption than UK for the first time in 25 years’ (31 January 2023).

188 Máira Martini, ‘EU court ruling on beneficial ownership registers: one year on, need for harmonised approach is clear’ (*Transparency International Blog* 22 November 2023).

189 6th Anti-Money Laundering Directive (6 AMLD) (Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849, OJ L 2024/1640), Art 78.

190 European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 SI No 110 of 2019, reg 25(3A) (extended to ILPs by Investment Limited Partnerships (Amendment) Act 2020), as amended by the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) (Amendment) Regulations 2023 No 308 of 2023, reg 4.

191 6 AMLD (n 189 above) Art 12(2). The former must be connected with the prevention or combating of money laundering, its predicate offences or terrorist financing, while the latter must wish to prevent a link between their transaction and any of these offences.

192 John Devitt, ‘Comment: Ireland is being used to launder the world’s dirty money and must take action’ *Business Post* (Dublin 9 March 2021) recommended that data on the register of beneficial ownership should be available free of charge.

193 Bill, Head 34.

Other loopholes in disclosure requirements

First, little information about ordinary LPs is registered at all – not their accounts (except in limited circumstances) or their internal agreement or their ultimate beneficial owners.

The accounts of ordinary LPs are generally not required to be publicly registered. By way of exception, they must register their accounts with CRO if all their general partners are limited companies, or unlimited companies/partnerships all of whose members/partners are limited companies, because in these circumstances general partners have effectively limited their liability for partnership debts.¹⁹⁴ However, it is not clear that this obligation is monitored or enforced by CRO, even though '[a]ccounting and disclosure requirements ... operate ... through public disclosure of information, for the benefit of the *community as a whole*'¹⁹⁵ and

the fact that a [firm's] accounts and reports must be published enables the public at large to ... bring pressure to bear on 'the firm' so as to satisfy relational and wider social interests.¹⁹⁶

Second, not all of the registered information is publicly disclosed. CRO levies a fee for disclosure of anything beyond an LP's name, address and registered number, in contrast to the UK's Companies House whose records are free to search and download. Although ILPs must supply more information than ordinary LPs in order to obtain registration with the Central Bank, virtually none of this is publicly available.

The result is a loophole in transparency which hampers regulators, enforcement agencies, creditors, and members of civil society including journalists, in investigating LPs or holding them to account.¹⁹⁷ It is an effective way to achieve 'complete anonymity' and 'a wonderfully opaque method of hiding ownership and control',¹⁹⁸ and it prevents the media from acting 'as a "watch dog" reflecting societal interests and the need for transparency in the firm's operations'.¹⁹⁹ Suppliers and creditors cannot establish whom they are dealing with or access

194 The European Union (Qualifying Partnerships: Accounting and Auditing) Regulations 2019 SI No 597/2019 implement Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, OJ L 182/19. See also L K Shields, '[Irish Limited Partnerships Annual Return and Financial Reporting Obligations](#)' (15 July 2024).

195 UK Company Law Review Steering Group, 'Strategic Framework' (n 1 above) para 5.1.4 (original emphasis).

196 Ibid para 5.1.44.

197 Wilton Park, 'Report – Driving Dirty Money out of the UK: Beyond Economic Crime Plan 2' (WP3056 17–19 May 2023).

198 Higgins and Donnelly (n 51 above) quoting Declan de Lacy, partner with Dublin accountancy firm, and Graham Barrow, financial crime consultant, respectively.

199 Freeman et al (n 3 above) 17.

their assets if the LP defaults on its obligations, and investigations and enforcement cannot take place.

Again, we see the influence of the financial services industry. It has argued that since investment vehicles typically impose 'strong obligations of confidentiality in favour of investors' there is no case for requiring more information to be registered or for that information to be made public.²⁰⁰ But this ignores the fact that the limited liability given to limited partners is a privilege in return for which disclosure is required. It also ignores the fact that the use of corporate bodies as general partners – extensively by the financial services industry – achieves *de facto* limited liability for those general partners, which also necessitates fuller disclosure as a *quid pro quo*.

The Bill therefore needs to increase the information disclosed about ordinary LPs, their partners, and their beneficial owners. It does impose an obligation on LPs to file an annual confirmation statement updating registered information (which indirectly provides evidence that they are still active)²⁰¹ and requires LPs to provide a registered office address and email address,²⁰² and more detail about their partners.²⁰³ However, neither the LP itself nor its EEA corporate partners – not even if they are general partners – need disclose their beneficial owners, and no extra information at all is required from EEA limited partners.

A recent EU Directive²⁰⁴ will, when transposed into Irish law, require not only verification of registered information by CRO (as discussed above), but also that ordinary LPs disclose more information²⁰⁵ and that CRO makes more of it available for free.²⁰⁶

200 BVCA response to Department for Business, Innovation & Skills (BIS), 'Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business: discussion paper' (July 2013).

201 Bill, Head 29.

202 Ibid Head 23(2) (c) and (d).

203 Ibid Heads 23(2)(e) and 34(2). CRO guidance already states that any corporate partner registered outside Ireland must supply a certified copy of their constitution, copies of their certificate of incorporation and any certificates of name changes and, if any of these are not in Irish or English, certified translations (CRO information leaflet No 6, December 2019).

204 Directive (EU) 2025/25 (n 144 above).

205 Article 14a of Directive (EU) 2017/1132 (n 144 above), as inserted by the Directive (EU) 2025/25 (n 144 above). Art 14a is applied by Art 13 to the companies listed in Annexes IIB, which lists Irish LPs (*comhpháirtíochtaí teoranta*). The Explanatory Memorandum and Preamble, para 36, refer to the information being 'publicly available' on business registers, so not merely disclosed to CRO.

206 Art 19a(2) of Directive (EU) 2017/1132 (n 144 above), as inserted by Directive (EU) 2025/25 (n 144 above). Where Directive (EU) 2025/25 permits a fee to be charged, it must not exceed the administrative costs (Art 19(1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2025/25) but the fees charged by CRO (€2.50–3.50) would comply with this.

Although mandatory disclosure of ILP information to the Central Bank is greater than ordinary LPs' disclosure to CRO, even less of it is available to the public (and the Directive does not apply to ILPs).²⁰⁷ Transparency of ILPs could be improved by requiring information about ILPs to be registered with, and publicly available at, CRO. Although the UK equivalent of ILPs, private fund limited partnerships (PFLPs), are much less regulated than ILPs, they are registered at the UK's Companies House in the same way as other types of business organisation, and their details are publicly available on the register there.

No restrictions on corporate partners

The legislation imposes no restrictions on the use of corporate partners in LPs, and indeed LPs are not required to have any human partners at all. It is likely that this is primarily at the behest of the financial services sector because corporate partners are a common feature of investment LPs in order to limit liability and facilitate partner tax planning.²⁰⁸ However, the use of corporate partners creates significant vulnerabilities for LPs and is often associated with wrongdoing,²⁰⁹ a risk seemingly recognised by Ireland's total ban on corporate directors.²¹⁰

First, corporate partners can facilitate secrecy and lack of accountability, including financial accountability because the real individuals behind them are obscured, often behind further corporate layers or in overseas jurisdictions. As discussed above, the Bill will require some beneficial owners to be disclosed, but not all, and not publicly.

Second, enforcement measures such as disqualification, fines or imprisonment, have less or no deterrent effect on corporate partners. The risk that limited liability could be abused was foreseen in the nineteenth century, when legislation to permit LPs and modern-day companies was under discussion, and sanctions were provided; but the use of corporate directors or partners removes the possibility of a

207 Only ordinary Irish LPs, and not ILPs, are listed in annex IIB to Directive (EU) 2025/25 (n 144 above), which specifies the types of firm to which the relevant provisions of the Directive apply.

208 Pinsent Masons, 'Proposals to reform Irish limited partnerships oblige greater transparency' (*Out-Law News* 21 August 2024).

209 Elspeth Berry, 'Pandora's box: how UK and Irish partnerships are used in international crime' (*OpenDemocracy* 2 November 2021).

210 Companies Act 2014, s 130.

meaningful sanction being imposed on the individual(s) responsible for the abuse.²¹¹

Third, the use of corporate partners also enables *de facto* limited liability for general partners because the personal assets of their shareholders and directors are not available to meet the LP's debts and obligations.²¹² The vulnerability of limited liability is discussed further below.

These vulnerabilities would be avoided if corporate general partners were prohibited in the same way as corporate directors. However, LPs that engage in investment projects typically have a corporate general partner, and a complete ban is therefore probably unrealistic. An alternative, in return for the financial privacy that LPs (unlike companies) enjoy, would be to require a minimum of one individual general partner. That individual would be directly accountable through genuine personal liability for the firm's debts, and for penalties and sanctions. An alternative more acceptable to the financial services industry might be to require a compliance officer, along the lines of existing provisions for branches of EEA companies. They are required to file the name of a person resident in Ireland who is (i) authorised to accept service of documents required to be served on the non-Irish company, and (ii) authorised to ensure compliance with the provisions of CA 2014.²¹³

Unfortunately, the Bill imposes no such requirements and, indeed, introduces an explicit provision that a body corporate may be a partner.²¹⁴ The Bill does, however, require the disclosure of more information about some corporate partners, as discussed above, albeit that most of the information is available only to the authorities and not the public, and some of it is only required in relation to non-EEA corporate partners.²¹⁵

No requirement for a real connection with Ireland

There are two related vulnerabilities here, and both have results which are contrary to the Irish Government's aims in Project Ireland 2040

211 OpenCorporates' response to Department for Business, Innovation & Skills (BIS), 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business: Discussion Paper' (July 2013).

212 Twomey (2019) (n 35 above) para 28.17.

213 CA 2014, ss 1302 and 1304. Although CA 2014, s 223(1), provides that 'It is the duty of each director of a company to ensure that this Act is complied with by the company', an equivalent duty on general partners would be meaningless in the absence of provisions mandating that at least one of them is an individual.

214 Bill, Head 17(4).

215 The information listed in Head 23(2)(e) only applies to *corporate general* partners; that listed in Head 34 (including UBOs) only applies to *non-EEA corporate* partners.

for regional economic growth,²¹⁶ and in ‘Ireland for Finance’ for jobs which are unlikely to be outsourced or easily transferable.²¹⁷

First, there are no restrictions on the use of overseas partners in Irish LPs, as none of the partners need be resident in, or indeed have any connection with, Ireland.

Perhaps unsurprisingly, therefore, the majority of LP partners have no connection with Ireland,²¹⁸ often being based in UK overseas territories, the Seychelles, Belize, countries in eastern Europe²¹⁹ and former Soviet republics,²²⁰ as the Pandora papers demonstrated.²²¹ Less than a third of ordinary LPs formed between 2015 and 2021 had an Irish general partner and many of the overseas partners were based in secrecy jurisdictions.²²² Over a third were controlled by general partners in the Seychelles or Belize, and a fifth had strong links to Russia or Ukraine.²²³ The bulk of 800 LPs registered at a single Dublin address were found to involve partners based in offshore jurisdictions.²²⁴ Indeed, Irish LPs have been promoted as ‘cheap, opaque, and tax-free’ to Russia, Ukraine and Latvia, and a recent surge in the registration of Irish LPs was dominated by overseas partners from secrecy jurisdictions, indicating that ‘offshore-type secrecy arrangements have spread from their more traditional centres ... to onshore locations such as ... Ireland’.²²⁵

But overseas partners are clearly a risk factor, particularly when based in jurisdictions which are high risk (ie where there are deficient money-laundering and terrorist-financing controls) or secrecy jurisdictions (ie where business records are not kept or are not public). They put the individuals operating Irish LPs beyond the reach of regulators, enforcement agencies and creditors, and increase the secrecy and opacity of the LP’s structure. This is especially so when, as is usually the case, the overseas partners are also corporate

216 Rialtas na hÉireann Government of Ireland, ‘Planning Framework’ (n 25 above) 3, 5–7, 9, 16, 19–20, 25, 65–67 and 154–155 (156–157 in the ‘Draft First Revision’); ‘Development Plan’ (n 26 above) 6–7 and 67–70; and ‘Building Ireland’s Future’ (n 29 above) 3 and 5–6.

217 Rialtas na hÉireann Government of Ireland, ‘Ireland for Finance’ (n 17 above) 16 and 19.

218 Keena, ‘Partnership structure a shield against scrutiny’ (n 51 above).

219 DETE (n 60 above) CLRG, 7.

220 Keena, ‘Partnership structure a shield against scrutiny’ and ‘Pandora papers’ (both n 51 above).

221 Berry (n 209 above) and IMF (n 46 above).

222 Higgins and Donnelly (n 51 above).

223 Donnelly and Higgins, ‘Irish limited partnerships “have become a mask for shady dealings”’ (n 153 above).

224 Keena, ‘Pandora papers’ (n 51 above).

225 Keena, ‘Ireland marketed in Russia as offshore location with “impeccable reputation”’ (n 51 above).

entities,²²⁶ the separate problems with which have been discussed above. Many offshore partners have been linked to fraud and money laundering outside of Ireland,²²⁷ and the use of partners based in secrecy jurisdictions in particular has been identified as a money-laundering/terrorist-financing risk factor by the IMF²²⁸ and the EU Commission:²²⁹ in particular

foreign proceeds of crime (e.g., transnational organized crime, tax evasion, overseas corruption) flowing to Ireland for integration into the legitimate economy, funds intended for [money laundering/terrorist financing] passing through its financial sector and outflows of domestic proceeds of crime for [money laundering].²³⁰

In addition to this opacity, the use of overseas partners can also mean that no tax is paid in Ireland.²³¹ This enables wrongdoers to have a business vehicle

registered in a first-world economy which is untaxed, and the ownership of which is totally obscure ... [and] end up with a de-facto offshore entity.²³²

Ideally, the Bill should prohibit offshore general partners or, failing that, general partners based in secrecy jurisdictions (ie those who are not subject to rigorous transparency requirements, including disclosure of beneficial owners of corporate bodies). However, the Bill imposes no such requirement, merely requiring at least one general partner to be resident in, or have its registered office in, an EEA state.²³³ While this makes the general partner marginally easier to trace than if based in a secrecy jurisdiction outside the EEA, it provides no guarantee that its assets will be available to Irish creditors or enforcement agencies.

Second, an ordinary LP itself need not have any real or continuing connection with Ireland.²³⁴ Its proposed principal place of business on first registration must be in Ireland, but this need not be maintained

226 TI Ireland (n 187 above).

227 Donnelly and Higgins, 'Irish limited partnerships "have become a mask for shady dealings"' (n 153 above).

228 IMF (n 46 above) 6 and 16.

229 European Commission, 'Communication from the Commission to the European Parliament and the Council: Communication on further measures to enhance transparency and the fight against tax evasion and avoidance' COM(2016) 451 final, 7.

230 IMF (n 46 above) 8.

231 Keena, 'Pandora papers' (n 51 above).

232 Colm Keena, 'Irish limited partnerships: what are they and what is the problem?' *Irish Times* (Dublin 4 October 2021).

233 Bill, Head 19.

234 An ILP is required to have a registered office and a principal place of business in Ireland at all times, to ensure a continuing connection (ILP Act 1994, s 12(1)).

thereafter.²³⁵ This makes it difficult for investigators, regulators and enforcement agencies to locate it or its assets, and the IMF has noted that:

[r]apid growth in the size of the Irish financial center ... has increased further the [money-laundering/terrorist-financing] risks from non-resident and cross-border activity.²³⁶

Such firms have been described as using ‘flags of convenience – set up because the background regulatory regime is much less stringent’²³⁷ and, as early as 1994, Deputies Farrelly and R Bruton warned (in relation to ILPs) that ‘[we] need an assurance that partnerships cannot be used as offshore companies for purposes we would not like’.²³⁸ The lack of connection not only facilitates wrongdoing, it also means that the LP is unlikely to provide an economic benefit to Ireland.

The Bill should therefore require an LP to have a real and continuous link to an economic activity in Ireland.

The Bill does contain a potentially helpful provision that an LP will not be registered ‘unless it appears to the Registrar that the [LP], when registered, will carry on an activity in the State’.²³⁹ However, although this replicates existing company law,²⁴⁰ it is not clear what counts as an ‘activity’, or how substantive or economically valuable it must be. It is also unclear how the registrar will assess this, and how rigorously. Further, this requirement is not matched by any proposal for the new annual confirmation statement required by the Bill²⁴¹ to confirm, let alone demonstrate, a continuing activity in Ireland.

The Bill also requires an LP to have an ‘appropriate’ registered office or principal place of business in Ireland,²⁴² but this would not guarantee that it will carry on an economic activity there, contrary to DETE’s assertion to this effect²⁴³ and, indeed, to the assumptions of others.²⁴⁴ This is because the definition of ‘appropriate’ can be

235 LPA 1907, s 8; and Twomey (2019) (n 35 above) para 28.26.

236 IMF (n 46 above) 8. LPs which have limited or no connection with Ireland are liable to have no bank account in Ireland, which enables them to avoid AML regulation in Ireland: Transparency International UK, ‘[Hiding in plain sight](#)’ (2017) 28.

237 Jim Wells MLA, Northern Ireland Assembly Committee for Enterprise Trade and Investment, ‘Report on the Limited Liability Partnerships Bill’ (NIA Bill 9/01).

238 Seanad Éireann debate, Tuesday 5 July 1994, vol 140, no 19 (Farrelly), and Dáil Éireann debate, Tuesday 21 June 1994, vol 444, no 1 (R Bruton).

239 Bill, Head 18(2).

240 CA 2014, s 18.

241 Bill, Head 29.

242 Ibid Head 18.

243 DETE (n 41 above) s 2.

244 See, for example, Caoimhe McCrea (Addleshaw Goddard), ‘[Proposals of the General Scheme for Limited Partnerships and Business Names Bill 2024](#)’ (*Insights & News* 26 August 2024).

fulfilled if the LP merely has a registered office in Ireland, or just a general partner's address there, or even just the address of a TCSP acting for the LP. Although these options should combat the 'phantom or postbox'²⁴⁵ LPs – which provide a fictitious Irish address, often resulting in the innocent residents receiving intimidating demands for payment and a damaged credit rating – none guarantee a substantive economic link to Ireland.

Again, the influence of the financial services industry and its professional advisors can be seen to be at work; a significant number of the responses to the 2019 consultation on LP reforms objected to the proposal for an LP to be required to have a principal place of business in Ireland.²⁴⁶

No power to investigate or deregister wrongdoing LPs

The legislation currently leaves a glaring loophole in the enforcement powers against wrongdoing partnerships, which creates an obvious vulnerability.

First, there is no power to investigate the affairs of an ordinary LP in the event of suspected fraud or other wrongdoing, and the Bill does not propose to introduce one. Yet, the need for such a power, in order to protect creditors and the wider community, has been recognised in both ILP²⁴⁷ and company²⁴⁸ legislation, and it is not clear why LPs have not been made subject to an equivalent safeguard. The Bill therefore needs to include powers equivalent to the existing powers to investigate companies and ILPs.²⁴⁹ Company inspectors can be appointed by the court on the application of members, directors, creditors, or Ireland's Corporate Enforcement Authority (CEA) (whose role is to investigate suspected offences under, or non-compliance with, corporate legislation),²⁵⁰ while ILP inspectors may be appointed only on application by the Central Bank.²⁵¹ An ordinary LP should therefore be subject to investigation on application by its partners, creditors, or the CEA. The grounds set out for both companies and ILPs are similar and would be equally appropriate for ordinary LPs, including that the firm's affairs are being conducted fraudulently, and that those who

245 *Dáil Éireann debate*, Thursday 12 November 2020, vol 1000, no 6.

246 DETE (n 60 above) Law Society of Ireland, para 5.1; Arthur Cox, para 4.1; CLRG, 9–10; Byrne Wallace, Q4; Deloitte, Q4; and McCann FitzGerald, 3, said it was only necessary for a service address to be provided.

247 ILP Act 1994, s 26.

248 CA 2014, ss 747ff.

249 ILP Act 1994, s 26.

250 CA 2014, ss 747ff.

251 ILP Act 1994, s 26.

formed or manage it are guilty of fraud or misconduct.²⁵² Given the international nature of the abuses of LPs, as discussed above, the court's explicit power to take account of events occurring outside Ireland, as provided in relation to ILPs, but not companies, should also be applied to LPs.²⁵³

Second, there is no power to compulsorily dissolve or strike an ordinary LP off the register in the public interest, if it is guilty of wrongdoing. Again, the need for such a safeguarding power has been recognised in relation to both ILPs (whose winding-up in the public interest can be ordered by the Bank)²⁵⁴ and companies;²⁵⁵ and again, it is not clear why LPs have not been made subject to an equivalent safeguard or why the Bill contains no such power.²⁵⁶ It permits the registrar to remove an LP from the register, but only for defaults in registration or the happening of an event which makes it unlawful to carry on the business in partnership,²⁵⁷ and the latter would not apply merely because the LP engages in wrongdoing, but only if the substantive business is unlawful.²⁵⁸

Multiple partner appointments

There is no statutory limit on the number of appointments as a partner that a person (individual or corporate) can hold, and multiple appointments often involve corporate or overseas partners, the problems with which have already been discussed. For example, investigators discovered that eight (offshore) partners controlled 859 of the LPs registered by a particular group of TCSPs,²⁵⁹ and that one individual in the Seychelles was a general partner in almost 150 LPs, while a Romanian national was the controlling partner in more than 370 LPs.²⁶⁰

Multiple appointments can facilitate wrongdoing because they allow the perpetrators to set up and operate multiple firms, which increases the scope for money laundering and, importantly, for

252 Ibid and CA 2014, s 748.

253 ILP Act 1994, s 26(3).

254 Ibid s 3.

255 CA 2014, ss 568–577.

256 The UK's ECCTA 2023 now allows the Secretary of State to petition the court for winding up in the public interest (LPA 1907 (UK), s 27, as inserted by ECCTA 2023, s 131).

257 Bill, Heads 31–32.

258 *Everet v Williams* (1725) noted in (1893) 9 LQR 197 and *Hudgell, Yeates & Co v Watson* [1978] 2 All ER 363. See, generally, Twomey (2019) (n 35 above) ch 9.

259 Ross Higgins, 'Smash and grab: the UK's money laundering machine' (*Bellingcat* 1 October 2019).

260 Higgins and Donnelly (n 51 above).

obfuscation of their activities.²⁶¹ Indeed, the Irish Government itself has acknowledged these risks.²⁶²

It is also unlikely that general partners who act for dozens or hundreds of LPs can fulfil their legal duties to their co-partners, creditors or the state.

Again, we see the influence of the financial services industry, where multiple appointments are ‘common practice in the investment industry’.²⁶³

What the Bill should include as a minimum standard (but does not), is the same restriction on partners as already imposed on directors, in recognition of the same risks – a limit of 25 directorships.²⁶⁴

Tax transparency

The fact that LPs are tax transparent – meaning that the LP itself is not liable to tax and the only tax paid is by its partners on their profit shares²⁶⁵ – makes them attractive both to legitimate investors and wrongdoers.²⁶⁶ One company formation agent has advertised it as ‘one of the most valuable aspects’ of Irish LPs,²⁶⁷ and the financial services industry regards tax transparency as an advantageous feature of LPs,²⁶⁸ as do TCSPs,²⁶⁹ because it allows funds to be formed without the complexity of fund tax issues.

However, it provides a potential vulnerability as it often results in tax being avoided in Ireland entirely²⁷⁰ because overseas partners are not taxed in Ireland (and in fact can often avoid tax in their home jurisdictions also), and ‘[o]ne of the major obstacles to tax collection worldwide is corporate anonymity’.²⁷¹ As the then Deputy Irish Prime

261 Ibid and Transparency International UK, ‘Partners in Crime’ (October 2020) 18–22.

262 DETE (n 41 above) s 1.1.

263 BVCA response to Department for Business, Innovation & Skills (BIS), ‘Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business: Discussion Paper’ (July 2013).

264 CA 2014, s 142.

265 Revenue C  in agus Custaim na h  ireann Irish Tax and Customs, ‘Notes for Guidance’ and ‘Collective investment vehicles’ (both n 69 above) .

266 DETE (n 60 above) CLRG, 6–7; Twomey (2019) (n 35 above) para 28.13.

267 Company Bureau.

268 Peter Vale and Brian Murphy, ‘The reform of the investment limited partnership’ (Accountancy Ireland April 2019) 62; and A&L Goodbody, ‘Fund structures: ILPs/investment limited partnerships’, 2; DETE (n 60 above) Arthur Cox, para 1.2; Irish Funds, 4 and 9; William Fry, 3.

269 DETE (n 60 above) IVCA, Q6.

270 Keena, ‘Pandora papers’ (n 51 above).

271 Alldridge (n 175 above) 29.

Minister said of such arrangements ‘There is nothing in that for us’²⁷² and, as another commentator has noted:

the same harmful secrecy laws which enable tax evasion are also conducive to laundering the proceeds of crime and creating a criminogenic environment in which financial crime thrives.²⁷³

The Bill should therefore require, first, a genuine connection between the LP itself and Ireland, so that taxes on employees, property taxes or turnover taxes may be paid in Ireland; second, at least some partners based in Ireland, so that partner income/corporation tax is paid there; and third, no partners based in secrecy jurisdictions, so there is transparency for the tax authorities.

Limited liability

LPs can offer limited liability for all but one partner, and this is clearly seen as attractive by potential limited partners.²⁷⁴ Yet ordinary LPs (unlike ILPs)²⁷⁵ are not currently required to use a suffix to their firm name to indicate their status (ie as an LP), which makes it more likely that third parties are unaware that not all partners are personally liable for the firm’s debts. Fortunately, the Bill proposes the mandatory use of an appropriate suffix; either the words ‘limited partnership’ or ‘comhpháirtíochtaí teoranta’, or the abbreviations LP or CT.

Unfortunately, LP regulation will still allow what little personal liability there is to be virtually eliminated. In addition to the practical financial consequences of this for creditors, employees and government enforcement agencies, this also gives rise to the moral hazard of partners engaging in risky decisions for which they can avoid the costs.²⁷⁶

272 Jennifer Bray, ‘Government will close tax loopholes – Varadkar: Tánaiste says some arrangements revealed in Pandora papers appear to be “dubious”’ *Irish Times* (Dublin 5 October 2021).

273 Mary Alice Young, ‘Financial transparency in Britain’s secrecy jurisdictions has just got a whole lot murkier following the UK’s decision to leave the EU’ (2016) 31(11) *Journal of International Banking Law and Regulation* 583–586, 585.

274 Vale and Murphy (n 268 above) and DETE (n 60 above) IVCA, Q1; and William Fry, 3.

275 ILP names must include one of the suffixes: ‘investment limited partnership’, ‘Comhpháirtíocht Theoranta Infheistíochta’, ILP or CTI (ILP Act 1994, s 12(2)).

276 Richard DeFusco, Paul Shoemaker and Nancy Stara, ‘Controlling the moral hazard created by limited liability’ (1996) 12(3) *Journal of Applied Business Research* 9–19, 12–14; Deniz Igan, Prachi Mishra and Thierry Tresselt, ‘A fistful of dollars: lobbying and the financial crisis’ (IMF WP/09/287 2009) 5–6 and 9–10; Marie-Laure Djelic and Joel Bothello, ‘Limited liability and its moral hazard implications: the systemic inscription of instability in contemporary capitalism’ (2013) 42 *Theory and Society* 589–615, 606–609 and Berry (n 14 above) 119 and 120.

First, as discussed above, the general partner, who theoretically has personal liability, can in fact be a corporate body, thus achieving *de facto* limited liability.

Second, limited partners' mandatory capital contribution is not subject to a minimum amount,²⁷⁷ so their liability could be as little as one euro.²⁷⁸ ILP limited partners have even greater protection: they are not even required to contribute capital and are not liable for withdrawn capital beyond four months after the withdrawal.²⁷⁹ This transfers the risk of cash-flow problems or insolvency from them to innocent third parties.

What the Bill should do is, first, prohibit or restrict the use of corporate partners as discussed above; and, second, require a meaningful capital contribution from limited partners, which cannot be withdrawn without continuing liability for that amount.

4 IMPROVING PARTNERSHIP LAW FOR ALL BUSINESS SECTORS

The discussion in the preceding sections has focused on the vulnerabilities in the current regulation of LPs that facilitate their use for wrongdoing. However, (as outlined in Section 2) the influence of the financial services sector has also resulted in the absence of reforms that would benefit ordinary LPs and indeed general partnerships. This section will evaluate the key reforms which would benefit law-abiding businesses and thereby contribute to achieving the aims of Project Ireland 2040.²⁸⁰

Separate legal personality

Unlike a company, an LP (ordinary or ILP) does not have separate legal personality from its members. Separate personality enables useful features such as continuity of the company on a change of members, and the ability to enter into contracts and own property directly. Although LPs can achieve equivalent features through more indirect means, separate personality is generally perceived as advantageous because it simplifies business operations.²⁸¹ Its absence leads to dissolution of

²⁷⁷ LPA 1907, s 4(2).

²⁷⁸ This advantage is highlighted by TCSPs, for example, Company Bureau (n 267 above).

²⁷⁹ ILP Act 1994, s 20.

²⁸⁰ Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) and 'Development Plan' (n 26 above).

²⁸¹ See, for example, the Law Commission of England and Wales and the Scottish Law Commission, Partnership Law (Law Com No 283 and Scot Law Com No 192 2003), pt V; and LexisPSL Corporate Practice Guidance, 'Setting up a joint venture – choice of structure'.

an ordinary LP on a change of partner (unless there is prior contrary agreement) – and other potentially adverse consequences, including the need to renegotiate both external contracts and the internal agreement, and the risk that third parties and indeed partners make take the opportunity to simply walk away. This problem was highlighted in the Dáil as long ago as 2000.²⁸²

Again, we see the influence of the financial services industry. Overseas jurisdictions where financial services LPs often operate may not recognise an LP's tax transparency if it has separate personality,²⁸³ and it has been argued by a leading Irish law firm that '[t]he main attraction of an ILP is that [it] does not have an independent legal existence'.²⁸⁴

The Government's 2019 consultation on LP reforms²⁸⁵ did not include separate personality. Only three responses proposed it, and then only as an optional alternative – but, as explained above, all bar one of the responses came from representatives of the financial services industry and their professional advisors.²⁸⁶

The introduction of separate personality would be beneficial but, failing that, the Bill should at least give ordinary LPs the benefit that ILPs already have – namely, continuity on a change of general partner.²⁸⁷

Removing restrictions on partner numbers

Ordinary LPs, but not ILPs,²⁸⁸ are currently restricted to a maximum of 20 partners,²⁸⁹ subject to a higher limit of 50 for investment and loan finance firms, and a complete exemption for accountants, solicitors, and providers of investment services to businesses.²⁹⁰ Again, an advantage has been bestowed almost exclusively only on financial firms and their advisors.

282 Mr Naughten, Dáil Éireann debate, Thursday 12 October 2000, vol 524, no 1.

283 John F Avery Jones et al, 'Characterization of other states' partnerships for income tax' [2002] *Bulletin for International Taxation* 288–320, 288–290.

284 A&L Goodbody (n 269 above) 2.

285 DBEI (n 89 above).

286 Three responses supported separate personality, two for LPs on condition that tax transparency was retained (DETE (n 60 above) Arthur Cox, paras 4.3 and 11.7; Law Society of Ireland, para 11.2.5) and one as an option for a new form of ILP (Simmons & Simmons, 3).

287 ILP Act 1994, s 37.

288 *Ibid* s 4(4).

289 LPA 1907, s 4(2). The maximum for a banking partnership is 10 partners.

290 CA 2014, s 1435(c). The exemptions also include thoroughbred horse breeders.

Although the Government's 2019 consultation on LP reforms²⁹¹ did not include this restriction, several responses proposed its abolition,²⁹² and indeed the issue was raised in the Dáil as long ago as 2000.²⁹³ However, the Bill makes no such proposal, and this is unsurprising given that it has already been abolished for ILPs and most professional service firms, which is liable to diminish financial services lobbying for its further abolition. One response to the Government's 2019 consultation on LP reforms actually opposed abolishing the limit 'in case this opens up an avenue for unscrupulous promoters',²⁹⁴ but there is no evidence that wrongdoing LPs in the UK, where the 20-partner limit was abolished several decades ago,²⁹⁵ have made particular use of large numbers of partners.

Safe harbour list

The LPA gives limited partners their limited liability on condition that they do not engage in 'management of the partnership business'.²⁹⁶ If they do, they forfeit that limited liability. In response to uncertainty over what might be held to constitute 'management' for this purpose, the ILP Act 1994 – which provides an equivalent sanction for 'taking part in the conduct of the business'²⁹⁷ – contain a 'safe harbour' list of activities which are stated not to constitute such behaviour.

In principle such a list would benefit limited partners in ordinary LPs and thus support enterprise in line with Project Ireland 2040.²⁹⁸ However, some of the actions in the ILP 'safe harbour' list are in fact management-type activities. These include being a director or shareholder of a corporate partner, and thus potentially able to control that general partner.²⁹⁹ The safe harbour list thus allows limited partners to engage in some degree of management while retaining their limited liability. This transfers the financial risks of such decisions from the partners to innocent third-party creditors and wider society, which is contrary to the spirit of the legislation which, as discussed above, is to penalise engagement in management by loss of limited liability.

291 DBEI (n 89 above).

292 DETE (n 60 above) Byrne Wallace, Q5, recommendation 11; Arthur Cox, para 11.2; William Fry, 6–7; Irish Funds, 15; Mason Hayes & Curran, 6.

293 Mr Naughten, Dáil Éireann debate, Thursday 12 October 2000, vol 524, no 1.

294 Company Law Review Group (CRLG), '[Report of the Company Law Review Group](#)' (2007) 40.

295 Regulatory Reform (Removal of 20 Member Limit in Partnerships etc) Order 2002.

296 LPA 1907, s 6(1).

297 ILP Act 1994, s 6(2).

298 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) and 'Development Plan' (n 26 above).

299 ILP Act 1994, s 6(4a).

What is needed is for management-type activities to be removed from the list in the ILP Act 1994, and then for a similar list to be applied by the Bill to ordinary LPs. A safe harbour list for ordinary LPs was supported in principle by many of the responses to the 2019 consultation on LP reform,³⁰⁰ but the Bill makes no such proposal. Again, this is perhaps unsurprising given that ILP limited partners already benefit from such a list, which is liable to diminish the strength of financial services lobbying for it to apply more widely.

Winding-up by limited partners

Limited partners do not have the power to wind up an LP, and the only option for them currently is to petition the court. Enabling them to appoint a person to wind it up if no general partners remain to do so would provide a cost and efficiency saving. Of course, financial services firms are unlikely ever be in this position – both because they are likely to have access to the necessary expertise to avoid it, and because the general partner will normally be a corporate body – and so are unlikely to lobby for it.

A model agreement

The provision of a model agreement for LPs (and indeed for general partnerships) would not only save costs but, if provided as a default position in the absence of contrary agreement in the same way as model articles of association are provided for companies in the UK,³⁰¹ would ensure that no LP is without a written agreement, the lack of which is a frequent cause of expensive and destructive disputes. Of course, financial services firms have the resources to pay for such an agreement to be drawn up, and to pay for advisors who will alert them to the advantages of doing so and the risks of failing to do so – and so, again, are unlikely to lobby for it.

5 LESSONS FOR THE UK?

As explained at the outset, the LPA 1907 applies in both Ireland and the UK, and it is only with the UK's ECCTA 2023 reforms that the LPA 1907 has begun to look very different in the two jurisdictions. Many of the provisions of the Bill parallel ECCTA 2023, for example giving CRO greater powers to verify registered information, and requiring more information about partners. But there is also scope for the UK to learn from Ireland's approach in the Bill, as the following examples demonstrate.

300 DETE (n 60 above) Law Society of Ireland, para 11.2.2; Arthur Cox, para 11.3; William Fry, 5; IVCA, Q1; and McCann FitzGerald, 41.

301 Companies (Model Articles) Regulations 2008, SI 2008/3229, schs 1–3.

Disclosure of (at least some) beneficial owners

As discussed above, the Bill requires some LPs to disclose at least some degree of their beneficial ownership, namely the beneficial owners of their non-EEA corporate partners.³⁰² This would advance transparency and accountability in most of the UK, since in England, Wales and Northern Ireland neither LPs, nor the UK equivalent of ILPs, PFLPs, need disclose any beneficial owners, either of corporate partners or of the LP itself. However, a more significant improvement in those countries (and in Ireland) would be the adoption of the same provisions as in Scotland, where all LPs (including PFLPs) are required to disclose all of their beneficial owners.³⁰³

Improved disclosure of accounts

Although both Ireland³⁰⁴ and the UK³⁰⁵ require the public disclosure of partnership accounts in certain limited circumstances, because this stems from their obligations (prior to Brexit) to implement an EU Directive on accounts,³⁰⁶ Ireland has implemented it much more effectively. The Directive's purpose is to ensure that partnerships disclose their accounts in the same way as limited companies (and in the UK, limited liability partnerships (LLPs)), if their general partners effectively avoid personal liability by being corporate bodies.

First, Ireland defines the partnerships to which the accounting obligations apply much more widely than the UK, so more LPs are required to disclose their accounts. Both jurisdictions require disclosure if all general partners are limited companies, or unlimited entities whose own members are all limited companies. However, Ireland also requires disclosure of accounts if all general partners are 'such that the ultimate beneficial owners of the partnership enjoy the protection of limited liability'.³⁰⁷ The UK has no such catch-all provision, despite the fact that a UK LLP confers the same limited liability on its members as a limited company.³⁰⁸ This means, for example, that an Irish LP whose partners are all UK LLPs has to disclose its accounts, whereas a UK LP with the same membership does not.

302 Bill, Head 34.

303 Scottish Partnerships (Register of People with Significant Control) Regulations 2017, SI 2017/694.

304 European Union (Qualifying Partnerships: Accounting and Auditing) Regulations 2019 (n 194 above).

305 Partnerships (Accounts) Regulations 2008 SI 2008/569.

306 EU Directive 2013/34 (n 194 above).

307 European Union (Qualifying Partnerships: Accounting and Auditing) Regulations 2019 (n 194 above) reg 5(1).

308 Limited Liability Partnerships Act 2000, s 1.

Second, Ireland enables LP accounts to be registered with the LP's own records at CRO, whereas in the UK they can, at best, only be registered with the records of a corporate partner at Companies House. If none of the partners are UK companies then the disclosure options become even more obscure – which of course makes it much more difficult for third parties to find those accounts, and thus much easier for the LP to avoid disclosing them at all.

Sanctions for defaults in registration

In Ireland, defaults in registration of the required information can result in the loss of limited partners' limited liability.³⁰⁹ Despite criticisms of this sanction as 'disproportionate' and 'a relic of the unwarranted fear ... of limited liability',³¹⁰ the Bill makes no proposals to abolish it. The UK abolished it in 2009³¹¹ and the subsequent abuses of LPs, which are often LPs that fail to register the required information accurately, show that the fear is not unwarranted, and the sanction is not disproportionate. It should therefore be reinstated in the UK.

CONCLUSION

The focus on financial services when reforming (or not) LP law has deprived ordinary LPs of valuable reforms, and contributed to the failure to combat the abuses of LPs. These results are contrary to the aims of Project Ireland 2040.³¹²

The Bill makes a number of important improvements, including greater powers for CRO, some disclosure of partners' (though not the LP's own) beneficial owners, greater disclosure of other partner details, and a requirement to at least state an economic link with Ireland. However, it has failed to fully remove the vulnerabilities of secret beneficial owners, the lack of freely available verified information, corporate partners, the absence of a real economic connection to Ireland, the lack of investigatory or public interest strike-off powers, tax and liability avoidance, inadequate supervision of TCSPs or multiple partner appointments.

The Irish Government should not be deterred from making the necessary reforms to LPs, as these will not detract from its very important advantages as a business destination. First, its reputation – for being

309 An LP which is not properly registered is deemed to be a general partnership (LPA 1907, s 5).

310 Twomey (2019) (n 35 above) para 28.72.

311 Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 SI 2002/3203.

312 Rialtas na hÉireann Government of Ireland, 'Planning Framework' (n 25 above) and 'Development Plan' (n 26 above).

‘a safe jurisdiction with the rule of law and a good reputation’,³¹³ and not considered a tax haven or secrecy jurisdiction by the OECD³¹⁴ – is a significant factor in the popularity of its business vehicles.³¹⁵ This reputation could, however, be damaged if the abuses are allowed to continue.³¹⁶ As Ireland’s enterprise and trade minister stated:

some of these partnerships don’t have any real operation in Ireland, they they’re just kind of using the good name of Ireland as cover for some bad things they are doing.³¹⁷

Second, it is a common law jurisdiction, which is particularly attractive to US and UK firms and investors.³¹⁸ Third, as Project Ireland 2040 recognises,³¹⁹ access to the EU’s single market gives Ireland a comparative advantage post-Brexit over its English-speaking, common law, rival, the UK³²⁰ (which offers otherwise broadly similar LP vehicles),³²¹ particularly for investment funds which generally operate internationally.³²²

What the Government needs to do is match its confidence and boldness in Project Ireland 2040 with bold reforms to LP law.

313 David Leask, Peter Geoghegan and Richard Smith. ‘[The Northern Irish ghost companies that mask crime worldwide](#)’ (*OpenDemocracy* 26 March 2020); see also Rialtas na hÉireann Government of Ireland, ‘Ireland for Finance’ (n 17 above) 27.

314 Donnelly and Higgins, ‘Has Ireland become a haven for scammers, launderers and pornographers?’ (n 153 above).

315 DETE (n 60 above) Arthur Cox, paras 1.2–1.3 and 2.1; CLRG, 5; Irish Funds, 1–3; William Fry, 3; Byrne Wallace, Q1; Deloitte, Q1; Maples Group, para 1.4; McCann FitzGerald, 2; and Simmons & Simmons, 1 and 3–5.

316 An Roinn Dlí agus Cirt Department of Justice (n 37 above) 19.

317 Donnelly and Mahon (n 43 above).

318 Reddan (n 98 above) 74.

319 Rialtas na hÉireann Government of Ireland, ‘Planning Framework’ (n 25 above) 109.

320 Rialtas na hÉireann Government of Ireland, ‘Ireland for Finance’ (n 17 above) 3, 14, 25, 37 and 39.

321 DETE (n 60 above) Law Society of Ireland, paras 1.5–1.7; IVCA, Q 3; Arthur Cox, para 1.5; Simmons & Simmons, 4–5; and Maples Group, paras 1.4(b) and 3.1(d).

322 Ibid Irish Funds, 8; and Maples Group, para 11.6(b). The latter also noting that the common origin of Irish and UK LP law means that there is ‘strong interest among UK fund sponsors’ in using Irish LPs. See also Murphy (n 98 above) 160; and Piers Warburton and Peter Mallon (Ashurst), ‘[The Irish ILP](#)’ (*Funds Insider* (2) 12 July 2021).



Judicial security of tenure: the dangers of side-stepping constitutional protections

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ABSTRACT

The Judicial Committee of the Privy Council's decision in *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* (2025) is, on the one hand, an important reiteration of the importance of judicial independence (a key requirement of the rule of law) through the security of tenure enjoyed by judges under the Constitution of Trinidad and Tobago and, on the other, a relatively straightforward matter of constitutional statutory interpretation. It will be argued that this characterisation is deceptive given the differing interpretations as to the ambit of section 137 of the Constitution reached by the Court of Appeal of Trinidad and Tobago and the Privy Council. The case concerned an appeal by the Judicial and Legal Service Commission against the decision of the Court of Appeal of Trinidad and Tobago. The Court of Appeal had held that Marcia Ayers-Caesar (the respondent) had been unlawfully pressured to resign as a judge through the threat of a disciplinary enquiry in the event that she had not tendered her resignation. The Court of Appeal of Trinidad and Tobago and the Privy Council in their decisions were clear that section 137 of the Constitution was the only method available to remove a judge and that the Judicial and Legal Service Commission had sidestepped this important constitutional provision. This article considers the provisions of the Constitution of Trinidad and Tobago that permit the removal of a judge; the broader context of judicial independence; and analyses the decision of the Privy Council.

Keywords: judicial independence; security of tenure; rule of law; Trinidad and Tobago; Judicial Committee of the Privy Council.

INTRODUCTION

The Privy Council's decision in *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* (2025)¹ is, on the one hand, an important reiteration of the importance of judicial independence through the security of tenure enjoyed by judges under the Constitution of Trinidad and Tobago (the Constitution) and, on the other, a relatively straightforward matter of constitutional statutory interpretation. Yet, this is deceptive as, whilst the Privy Council agreed with the Court of Appeal of Trinidad and Tobago that section 137 of the Constitution

1 *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* [2025] UKPC 15.

was the only method available to remove a judge, it disagreed with two of the judges in the Court of Appeal that the misbehaviour required to trigger section 137 had to take place exclusively after the judge's appointment.

The case concerned an appeal by the Judicial and Legal Service Commission (the Commission) against the decision of the Court of Appeal of Trinidad and Tobago. The Court of Appeal had held that Marcia Ayers-Caesar (the respondent) had been unlawfully pressured to resign as a judge through the threat of a disciplinary enquiry in the event that she had not tendered her resignation. The Commission and its chair, the then Chief Justice of Trinidad and Tobago, who had communicated the decision to Ayers-Caesar, were found to have side-stepped the important constitutional protection afforded by the Constitution. This article will first consider the provisions of the Constitution of Trinidad and Tobago that permit the removal of a judge. Second, it will address the broader context of judicial independence in the country before finally offering an analysis of the Privy Council's decision in the present case.

CONSTITUTIONAL FUNDAMENTALS

Judicial independence is a cornerstone of the rule of law. A healthy democracy requires that the judiciary are not controlled by the other branches of government and have the freedom to reach decisions without fear of reprisals by another branch of government. This fear of reprisal is a threat to judicial independence and undermines public confidence in the administration of justice. A pivotal moment in the common law tradition was the statutory protection of judicial independence through the provisions of the Act of Settlement 1701 that guaranteed judicial security of tenure, subject to the good behaviour of office holders. This meant that the monarch (or today the government) would no longer have the discretion to dismiss judges at their pleasure, rather an address from both Houses of Parliament was required. The Act of Settlement did not remove the ability of Parliament to impeach a judge. The independence of judges is not to be taken for granted within democracies. Several examples can be given to illustrate this point. The first is in the United Kingdom (UK) where Robert Jenrick MP, the Shadow Justice Secretary, called for a judge to be sacked.² The second is in the United States (US) where President Donald Trump called for the impeachment of a judge whose decision he did not like, which led

2 Eleni Courea, 'MPs' attacks on judges a huge threat to the rule of law, says attorney general' *The Guardian* (London 2 April 2025).

to a rebuke from Chief Justice John Roberts.³ There is no dispute that in principle judges ought to be accountable, however, there is a need to balance the accountability of judges alongside judicial independence. This is a difficult balancing act, as the former Chief Justice of Australia, Sir Anthony Mason observed, ‘a failure to strike the right balance ... will result in either an unacceptable weakening of judicial independence or inadequate accountability’.⁴

In Trinidad and Tobago, the Constitution contains a presidential impeachment mechanism and a separate mechanism for the removal of judges. Although the method of removing judges is informally referred to as impeachment, it is not initiated by politicians or undertaken by the legislature (unlike the use of impeachment to remove federal judges in the US).⁵

Section 35 of the Constitution provides for the removal of the President. Paragraphs (a)–(d) set out the grounds on which a president can be removed from office. The grounds are broad and *inter alia* cover incapacity, breaching of the Constitution, misbehaviour and endangering national security. The procedure for removing the President is set out in section 36. Unlike the operation of impeachment under the US Constitution, which only involves the House of Representatives and the Senate in the determination of the process and outcome, section 36 involves the House of Representatives, the Senate and a tribunal constituting the Chief Justice and four other senior judges. The judges’ role is not to approve the decision to impeach, but rather to ‘investigate the complaint and report on the facts to the House of Representatives’. The decision as to whether to remove the President is that of the legislature and not the judiciary. There is also a mechanism to remove the Prime Minister as section 77 permits the removal of a Prime Minister after a vote of no confidence by a majority of the members of the House of Representatives.

The removal of judges is provided for under section 137. It is important to note that the sole way of removing a judge is section 137, and there are no alternative provisions which can be used. Section 137(1) states that a judge can only be removed from office for two reasons, which are ‘for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour’. The section is explicit that a judge cannot be removed ‘except in accordance with the provisions of this

3 Kayla Epstein, ‘[Top US Supreme Court justice rebukes Trump’s call to impeach judge](#)’ (*BBC News* 18 March 2025).

4 David Simmons, ‘Aspects of judicial independence and accountability – lessons for the Commonwealth Caribbean?’ (2007) 33(4) *Commonwealth Law Bulletin* 657–670.

5 See ‘[Impeachment of federal judges](#)’ (Federal Justice Centre nd).

section'. There are clear checks and balances built into section 137 that prevent inappropriate use of the provision. The final decision as to whether a judge should be removed under section 137(2) is made by the Privy Council. In order to get to this stage, the President must make a referral to the Privy Council, and only upon the advice of the Privy Council can the judge be dismissed by the President. Crucially, for the purposes of the present appeal, it is the Commission that will make the representation to the President that there needs to be an investigation into the judge's conduct under section 137(3) where the judge in question is not the Chief Justice. As the Privy Council noted, the Commission was 'a body whose membership is designed to ensure its independence'.⁶

Safety valves are further built into section 137(3) where, upon a referral by the Commission, the President is required to 'appoint a tribunal which shall consist of a chairman and not less than two other members'. For judges under investigation (other than the Chief Justice) the President must appoint the tribunal 'in accordance with the advice' of the Prime Minister 'after consultation with the Judicial and Legal Service Commission'. The members of the tribunal must be judges. The President can only make a referral to the Privy Council where the tribunal recommends this. Significantly, the determination at all stages is conducted by judicial office holders and the Commission, and the President's role is to act as a conduit to make a referral. In the event that the Privy Council advises that the judge should be dismissed, the wording of section 137(2) is clear that the President must do so.

THE BROADER CONTEXT OF JUDICIAL INDEPENDENCE

As Douglas Mendes SC observes, '[u]nder the Constitution of Trinidad and Tobago, the judiciary enjoys a high degree of protection from outside influence'.⁷ The removal process 'is cumbersome but more importantly is insulated from executive influence'.⁸ Trinidad and Tobago's retention of the referral process to the Privy Council was not the norm for Commonwealth member states:

The provision of external scrutiny has not been constant in Commonwealth jurisdictions since independence ... At the time of independence, it was standard practice for new Commonwealth member states which had adopted the *ad hoc* tribunal system to provide that any tribunal decision which recommended the removal of a judge should automatically be referred to the Privy Council for confirmation.

6 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 6.

7 Douglas Mendes, 'Judicial independence and the administration of judiciary in Trinidad and Tobago' (2000) 6 (3/4) *Caribbean Dialogue* 89–98, 92.

8 *Ibid* 92.

As these states withdrew from the appellate jurisdiction of the Privy Council, they also abolished this referral procedure. Five independent Commonwealth jurisdictions still retain this referral jurisdiction ... In all other jurisdictions the *ad hoc* tribunal effectively became the final decision-maker. Although the cutting of ties with the Privy Council explains why that court no longer has a role in those jurisdictions, it does not justify the decision to abandon any appellate check.⁹

As the Privy Council is the final appellate court, there has been criticism that Trinidad and Tobago has not fully decolonised as it retains vestiges of colonialism. Sir Dennis Byron, the President of the Caribbean Court of Justice, put this in stark terms: 'Trinidad and Tobago was once a colony. Today, it is an independent republic. But its independence does not include judicial independence as the final appellate court is still the colonial Privy Council.'¹⁰ Byron added, '[s]peaking for myself it is a bit embarrassing'.¹¹ This colonial vestige is controversial among academics.¹² Trinidad and Tobago's decision not to accept the appellate jurisdiction of the Caribbean Court of Justice is despite the role it played in funding the creation of the court and the fact that the court is located in Trinidad and Tobago.¹³

The Law Association of Trinidad and Tobago noted that the security of tenure enjoyed under the Constitution meant that it was difficult to hold judges accountable for their performance (given the requirement of misbehaviour):

It is significant however, that apart from infirmity, the only ground for termination is misbehaviour. Short of overtly criminal conduct such as bribery, the misconduct must be so serious as to undermine public trust in the Judiciary and the rule of law. The bar for removal is, understandably, quite high. What this means is that issues such as persistent delays in delivering judgments or ethical breaches which might exercise the minds of the public are unlikely to lead to termination if the judge is in fact impeached on those grounds. Moreover, it is difficult

9 'The appointment, tenure and removal of judges under Commonwealth Principles: a compendium and analysis of best practice' (Bingham Centre for the Rule of Law 2015) 101.

10 Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice, 'Restoring public confidence in the independence of the judiciary' (Speech given at Trinidad and Tobago Transparency Institute Annual Fundraising Dinner 16 November 2015) 2.

11 Ibid 3.

12 See, for example, Richard Albert, 'Constitutional reform in the Caribbean' (2017) 216 *Election Law Journal* 263–276.

13 See Derek O'Brien, 'The end of the Caribbean Court of Justice? On failed constitutional referendums in Grenada, and Antigua and Barbuda' (*Constitutionnet* 26 November 2018).

to conceive of any sanctions which could effectively influence a judge's performance which do not trigger the Section 137 procedures.¹⁴

The consequence was that as 'it is virtually impossible to remove a judge ... it means that the appointment of judges takes on heightened significance. There should be little room for error in selection since, if mistakes are made, they would be very difficult to correct.'¹⁵ We can see this concern played out in the strategy adopted by the Commission in regards to how to find a practical solution to the part-heard cases of *Ayers-Caesar*.

Commenting on the removal procedure (which was similar to Jamaica's), Derek O'Brien noted that the procedure was intended to ensure that this:

would cause the Prime Minister to give very serious consideration at the outset before recommending that the question of a judge's removal should be investigated by a tribunal, and would discourage the tribunal from making unmeritorious recommendations for the removal of a judge.¹⁶

As the former Chief Justice of Barbados, David Simmons argued, 'the Constitutions of Commonwealth Caribbean States provide ample security of tenure for the senior judiciary ... Removal of a judge is not a light undertaking. So, the Constitutions embody an elaborate procedure to secure fairness for the judge.'¹⁷

In its assessment of Trinidad and Tobago's judicial system, the International Commission of Jurists stated that:

In practice, the Trinidadian judiciary fiercely safeguards its independence and attempts to give full effect to the constitutional rights of accused persons in both civil and criminal proceedings. Unfortunately, judicial vigilance often leads the courts into direct conflict with authoritarian executive and legislative tendencies.¹⁸

The International Commission of Jurists was critical of the executive, as by questioning the 'legitimacy of the judiciary's work ... [it] has effectively pitted authoritarian political party and racial group interests against the activities of an independent adjudicative system, which hinders the latter's ability to render substantive justice.'¹⁹

14 'Report of the Committee on Judicial Appointments' (Law Association of Trinidad and Tobago June 2018) 31.

15 Ibid 32–33.

16 Derek O'Brien, 'The Commonwealth Caribbean and the Westminster model' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press 2020) 152.

17 Simmons (n 4 above) 661.

18 'Trinidad and Tobago – attacks on justice' (International Commission of Jurists 2002) 358.

19 Ibid 358–359.

Race plays a significant factor in how Trinidad and Tobago functions given the tensions existing largely between Afro-Caribbean and Indo-Caribbean sections of the population.²⁰ As Se-shauna Wheatle observes, '[t]hese historical tensions ... are now reflected in the divide between major parties and political factions, which primarily run along racial, rather than ideological lines.'²¹ As illustrative of this, Terrence W Farrell gives the example of the disciplinary enquiry into Chief Justice Satnarine Sharma after the Chief Magistrate had made allegations against him.²² The tribunal that investigated this matter (including Lord Mustill as the Chair) was extremely critical of what had happened:

The picture presented to this Tribunal almost defies belief. ... The air was full of rumour, innuendo and gossip, around and across deep political (and, we are forced to say, ethnic) divides. At least within this narrow field of view, the concept of the separation of powers seems to have been ignored. We need not go on. The picture is 'troubling' indeed, both for the Tribunal and for the peoples of Trinidad and Tobago.²³

Kate Malleson argues that '[t]he fact that the President felt the need to appoint a UK Law Lord to chair the tribunal so as to ensure that there would be no allegations of bias in its findings is in itself indicative of the deep-seated politicisation within the legal system in Trinidad'.²⁴ This need was justified, given that the tribunal's report 'left no doubt about the political motivation behind much of the behaviour of the leading legal figures involved'.²⁵

Farrell argued that the public have low trust in the judiciary of Trinidad and Tobago,²⁶ citing research by Selwyn Ryan, surveys carried out in March 2000 had 56 per cent of respondents stating that they had no trust in the judiciary.²⁷ Farrell showed that low public trust was a regular feature, as:

20 Se-shauna Wheatle, 'Constitutional principles: forging Caribbean constitutionalism' in Albert et al (n 16 above) 81.

21 Ibid 82

22 Terrence W Farrell, '[Judicial conduct in the Caribbean](#)' (2021, paper originally delivered on 31 October 2019 at Caribbean Association of Judicial Officers, Belize) 18.

23 Sir Vincent Floissac, Mr C Dennis Morrison QC and Lord Mustill, 'In the Matter of an Enquiry Under Section 137 of the Constitution of Trinidad and Tobago, Report of the Tribunal' (14 December 2007).

24 Kate Malleson, 'Promoting judicial independence in the international courts: lessons from the Caribbean' (2009) 58 *International and Comparative Law Quarterly* 671–687, 676.

25 Ibid.

26 Farrell (n 22 above) 3–4.

27 Ibid 3.

[i]n 2010, the World Values Survey asked respondents in Trinidad and Tobago whether they had confidence in various institutions. In respect of the 'courts', 31.2% of respondents had 'quite a lot' or 'a great deal' of confidence, while 44.5% had 'not very much' and 16.7% had 'none at all'.

However, Farrell noted that respondents might have conflated the judicial system to include other organisations such as the police.²⁸ In terms of what may cause this low level of trust, Farrell pointed to the problem of judicial conduct, as '[t]he Caribbean, especially Trinidad and Tobago, has produced a disproportionate number of the cases involving controversial judicial conduct'.²⁹ The Law Association of Trinidad and Tobago in 2018 noted that '[i]n the period after Independence, the Judiciary has experienced its share of difficulties and conflict which became public and arguably impacted the public's perception of the Judiciary and its confidence in the administration of justice'.³⁰ It noted that the evidence suggested that, 'the approval rating had been declining over successive surveys from 2012 to 2016'.³¹

Furthermore, Caribbean courts are notoriously slow and Farrell gives an example of the *Sookar* case that was heard in 2000 and the judgment only delivered in 2012.³² In his judgment Justice Ricky Rahim said that this:

was highly unsatisfactory and unacceptable having regard to the continuing duty of judges and the judiciary as a whole to ensure that decisions are given in a timely manner so as not to impose injustice on litigants ... [it] erodes public confidence in the system of justice to which the nation subscribes and in the judiciary as an independent institution.³³

It is within this context that Farrell referred to the present case involving Ayers-Caesar and the impact that her appointment to the High Court has had on her previous cases.³⁴

28 Ibid 4.

29 Ibid 13.

30 'Report of the Committee on Judicial Appointments' (n 14 above) 10.

31 Ibid 11.

32 Farrell (n 22 above) 13.

33 *Sookar v The Attorney General* CV 2010-04777 (unreported).

34 Farrell (n 22 above) 13.

THE CASE: MARCIA AYERS-CAESAR v THE JUDICIAL AND LEGAL SERVICE COMMISSION

The appeal before the Privy Council concerned the lawfulness of the request for Ayers-Caesar (the respondent) to resign as a High Court judge. Ayers-Caesar had served as the Chief Magistrate of Trinidad and Tobago from 2010 to 2017 before her appointment to the High Court on 12 April 2017. Prior to being appointed as Chief Magistrate she had joined the magistracy in 1992.³⁵ The Chief Magistrate was responsible for the Courts of Summary Criminal Jurisdiction and Petty Civil Courts and reported to the Chief Justice.³⁶ Ayers-Caesar resigned from the High Court on 27 April 2017, after just 15 days. The decision of the Privy Council related to the circumstances that led Ayers-Caesar to tender her resignation.

As a judge, Ayers-Caesar was appointed by the President.³⁷ As discussed above, judges enjoy security of tenure and can only be removed pursuant to section 137 of the Constitution. Any other attempt to remove a judge will be unlawful. As the Privy Council observed:

The limited grounds on which judges can be removed from office under section 137, and the nature of the procedure laid down in that section, reflect the Constitution's recognition of the importance of protecting judicial independence from the executive, as a vital aspect of governance in accordance with the rule of law.³⁸

Ayers-Caesar could only have been dismissed in the event of her inability to carry out her functions or her misbehaviour and this would require the Privy Council to recommend her dismissal to the President. The Privy Council's role gives judges the protection of an independent court based outside of the region, as the Privy Council is the arbiter of whether she could be dismissed. This presents a strong model of the separation of powers, with the legislature having no role, and the executive's role limited to following the procedure and having no discretion as whether to follow the Privy Council's recommendation.³⁹ This was recognised by the Privy Council:

section 137 addresses the need to protect the judiciary against the threat to judicial independence, and therefore to the impartial application of the law, which would arise if the removal process could be used by the

³⁵ *Marcia Ayers-Caesar v The Judicial and Legal Service Commission; The Attorney General of Trinidad and Tobago* [2023], Civil Appeal No S241 of 2021, para 1 (per Mendonça JA).

³⁶ See [Judiciary Trinidad and Tobago](#).

³⁷ Constitution of Trinidad and Tobago, s 104(1).

³⁸ *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 5.

³⁹ Constitution of Trinidad and Tobago, section 137(2) states that a judge 'shall be removed' by the President where the Privy Council advises that the judge should be removed. The language is clear that the President has no discretion.

executive to penalise or intimidate judges. It achieves that objective by ensuring that the critical decisions are taken by bodies which are independent of the executive.⁴⁰

It is necessary now to consider why Ayers-Caesar resigned as a High Court judge on 27 April 2017. The crucial matter here related to Ayers-Caesar's previous role as Chief Magistrate. Ayers-Caesar's appointment to the High Court meant that she would no longer be available to carry out her previous role, which could affect any ongoing matters for which she was personally responsible. As the Privy Council observed, 'there were some expressions of concern over the number and nature of the part-heard matters which she would leave behind in the Magistrates' Court.'⁴¹ In response to these concerns, the Chief Justice contacted Ayers-Caesar on 10 April and enquired about this. Ayers-Caesar stated that the majority of the ongoing part-heard work 'could be re-listed before another magistrate without causing undue delay'.⁴² Having received Ayers-Caesar's explanation, the Chief Justice requested a list, which Ayers-Caesar sent to him on 11 April. There were 28 cases on the list and, importantly, 'there was no indication that oral evidence had already been heard in any of the cases'.⁴³ The Chief Justice offered the opportunity for Ayers-Caesar to deal with the part-heard matters before being appointed to the High Court. This offer was declined.

However, on 20 April 2017, the press reported that:

prosecuting counsel [in a case Ayers-Caesar had not included in the list] expressed concern that cases part-heard by [Ayers-Caesar] and close to completion would have to start again before another magistrate, with the result that public money would be wasted and defendants would have to spend longer in custody awaiting trial.⁴⁴

A new list was prepared independently of Ayers-Caesar which contained 52 part-heard cases. Unlike Ayers-Caesar's description of the earlier list, here '[w]itnesses had been cross-examined in most of the cases. In some of them, the prosecution had closed its case'.⁴⁵ Ayers-Caesar had met with the Chief Justice on 25 and 26 April to discuss the matter. It would appear that the events of 26 April were pivotal, as 'there was a fracas at a Magistrates' Court involving several accused in custody, when they protested about the adjournment of their cases, which had been part-heard by the claimant', and the Law Association of Trinidad

40 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 6.

41 *Ibid* para 9.

42 *Ibid*.

43 *Ibid*.

44 *Ibid* para 10.

45 *Ibid* para 12.

and Tobago was concerned about the impact Ayers-Caesar's departure as Chief Magistrate would have.⁴⁶

Clearly, the circumstances around Ayers-Caesar's departure were unfortunate and had consequences for the part-heard cases that she left outstanding. At this point, the offer of the Chief Justice on 11 April 2017, had it been accepted, would have avoided the negative public perception.

On 27 April 2017, the Chief Justice met with the Commission 'to discuss the course of action that had to be taken with respect to Mrs Marcia Ayers-Caesar's appointment'.⁴⁷ The minutes of the meeting record that 'the chairman [the Chief Justice] was of the view that Mrs Ayers-Caesar's position had become untenable, however he wanted the Commission's views as to the course of action that would be warranted'.⁴⁸ The meeting discussed what had happened and whether Ayers-Caesar had misled the Chief Justice and Commission about the extent and nature of her unfinished work.⁴⁹ Crucially, the minutes recorded the Commission's conclusion that Ayers-Caesar, as a consequence of her actions, could face a disciplinary enquiry.⁵⁰ The decision of the Commission was that:

Mrs Ayers-Caesar be given the option of withdrawing from the High Court bench and returning to the magistracy to discharge her professional responsibilities; and in the event she refuses to withdraw, the Commission would consider instituting disciplinary action in accordance with section 137 of the Constitution of Trinidad and Tobago.⁵¹

This was put to Ayers-Caesar by the Chief Justice in the afternoon and, as a consequence, Ayers-Caesar resigned.⁵² The approach of the Commission (which included the Chief Justice as its Chair) was to find a practical solution to the part-heard cases. By declaring that it believed the threshold had been met to trigger an enquiry under section 137, the Commission effectively presented Ayers-Caesar with no option but to resign or to face a disciplinary enquiry.

This solution may have been attractive to the Commission given the fact there were so many outstanding part-heard cases. However, the communication to Ayers-Caesar that the alternative to her resignation was a disciplinary enquiry was a threat, and one that succeeded in achieving its objective. Ayers-Caesar resigned without the need

46 Ibid para 13.

47 Ibid para 14.

48 Ibid.

49 Ibid para 15.

50 Ibid para 16.

51 Ibid 16.

52 Ibid para 17.

to follow the procedure under section 137, which, even if there has been an enquiry, this does not guarantee that the outcome would be a recommendation by the Privy Council that she should be dismissed. However, despite the immediate attractiveness of the solution, the reality was that the Commission had sidestepped section 137 and the protection it offered by way of security of tenure and undermined this important constitutional safeguard. In the Court of Appeal, Mendonça JA addressed the motivation of the Commission, finding that it was not due to ‘any malice or malicious intent’, but rather to offer an ‘urgent solution’ and ‘without perhaps taking the time to properly assess the full consequences’.⁵³ Bereaux JA was critical of the Commission, noting that from the Commission’s perspective ‘[t]here was need for a “quick fix”, but that ‘section 137 is not about “quick fixes” ... However well intended’.⁵⁴

Imagine for a moment a different set of facts, and that Ayers-Caesar had disagreed with colleagues who were critical of her decisions as a High Court judge, or if her judging was found to be too deferential or activist, then a solution offered by the Commission in a similar vein looks even more stark as a way to circumvent the protection afforded by section 137. On the present facts, it is apparent that the Commission had found a solution that would benefit the administration of justice and prevent further delays. But, as the Privy Council found, this is not the correct approach.

THE COURT OF APPEAL’S DECISION

The Court of Appeal of the Republic of Trinidad and Tobago in *Marcia Ayers-Caesar v The Judicial and Legal Service Commission; The Attorney General of Trinidad and Tobago* (2023)⁵⁵ was comprised of Mendonça JA, Yorke-Soo Hon JA and Bereaux JA. The Court held that the Commission had unlawfully used coercion and threats to induce the resignation of Ayers-Caesar and had circumvented section 137. The Court of Appeal reached a different decision to Harris J who heard the case in the High Court and had found against Ayers-Caesar. In his judgment, Mendonça JA was clear that the Commission’s role ‘in the removal of a Judge is limited’, as it initiates the process under section 137 but ‘does not recommend the revocation of the Judge’s appointment. It makes no decision or determination in that regard.’⁵⁶ The Commission’s role in initiating the disciplinary enquiry was not merely to respond to complaints by making the representation to begin

53 *Marcia Ayers-Caesar* (CA) (n 35 above) para 65.

54 *Ibid* para 156.

55 *Ibid*.

56 *Ibid* para 15.

an enquiry, as the Commission ‘must satisfy itself that the complaint against the Judge is sufficiently serious to warrant representation to the President. In that process the [Commission] must act fairly.’⁵⁷ Mendonça JA accepted that the trial judge had been wrong not to take into account Ayers-Caesar’s evidence as to what had happened at the meeting with the Chief Justice on 27 April 2017. Accepting Ayers-Caesar’s evidence (through contemporaneous WhatsApp messages and the evidence of her husband), Mendonça JA held ‘in my view [the evidence] support[s] the Appellant’s case that at the time of her resignation she was acting under threat or pressure and that caused her to resign’.⁵⁸ The option of resigning or facing a possible disciplinary enquiry, ‘points to a threat made to or pressure or coercion put on her to resign’.⁵⁹ In Ayers-Caesar’s affidavit of 19 July 2017, she had recounted that:

I was horrified by what I was hearing since it was clear to me from what the Chief Justice said that a decision had already been made by the JLSC and that I had no choice but to resign as a High Court Judge or have my appointment as a High Court Judge revoked by the President. The Chief Justice also told me that he was under pressure from the President and that an appointment had already been sought for me to go to President’s House later that day to deliver my resignation to the President ... I was distraught and felt that I had no real choice but to sign the letter of resignation and the media release and to accede to resigning since it was clear to me that my resignation had already been orchestrated and that this was a done deal.⁶⁰

Mendonça JA held that the Commission had given its authority to the Chief Justice in order to communicate its decision, which was designed to pressure and coerce Ayers-Caesar to resign.⁶¹ It was apparent that the Commission had reached the decision that the ‘threshold’ of triggering section 137 had been met and, presumably, it would refer the matter to the President if Ayers-Caesar did not resign. Mendonça JA was critical of the Commission, as it went beyond its remit and had sought Ayers-Caesar’s resignation using threats and ‘unlawful pressure’, rather than relying on section 137.⁶² The criticism was stark: ‘[t]hey bypass the constitutional safeguards for securing judicial independence, a vital element in our democracy’.⁶³

Having regard to section 137, even if the Commission had referred the matter to the President, then this would not automatically result

⁵⁷ Ibid para 16.

⁵⁸ Ibid para 44. See also para 55.

⁵⁹ Ibid para 44.

⁶⁰ Ibid para 28.

⁶¹ Ibid paras 63–64.

⁶² Ibid paras 64 and 69.

⁶³ Ibid para 64.

in Ayers-Caesar's dismissal. Mendonça JA accepted that Ayers-Caesar had reason to believe that the Chief Justice would advise the President to dismiss her, and that it was believable that Ayers-Caesar, as a new judge, would not have a thorough understanding of section 137.⁶⁴ This approach is sensible, since it would be unreasonable to expect Ayers-Caesar to have fully understood the removal procedure and arguably what happened would have realistically precluded her from finding out more. Notwithstanding the extent of her knowledge of section 137, there was still a threat that the Commission would refer the matter to the President (even if he could not then just dismiss her) and Mendonça JA observed that no judge would want to endure disciplinary proceedings.⁶⁵ Considerable emphasis was placed on the consequences for judicial security of tenure, as the Commission had deprived Ayers-Caesar of the protections accorded to her under section 137.⁶⁶ This eroded 'a critical safeguard in securing judicial independence which is a vital element in any modern democratic constitution such as ours. It is the role of this Court to uphold the rule of law.'⁶⁷

In her judgment, Yorke-Soo Hon JA was critical of the Commission's 'lack of due diligence'.⁶⁸ In any event, Yorke-Soo Hon JA held that section 137 did not apply as the conduct took place before Ayers-Caesar's appointment.⁶⁹ This was also the view of Bereaux JA, who held that misbehaviour 'could only be misbehaviour while holding the office of judge' which would mean that the complaint about her part-heard cases and misleading the Chief Justice related to her conduct before becoming a judge. Importantly, if section 137 would not have applied, then 'the threat of disciplinary action was an empty one. That it was sufficient to coerce Ayers-Caesar J into resigning her office, makes the breach of section 137 all the more egregious.'⁷⁰

In his judgment, Bereaux JA held that, '[t]he threat of "considering" disciplinary action was intended to pressure Ayers-Caesar J into resigning (however euphemistically described)'.⁷¹ This was because the Commission had determined that the threshold had been met and it was possible that disciplinary action would be initiated.⁷² The Commission had acted unlawfully when giving its 'ultimatum'.⁷³ It

64 Ibid para 78.

65 Ibid para 79.

66 Ibid para 86.

67 Ibid para 87.

68 Ibid para 91.

69 Ibid para 93.

70 Ibid para 160.

71 Ibid para 139.

72 Ibid.

73 Ibid para 141.

was contrary to the Constitution as '[a] forced resignation using the threat of initiation of disciplinary proceedings to pressure a judge into resignation is an arbitrary removal from judicial office. It bypasses the constitutional process with all the protections that are accorded the judge.'⁷⁴ Bereaux JA held that Ayers-Caesar's faced a real threat of disciplinary action and had this happened it would have damaged her reputation, especially given the size of Trinidad and Tobago, which meant that there was an incentive to resign in order to avoid 'the odium likely to accompany the public revelation that such a process has been started'.⁷⁵

THE PRIVY COUNCIL'S DECISION

The Privy Council was comprised of Lord Reed, Lord Hodge, Lord Stephens, Lady Rose and Lady Simler. Lord Reed delivered the judgment on behalf of the Board. The Privy Council had to answer four key questions of law. The first of these questions was whether Ayers-Caesar's conduct fell within the ambit of section 137.⁷⁶ The Board noted, although importantly disagreed, with the view of Yorke-Soo Hon JA and Bereaux JA that the conduct complained about took place prior to her appointment and therefore was not within the scope of section 137.⁷⁷ This meant that Ayers-Caesar's conduct could be investigated, even if the Privy Council declined to comment on whether the concerns relating to Ayers-Caesar had been proven.⁷⁸

The Privy Council then proceeded to explain its reasoning and why it had interpreted the temporal occurrence of misconduct differently than the Court of Appeal. Making reference to previous decisions of the Privy Council in *Lawrence v Attorney General of Grenada* (2007)⁷⁹ and *Hearing on the Report of the Chief Justice of Gibraltar* (2009)⁸⁰ that concerned the meaning of inability and misbehaviour when addressing the ability of a judge to carry out their judicial function, the Privy Council concluded that one could look at the impact where it had an immediate effect or related to the public perception of the judge's conduct.⁸¹ The Privy Council explained that:

there is nothing in the analysis in those cases which would logically confine its ambit to conduct occurring during the term of office. Nor

74 Ibid para 146.

75 Ibid para 158.

76 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 18.

77 Ibid para 22.

78 Ibid paras 22–23.

79 *Lawrence v Attorney General of Grenada* [2007] UKPC 18; [2007] 1 WLR 1474.

80 *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43.

81 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 33.

would the underlying aim of the power of removal for inability or misbehaviour, namely, to protect the due administration of justice, require such a limitation on its ambit.⁸²

This approach was supported by the decision of the Supreme Court of Canada in *Therrien v Minister of Justice* (2001).⁸³ The rationale given by Gonthier J was that the past conduct of a judge was relevant when assessing whether they could perform their judicial functions, so that it could be determined:

based on that [prior conduct], whether it may reasonably undermine public confidence in the incumbent of the office. In this case, the appellant's actions, though predating his appointment, were alleged to have had that kind of impact on the performance of his functions.⁸⁴

The Privy Council was clear that there was a public policy argument of including past conduct to help determine whether section 137 was satisfied, as the aim of section 137 would not necessitate the exclusion of previous conduct.⁸⁵ The Privy Council posed an example of 'where it emerged that the judge had committed a serious criminal offence prior to his or her appointment' and why this would fall within the ambit of section 137.⁸⁶ Indeed, it viewed the facts and circumstances of the present case as being capable of being covered by section 137.⁸⁷

The second question considered by the Privy Council was whether the 'Commission's decision that the information before it triggered and met the threshold for disciplinary enquiry' was 'unlawful by reason of procedural unfairness?'⁸⁸ The Privy Council referred to the decision in *Rees v Crane* (1994)⁸⁹ and the requirement that the Commission owed a judge the duty to act fairly.⁹⁰ This would require the judge to be notified of the allegations and be given a right to reply.⁹¹ As the Privy Council noted, Ayers-Caesar might have been able to rebut the allegations and it outlined in detail how she might have done this.⁹² In terms of what had actually happened, the Privy Council noted that Ayers-Caesar was not provided with the opportunity to rebut the allegation, nor was she told by the Commission that on 27 April 2017 it had discussed whether

82 Ibid.

83 *Therrien v Minister of Justice* [2001] 2 SCR 3.

84 Ibid para 58 and *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 34.

85 Ibid para 33.

86 Ibid.

87 Ibid para 36.

88 Ibid.

89 *Rees v Crane* [1994] 2 AC 173.

90 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 37.

91 Ibid para 38.

92 Ibid para 39.

to begin the process to remove her.⁹³ The Commission reached the decision that, based on what it knew (and without having informed Ayers-Caesar or heard her account), section 137 was triggered and 'met the threshold for representing to the President that the question of removing her ought to be investigated'.⁹⁴ This was unfair to Ayers-Caesar as the Commission's decision had been reached without her involvement. Therefore, now that the decision was reached, it would be harder for Ayers-Caesar to convince the Commission to reach a different outcome than if she had been given the opportunity to make her representations beforehand.⁹⁵

The third question was whether the option communicated to the respondent by the Chief Justice on behalf of the Commission was unlawful given its inconsistency with what was required by section 137. The Privy Council made reference to *Rees v Crane*, a case on appeal from Trinidad and Tobago,⁹⁶ where Lord Slynn of Hadley had stated:

It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways.⁹⁷

It observed that 'the Commission has a vital but limited role' which was to make a representation to the President that there should be an investigation, and therefore '[i]t is no part of the Commission's role, where it has found that there are circumstances justifying such a representation, to seek to procure the removal of the judge by other means, such as resignation'.⁹⁸ Thus, the Commission's decision that Ayers-Caesar should be offered a choice to resign or face a possible disciplinary enquiry was unlawful.⁹⁹ The choice it offered Ayers-Caesar was not advice, nor could the fact that the Chief Justice had communicated it to her mean that he was offering advice as he was not undertaking his pastoral role, but rather he was exercising his disciplinary role.¹⁰⁰

The final question as to whether the Commission brought about Ayers-Caesar's resignation was answered in the affirmative. The Privy Council observed that pressure had been applied on Ayers-Caesar and that '[i]t is unsurprising that she responded by agreeing to resign'.¹⁰¹

93 Ibid para 40.

94 Ibid.

95 Ibid para 43.

96 *Rees v Crane* (n 89 above).

97 Ibid paras 187–188.

98 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 48.

99 Ibid para 51.

100 Ibid para 50.

101 Ibid para 53.

Although the Board disagreed with Yorke-Soo Hon JA and Breaux JA on the issues of whether Ayers-Caesar's conduct fell within the ambit of section 137, it nevertheless upheld the Court of Appeal's decision as to the unlawfulness of the Commission's handling of this case. The conduct of the Commission and of its Chair, the Chief Justice, demonstrated the problems of trying to find a quick solution to circumvent the fact that the Constitution afforded judges a high degree of security of tenure. Had the Commission not embarked on the journey that it did which ended with Ayers-Caesar resigning, and rather had it performed its functions lawfully, then it could have made a referral to the President (subject to the requirement of fairness and the need to communicate the allegations to Ayers-Caesar) and this would have led to a disciplinary enquiry. Even if there had been such an enquiry, it is by no means certain what the recommendation of the Tribunal or the Privy Council would have been, if it had indeed got that far. It is likely that Ayers-Caesar would have remained in post, notwithstanding the public concern about the part-heard cases. This would have been a much-needed learning curve for all those involved, with more due diligence needing to be undertaken in the future prior to the appointment of a judge. Furthermore, once it was decided that a judge should be removed, the Chief Justice and the Commission would need to ensure that they followed the Constitution and not what might appear to be an expedient solution. The Court of Appeal had been clear that Ayers-Caesar's conduct should not be relevant to its decision, as the issue was about the lawfulness of the Commission and its compliance with the Constitution. Likewise, the Privy Council had reflected that Ayers-Caesar, had she been given the opportunity to do so, might have been able to rebut the allegations. Having had regard to the background facts and the evidence considered by the Court of Appeal, it is difficult to conclude other than that Ayers-Caesar was given little choice but to resign and that it was clear that everyone expected her to do so.¹⁰²

The Privy Council relied on jurisprudence from previous Privy Council decisions and the Supreme Court of Canada to interpret section 137 to permit the inclusion of conduct that had occurred prior to appointment. This conclusion is attractive as the judge's ability to carry out their judicial function with public confidence can never be separated from the totality of the judge's career, namely, anything that emerges about the judge's career or personal life prior to their appointment may well have an impact on their ability to do their job. If this conduct was not capable of triggering section 137, then this would be problematic, as the judge could remain in office regardless of public

102 See, for example, the account from Ayers-Caesar in *Marcia Ayers-Caesar* (CA) (n 34 above) para 28.

opinion and losing the confidence of the legal profession. However, is the answer to take the approach adopted by the Privy Council, or rather to read section 137 as the Court of Appeal did? There is merit in limiting inability to perform judicial functions and misbehaviour to events or conduct that occurred post-appointment. Surely a high degree of due diligence and consultation with the legal profession could reveal areas of concern?

The fact was that, in the present case, the Chief Justice was content to accept Ayers-Caesar's account, even where there was enough uncertainty as to require an independent assessment to verify the extent of her outstanding workload. This due diligence and consultation was lacking here and, as a result, Ayers-Caesar was appointed. In light of the relative size of the jurisdiction, it arguably would not have taken much more to have ascertained a more accurate account. Given the difficulties (for good reason) in removing a judge, it is surprising that a more thorough appointment process has not been undertaken. There are lessons to be learnt here for any jurisdiction that accords judges security of tenure as there may be a legitimate reason for regretting a judicial appointment. To avoid a situation such as the present case, more scrutiny would have flagged up the problem prior to appointment.

It is submitted that the Court of Appeal's approach to the scope of section 137 is preferable. This approach places the onus on those appointing judges to undertake the commensurate amount of due diligence as required by the nature of the role. It is readily conceded that there is merit in the Privy Council's reading of section 137, as such an approach helps to remedy a problem and as such offers an expedient solution to an otherwise difficult situation. The Privy Council's approach has clear merits as it removes an unsuitable person from judicial office and restores public confidence in the judiciary, whilst retaining the confidence of the legal profession. Furthermore, the Privy Council's approach arguably does not on the face of it reduce the degree of judicial security of tenure available, as removal for past conduct could only be used in appropriate circumstances.

As discussed above, the Privy Council had provided the example of a judge who has been appointed, but it then emerges that they had committed a criminal offence prior to taking judicial office. This was presented as support for the Privy Council's reading of section 137. Having such a person as a judge is damaging to the reputation of the judiciary and to public confidence in the legal system. Even if you could then rely on section 137 to remove the judge, it would still nevertheless be embarrassing (to say the least) that they were appointed as a judge in the first place. Whether, or not, they can be removed using section 137 will not entirely remedy these consequences. In the present case, Ayers-Caesar's appointment, whilst problematic, was embarrassing in

the sense that there was a lack of due diligence. The irony is that *but for* the circumstances of her appointment and her degree of candour regarding her outstanding workload, she was suitable for judicial office.

To return to the Privy Council's example, even if the judge was found to have committed a serious offence prior to being appointed to the bench, this does not mean that there is no sanction. The judge would be prosecuted by the authorities like any other citizen and if they were subsequently convicted and given a custodial sentence, then section 137 would apply as the judge would be unable to perform the functions of their office. This then would allow the judge to be removed in line with the Court of Appeal's reading of section 137. The fictional judge who has been accused of a serious criminal offence has the same right as any other individual to be presumed innocent until proven guilty, and therefore they should not be removed from the bench (save if the Constitution provides otherwise) unless they are found guilty.

Ultimately, this case highlighted the shortcomings in the judicial appointment system in Trinidad and Tobago. These shortcomings were due to human error and a failure to undertake sufficient due diligence. Whilst the Chief Justice could expect to be told the truth and not to be misled, this level of trust cannot replace due diligence, even if the Chief Justice has no reason to doubt the account he has been given. Judicial independence is key in any democracy and security of tenure is provided as it is a way of ensuring that judges have the freedom of do their job without fear of dismissal. This is required to uphold the rule of law. The Constitution of Trinidad and Tobago offered, on paper, this important protection. The drafters of the Constitution had rightly understood the importance of judicial independence and had provided for a well thought-out and transparent method of investigating a judge and ultimately to remove them from office. As Douglas Mendes SC has argued, it might be difficult to remove a judge, but the result is a strong degree of security of tenure and freedom from interference by the executive.¹⁰³ There can be no doubt that the appointment of Ayers-Caesar was regretted, but that was no justification for circumventing the important protection accorded to Ayers-Caesar by the Constitution. The case must serve as a warning to those responsible for judicial discipline (in Trinidad and Tobago and further afield) to follow the law, as the disciplinary and removal procedure is designed to secure the rule of law, and to do otherwise erodes this important constitutional protection.

103 Mendes (n 7 above) 92.



Legal and judicial responses to violence against women in Nigeria: a critical analysis of legislative frameworks and case law

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ABSTRACT

Despite an expanding body of legislation aimed at prevention and punishment, violence against women (VAW) remains pervasive and deep-rooted in Nigeria. This article critically examines VAW from a structural rather than individual perspective, arguing that, while the existing frameworks are seemingly progressive, they fall short of adequate measures for practical enforcement and victim protection. In this article, some key statutes such as the Violence Against Persons (Prohibition) Act 2015 and relevant case law have been used to highlight structural gaps, anomalies in judicial interpretations, and sociocultural underpinnings that hinder access to justice. By analysing the law's text, this article demonstrates that VAW is *inter alia* perpetuated by structures that uphold patriarchal norms, leading to unequal power relations between women and men. It is recommended that laws be enacted to reflect the realities of the day such as addressing psychological and systemic forms of VAW. This article is intended to contribute to the growing body of knowledge on the interplay between VAW, patriarchy, cultural influences, legislative actions, and judicial decisions.

Keywords: violence against women (VAW); legislative; judicial; gender-specific legislation; patriarchy.

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INTRODUCTION

Violence against women (VAW) and girls is a widespread human rights abuse and a major barrier to development. It impacts women globally and cuts across cultural, social, and economic divides.¹

A major report published by the World Health Organization (WHO) and United Nations partners states that VAW continues to be a deeply entrenched and largely neglected human rights issue worldwide, showing almost no improvement over the past 20 years.²

VAW is a specific category of gender-based harm that impacts women and girls at far higher rates than men. It includes various forms of abuse such as sexual assault, domestic violence (DV), stalking, coerced marriage, and practices like female genital mutilation (FGM).

There is a close relationship between the meanings of gender-based violence (GBV), DV and VAW. However, VAW is a particular category of GBV that addresses the kind of violence perpetrated against women just because they are women. It is an expression of gender inequality stemming from discrimination, unequal power relations, and social practices.³

The phrases ‘domestic violence’ or ‘gender-based violence’ play down the severeness of such violence by diminishing its true horror, brutality and habituation,⁴ making it seem either to occur in the family or domestic unit, or rather as a phenomenon that occurs equally between men and women. A possible interpretation of the phrases is either that such violence is more private, or it is a minor physical aggression and thereby less criminal in nature. According to the WHO, VAW is:

any act of gender-based violence that results in, or is likely to result in physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁵

To further emphasise the real nature of this type of violence, the Protocol to the African Charter on Human and People’s Rights (ACHPR) defines VAW as:

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary

- 1 Mary Ellsberg et al, ‘[Prevention of violence against women and girls: what does the evidence say?](#)’ (2015) 385 *The Lancet* 1555–1566.
- 2 World Health Organization, ‘[Lifetime toll: 840 million women faced partner or sexual violence](#)’ (WHO 19 November 2025).
- 3 World Health Organization, ‘[Violence against women](#)’.
- 4 S M Edwards, *Sex, Gender and the Legal Process* (Blackstone Press 1996) 180.
- 5 World Health Organization, ‘[Violence against women: key facts](#)’ (WHO 24 March 2024).

restrictions on or deprivation of fundamental freedoms in private or public life, in peace time and during situations of armed conflicts or of war.⁶

The above two definitions accurately capture the phenomenon by limiting the meaning to the violence directed at women. It is therefore made clear that VAW is not just random, but instead a gender-targeted action uniquely affecting women and, as such, rooted in unequal power relations that disproportionately affect them. More so, VAW is dynamic and broader in scope than expression of concerns for physical injuries that dominate literary perception of what constitutes violence.⁷ In addition to physical violence, it also includes emotional and psychological harm, as well as financial abuse,⁸ just as captured by the Protocol to the ACHPR in its definition of VAW.

In this article, therefore, the term 'VAW' has been chosen over 'GBV' or 'DV' in order to draw attention to how women are particularly and disproportionately affected by this form of violence. The term specifically highlights not only the gendered nature of the violence, whether it happens within the home, at school, or in the workplace, but also the systemic discrimination and unequal power relations that women face. This term aligns more closely with the scope and purpose of the article, which addresses the unique experiences of women in the context of gendered violence.

Having clarified the terminology, attention now turns to the phenomenon of VAW, a persistent problem across the globe, pervasive in Africa, and indeed a critical issue in Nigeria. This violence comes in different forms including physical, sexual, emotional and mental. It has been an issue that instigates reactions globally by political actors, government agencies, non-governmental organisations and even actors from the private sector. Currently, in Nigeria, VAW remains prevalent in both urban and remote areas, and, despite the measures put in place by the federal Government to mitigate violence in general, it seems the issue of VAW has not been specifically addressed. In Nigeria, common forms of VAW include rape, acid attacks, molestation, wife beating, and corporal punishment.⁹

There is no doubt that the fight against violence is a highly valued policy measure in Nigeria, but public discourse and public policy on

6 Commonwealth, 'Definitions of Violence Against Women'.

7 O Akenle and D A Busari, 'A socio-legal approach to violence against women in Nigeria' (2015) 10 LASU Journal of Social Sciences 98–120.

8 National Plan to Reduce Violence Against Women and Their Children, 'What is violence against women?'.

9 N Yusuf, 'Incidence and dimension of violence against women in the Nigerian Society: a case study of Ilorin township' (2000) 10(1) Centrepoint Journal 65–76.

men's VAW are not yet firmly established within the statutory, judicial and law enforcement frameworks. This has led to normalisation and invisibility of this form of violence, reducing the extent to which perpetrators are brought to justice, and leaving society with obvious challenges.

In this context, adopting a rights-based approach becomes crucial as it portrays VAW as a problematic human rights violation that cuts across all ages and religions and could happen anywhere – at work, school, church, on the street, or at home, and perpetrators could be loved ones, including husbands, guardians, friends and family members.¹⁰ Notably, one of the consequences is that it prevents women from pursuing education, employment or exercising their political rights and voice.¹¹ In furtherance of the above assertion, it has been maintained that across many jurisdictions, VAW is reinforced by discriminatory laws and exclusionary social norms that undermine women's opportunities for education, income and independence.¹² It accompanies shifting power relations within households and communities especially when there is resentment against women who move away from conventional roles.¹³ It is also a multifaceted phenomenon, demonstrating the interplay of factors at different levels: individual, community, and larger society.

In this article, it is crucial to mention that, in Nigeria, there is lack of insight on how this type of violence is sustained by established institutions such as the legislature and the judiciary. This research gap limits our understanding of its deep-rootedness and true nature. The lack of clear understanding of the dynamics of such violence, one might argue, leads to proffering of solutions at a micro level, which has proved inadequate. In light of the foregoing, examining the judicial and legislative responses to VAW in Nigeria is necessary in order to assess the effectiveness of the legal system in ensuring women's rights are protected. In doing so, one could argue that, in Nigeria, women's rights are not taken seriously because of many reasons including lack of faith in constituted authorities, as well as a judicial structure that allows the presence in court proceedings of people other than the victims, witnesses and lawyers, especially in matters involving matrimonial and partner relationships. These and many more factors make victims shy away for fear of breach of confidentiality. This becomes worse in sexual abuse and intimate violence cases where, because of public exposure,

10 B Obaji, 'Victims of violence against women in Nigeria' (*Your Commonwealth* 23 February 2018).

11 Selim Jehan, 'Violence against women, a cause and consequence of inequality' (*UNDP Blog* 19 November 2018).

12 Ibid.

13 Ibid.

victims might not feel comfortable to speak up when the courtroom is not a private space.

Nevertheless, as part of an effort to fight discrimination against women, the Nigerian Government became a state party to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) by its ratification in 1985 without reservations. Nigeria also signed the Optional Protocol in 2000 and ratified it in 2004. Further to complement its efforts in achieving this goal, Nigeria adopted in 2006 a framework and plan of action for the National Gender Policy with an aim to promote gender equality, women's empowerment, and to eliminate all forms of discrimination against women. Consequently, the federal and state governments adopted several legislative and policy instruments, including the Violence Against Persons (Prohibition) Act (VAPP Act 2015), which prohibits FGM, harmful widowhood and traditional practices and all forms of violence against persons in both private and public life. However, while these steps are commendable, the full enforcement of these legal frameworks is still lacking due to deep-rooted cultural and societal norms, weak enforcement and implementation, as well as legal and institutional barriers.

All things considered, this article adopts the position that VAW arises as a result of unequal power relations between women and men. It further argues that this type of violence is sustained by a lack of an adequate legal and institutional framework occasioned by pervasive patriarchal norms supported by long-existing cultural and religious influences.

LEGAL INSTRUMENTS AND HUMAN RIGHTS MECHANISMS IN NIGERIA

Despite the broad constitutional provisions regarding violence in Nigeria, there is still the need for gender-specific legal protection as these constitutional guarantees lack explicit language. This omission not only reveals a lack of legislative thoroughness, but also highlights a structural failure to address VAW as a systemic and widespread issue. It is quite agreeable that the Constitution of the Federal Republic of Nigeria 1999 guarantees the right to dignity and prohibition of torture and inhuman treatment¹⁴ as well as freedom of expression,¹⁵ but it failed to specifically address VAW. Rather, these protections are framed in loose terms, hiding the gendered nature of violence, and have consequently failed to address women as particular subjects of legal

14 Constitution of the Federal Republic of Nigeria 1999, s 34(1).

15 Ibid s 39.

concern. It can be argued that this lack of recognition is a pointer that the drafters of the Constitution framed violence through a personalised and narrow lens that diminishes the presence of patriarchal power behind such framing, thereby reinforcing the obscurity of women's experiences within the legal order. It may, however, be argued that section 34(1)(a) of the 1999 Constitution¹⁶ indirectly guarantees protection against domestic or sexual violence by providing for the right to dignity of a person by stating that 'Every individual is entitled to respect for the dignity of his person' and it also prohibits torture or 'inhuman or degrading treatment'. Obviously, VAW and sexual violence are forms of torture and an infringement on personal dignity and honour. Nonetheless, on strict examination of the section, one might say that it does not fully provide a framework that addresses the continuum of violence inflicted on women both in private and public spaces.

Resulting from this constitutional inadequacy, the VAPP Act 2015¹⁷ was enacted to assuage the persistent critiques of the legal system. The VAPP Act 2015 not only criminalises rape, domestic abuse, FGM and other forms of violence, but it is also a normative shift that expands longstanding definitions of violence and rape. As an illustration of such a shift in standards, section 1 broadens rape definition beyond penile penetration to encompass a wide range of non-consensual sexual acts, completely deviating from older laws. In a similar manner, sections 14 and 16 acknowledge the complex realities faced by women through violence by bringing various forms of violence, such as emotional abuse, psychological abuse, and abandonment within the scope of VAW.

Notwithstanding the progressive nature of the VAPP Act 2015, its major limitation stems from its applicability within the Federal Capital Territory (FCT) of Nigeria. This lack of nationwide applicability results in a patchwork of protections, leading to inequalities in women's access to justice depending on the location of the victim. For example, while states like Anambra, Enugu, and Kaduna have made a positive effort to domesticate the Act, various other states have not followed suit, leaving many women without the protection that the VAPP Act 2015 affords. More so, the Act focuses more on criminalisation without making adequate provisions for prevention, rehabilitation of offenders, or long-term support for survivors. Therefore, while the Act is symbolically significant, its emphasis on punishment reveals a legal reform where criminalisation takes primacy over the need to dismantle structural inequalities that give rise to VAW.

From the foregoing, it suffices to say that the interplay between the Constitution and the VAPP Act 2015 highlights the inadequacy of a

16 Ibid s 34(1)(a).

17 VAPP Act 2015.

legal system that has historically made invisible women's experiences of violence. This situation calls for the need to not only expand legal coverage, but also to reimagine justice as a phenomenon that captures the lived experiences of women by addressing violence as an expression of deep-rooted gender hierarchies.

In like manner, while jurisdictional laws like the Protection Against Domestic Violence Law of Lagos State (PADVL) 2007,¹⁸ and Ekiti State Gender-Based Violence (Prohibition) Law 2011 (amended 2019)¹⁹ offer comprehensive legal frameworks to prevent and address VAW as well as to protect victims and provide legal and social support mechanisms, they not only lack the required public awareness but they also suffer from deep-rooted patriarchal values which challenge and hamper access to justice for GBV victims/survivors and their families.²⁰

Equally, notwithstanding the importance and roles played by the Criminal Code Act 1916²¹ and Penal Code Act 2004²² in Nigerian Criminal jurisprudence, significant limitations reduce their adequacy in the protection of women against violence. The Criminal Code, applicable in the South of the country, in its sections 357 and 358 excludes marital rape from its definition of rape, reinforcing longstanding and outdated notions of spousal consent. More so, section 360 validates gender-based discrepancies in sentencing by prescribing a lower penalty for indecent assault against women compared to similar crimes against men (section 353), leading to legal ambiguities. The Penal Code, applicable in the North, similarly, reinforces patriarchal norms that both marginalise and subordinate women. For example, section 282(2) clearly normalises non-consensual marital sex by particularly excluding sex within marriage from its definition of rape unless the wife is below puberty, thereby removing spousal rape as a legal category. More so, of special note is the right of the husband to 'correct' his wife as long as grievous harm is not inflicted (section 55). This section legitimises violence in the name of discipline and further reinforces androcentric interpretation of legal texts, exposing how Nigeria's approach to VAW is shaped by gender biases and sociocultural ideologies.

Similarly, the Child Rights Act 2003 (CRA 2003)²³ primarily provides for the rights and welfare of children to mitigate GBV against girls. However, while sections 11(2)(b) and 31 prohibit harmful

18 PADVL 2007.

19 Ekiti State Gender-Based Violence (Prohibition) Law 2019.

20 Invictus Africa, 'Ekiti State: Womanity Index (GBV) Ranking 2023' (Invictus Africa 2023).

21 Criminal Code Act 1916 (Cap C 38 LFN 2004).

22 Penal Code Act 2004, Federal Republic of Nigeria (Cap 53 LFN 2004).

23 Act No 26 of 2003, Child's Rights Act 2003 (Nigeria) (CRA 2003).

traditional practices and sexual exploitation by offering protection against violence that disproportionately affects female children, such as early marriage and FGM, its lack of nationwide implementation, especially in the Northern part of Nigeria due to cultural and religious opposition, has led to fragmented domestication across states. This has led to inconsistencies and a lack of legal certainty in the wider efforts to protect women from violence since implementation is dependent on state-level political will and socio-religious dynamics.

INTERNATIONAL LEGAL FRAMEWORKS ON VIOLENCE AGAINST WOMEN

Interestingly, the evolution of instruments from implicit acknowledgment to explicit condemnation of VAW through international and regional legal frameworks highlights the increasing awareness that such violence stems from a systemic and structural form of gender-based discrimination. Instruments such as CEDAW and the Protocol to the ACHPR on the Rights of Women in Africa (the Maputo Protocol) have historically played significant roles in spearheading this shift in the legal landscape despite limitations in enforcement due to structural barriers at the national level.

While CEDAW does not explicitly refer to VAW and girls, the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), in 1992, clarified in its General Recommendation (GR) 19²⁴ that GBV is a form of discrimination. GR 19 stated that VAW constitutes a form of discrimination aimed at women simply because they are women which disproportionately impacts them.

In furtherance of expanding the legal and conceptual scope of GBV, the CEDAW Committee responded to the evolving categories of VAW through other GRs. For instance, GR 28 (2010)²⁵ covers the core obligations of state parties under Article 2. This recommendation emphasises the general obligations of states under the CEDAW Convention and responds to the issue of VAW within this broader framework by stressing the importance of laws and policies that prevent and protect victims of VAW. The GR also encourages states to recognise and address the root causes of GBV, including patriarchal structures and societal norms that perpetuate inequality.

24 CEDAW/c/Gc/35/2017 General Recommendation No 35 on Gender-based Violence Against Women, Updating General Recommendation No 19.

25 Committee on the Elimination of Discrimination against Women, General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the CEDAW Convention (2010) UN Doc CEDAW/C/GC/28.

Likewise, GR 33 (2015)²⁶ addresses access to justice for women, especially those experiencing violence. It also emphasises the necessity of effective legal redress for women experiencing violence and demands for initiation of special procedures to help victims of violence which includes the establishment of women's police stations or specially assigned family courts.

Building upon these foundational principles and in line with new trends in crime, GR 35 (2017)²⁷ further expands GR 19 by including such crimes as cybersecurity and trafficking for sexual exploitation and establishes that violence targeted at women because of their gender is not merely incidental but structural, and thus requires systemic intervention. It suggests a multisectoral strategy to combat violence especially in the areas of health, education, and employment. It also calls for state parties to direct their focus in the collection and analysis of data on GBV to inform policy and action.

Extending this recognition of structural violence, GR 36 (2017)²⁸ deals with girls' rights focusing on the right to education. This GR acknowledges the impact of violence on girls' access to education and calls for safe spaces for them at school. This GR is an acknowledgment that, because GBV compromises educational access and outcomes, it is connected to lack of empowerment and gender inequality. Here, the Committee acknowledged how GBV – whether through school-based harassment or societal norms – undermines educational access and outcomes. The call for safe, inclusive learning environments, therefore, connects the issue of violence to long-term empowerment and gender equality.

A possible interpretation of the foregoing is that these instruments reveal violence as an expression of power imbalances stemming from deep-rooted patriarchal underpinnings. However, while CEDAW is meant to protect women's rights, especially in the area of violence, it has some limitations. For example, because it relies on state parties to implement its provisions, it lacks enforcement mechanisms which is 'one of the challenges of the international legal system, because while the municipal legal system has developed mechanisms for law enforcement, ranging from the police forces, the courts and prison

26 Committee on the Elimination of Discrimination against Women, General Recommendation No 33 on Women's Access to Justice (2015) UN Doc CEDAW/C/GC/33.

27 Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 (2017) UN Doc CEDAW/C/GC/35.

28 Committee on the Elimination of Discrimination against Women, General Recommendation No. 36 on Girls' Right to Education (2017) UN Doc CEDAW/C/GC/36.

systems, there is no equivalent in international law'.²⁹ Nigeria, for example, ratified the Convention in 1985, however, it has not yet domesticated its provisions,³⁰ meaning they are still not directly enforceable under national law as 'Section 12 of the Nigerian Constitution states that no treaty between the Federation and any other country shall have the force of law unless it has been enacted into law by the National Assembly.'³¹

As the role of the CEDAW Committee is limited to issuing recommendations rather than making binding rules, states may not make meaningful changes in their domestic legislation despite signing and ratifying the Convention. This gap between international expectation and domestic implementation reveals the inherent challenges posed by the nature of international treaties not being able to directly create binding national laws.

REGIONAL COMPLEMENT: THE MAPUTO PROTOCOL 2003 AND THE AFRICAN PERSPECTIVE

The Maputo Protocol (the Protocol) is a women's human rights instrument and a legally binding multilateral supplement to the ACHPR³² which directly addresses state responsibility to eliminate VAW. While CEDAW is the main international instrument on the rights of women, the Maputo Protocol is regarded as the first legislative instrument for the protection of African women against all forms of discrimination, and its 31 articles form a series of provisions for the protection of specific rights of women and girls in Africa, taking account of the sociocultural environment.³³ The Protocol considers the problems experienced by African women with regard to discriminatory practices violating the universal principle of equality between men and women, such as polygamy, legal incapacity in matters of inheritance, forced marriage, genital mutilation and so on.³⁴ Specifically, the Maputo

29 Donald R Rothwell et al, 'Enforcement of international law' in *International Law Cases and Materials with Australian Perspectives*, edited by Donald R Rothwell et al (Cambridge University Press 2019).

30 Attu Vera Felicitas, 'The impact analysis of the Convention on All Forms of Discrimination Against Women (CEDAW) Treaty on Women Participation in Nigerian Politics 2011–2020' (2022) 3(2) *Zamfara Journal of Policy and Development* 56–64.

31 Constitution of the Federal Republic of Nigeria 1999 (as amended), s 12.

32 F Viljoen, 'An introduction to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (2009) 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 11–46.

33 Z Kane, 'CEDAW and Senegal: discriminations still persist' (*Heinrich Böll Stiftung* 10 December 2019).

34 Ibid.

Protocol characterises VAW and girls as encompassing physical, sexual, psychological, and economic abuse, as well as threats of such harm. This protection applies in both private and public spheres, whether in peacetime or during conflict. Articles 3 and 4 oblige states to safeguard women's rights to dignity, bodily integrity, and security. States are required to introduce the necessary legislative, administrative, social, and economic measures to prevent, punish, and eliminate all forms of VAW, including trafficking. They must also identify the underlying drivers of such violence, allocate adequate funding and resources for monitoring implementation, and ensure the availability of accessible services, education, rehabilitation, and reparations for survivors.

A LANDMARK STEP: THE AFRICAN UNION CONVENTION ON ENDING VIOLENCE AGAINST WOMEN AND GIRLS

On 28 February 2025, the African Union heads of state and government formally adopted the African Union Convention on Ending Violence Against Women and Girls (AU-CEVAWG) during the 38th Ordinary Session of the Union. This historic legal instrument, although not yet in force, marks a transformative milestone in the continent's commitment to eliminating GBV. The full legal text was made publicly available earlier, on 16 February 2025.³⁵

At its core, AU-CEVAWG seeks to establish a comprehensive, legally binding framework for the prevention, elimination, and effective response to all forms of VAW and girls.³⁶ These include physical, sexual, psychological, and economic harm; FGM; early, child, and forced marriage; sexual violence in conflict settings; as well as emerging forms of violence such as cyberviolence and economic violence. The Convention obliges state parties to adopt proactive and holistic measures, reflecting a unified continental approach.

Importantly, the Convention moves beyond immediate legal protections to address the root causes and structural drivers of violence. It emphasises the need to strengthen legal and institutional frameworks while advancing human rights, gender equality, and the dignity of women and girls.³⁷ By recognising the influence of entrenched sociocultural norms and unequal power dynamics, the Convention aims to catalyse transformative change through law, education, and public policy.

A strategic objective of the Convention is to build solidarity among state parties and harmonise their approaches to GBV.

35 African Union, *African Union Convention on Ending Violence Against Women and Girls* 2025.

36 Ibid Art 5(a).

37 Ibid Art 10.

This harmonisation is expected to foster mutual accountability, enhance cross-border collaboration, and strengthen enforcement mechanisms.³⁸ Public advocacy is explicitly encouraged, urging governments and civil society to work together through awareness campaigns, community engagement, and education initiatives.³⁹ One of the Convention's progressive contributions is its embrace of 'positive masculinity,'⁴⁰ which seeks to engage men and boys as constructive allies in the effort to dismantle patriarchal structures. Rather than framing men solely as perpetrators, the Convention promotes inclusive, respectful models of male identity and calls for non-violent engagement. This recognition of men's roles in creating sustainable change marks a significant step toward transformative justice.

The Convention opened for signature and ratification in July 2025, and as of mid-2025, countries including Angola, Burundi, Djibouti, the Democratic Republic of Congo, Liberia, and The Gambia have signed the instrument.⁴¹

Nigeria's position vis-à-vis AU-CEVAWG presents a complex scenario. Domestically, Nigeria has enacted the VAPP Act 2015, which criminalises various forms of GBV and provides legal protection for victims. However, implementation remains uneven, as only some states plus the FCT have domesticated the Act, with several states, particularly in the North, yet to do so. This patchy domestication underscores the challenge of aligning national law with regional commitments.

In light of these domestic inconsistencies, the prospect of ratifying AU-CEVAWG brings both opportunities and challenges. The likelihood of Nigeria ratifying AU-CEVAWG may depend on sustained advocacy, both domestically and from regional bodies. Without such pressure, ratification could be delayed or contested. However, should Nigeria proceed with ratification and ensure robust implementation, significant benefits may follow. Chief among them is the potential to harmonise Nigeria's legal framework with continental standards, thereby reinforcing the VAPP Act 2015 and addressing existing legislative gaps. Furthermore, ratification would signal a firm national commitment to eradicating GBV and could serve as a catalyst for broader institutional reforms and stronger enforcement mechanisms.

38 Ibid Art 13(b).

39 Ibid Art 13(a).

40 Ibid Art 6(e).

41 African Commission on Human and Peoples' Rights, 'Joint Press Statement on the Signing of the African Union Convention on Ending Violence Against Women and Girls by Angola, Burundi, Democratic Republic of Congo, Djibouti, Liberia, and The Gambia' (2025).

CHALLENGES IN IMPLEMENTING INTERNATIONAL LEGAL STANDARDS IN NIGERIA

It is true that some international and regional human rights instruments have been signed and ratified by Nigeria for the promotion and protection of women against violence.⁴² However, section 12 of the Constitution of the Federal Republic of Nigeria 1999 requires that an international treaty be domesticated in Nigeria in order for it to apply. The author is aligned with the position that lack of incorporation into domestic law of international instruments that protect women's rights is a major reason for not realising the goal of gender equality and elimination of all kinds of VAW. For example, Nigeria ratified CEDAW⁴³ in 1985 but has not yet incorporated it into domestic law. Moreover, despite Nigeria incorporating the Maputo Protocol into domestic law,⁴⁴ the National Assembly has not been able to make laws on VAW to include psychological, emotional and economic abuse as articulated in the ACHPR. More so, even when international standards have been incorporated into Nigerian law, enforcement remains weak due to corruption and inefficiency, leaving gaps in enforcement due to systemic issues. For example, the VAPP Act 2015 was enacted to align with international standards such as CEDAW in addressing various forms of violence, including sexual offences, but, as of September 2025, at the time of writing this article, 33 out of 36 states have adopted the Act. Therefore, while Nigeria has made some notable moves through legislative imperatives to mitigate the spate of VAW, its fractured legal regime and the overall reliance on general provisions of the Constitution fail to address the lived experiences of women labouring under the consequences of violence.

JUDICIAL APPROACHES TO VIOLENCE AGAINST WOMEN IN NIGERIA

Gender-based violence in widowhood practices

Widowhood practices are mostly based on the sociocultural beliefs of a group of people. As Izzi and Adiele note, these include 'burial rites, mourning rites, inheritance right of widows and the general code of conduct imposed on the widow by the community'.⁴⁵ In the South

42 M O Izzi and O N Adiele, 'Judicial approach to gender based violence in Nigeria: an evaluation' (2021) 1(2) *International Journal of Civil Law and Legal Research* 1–36, 30.

43 CEDAW 1979.

44 Protocol to the ACHPR on the Rights of Women in Africa 2003.

45 Izzi and Adiele (n 43 above) 31.

Eastern part of Nigeria, predominantly made up of the Igbos, a widow is required to tie one wrapper and have her hair shaved off by the female relatives of the deceased husband, and she is most often required by tradition to sleep on the bare floor; she is also required to remain in isolation for a period of time according to the dictates of the members of the late husband's kindred.⁴⁶ These are all rooted in patriarchal sociocultural ideologies that dictate how a woman should grieve her husband, and, as such, the role of the judiciary in either sustaining or challenging these norms is very critical. The case of *Theresa Onwo v Nwafor & 12 Others*⁴⁷ then becomes instructive. In that case a widow's refusal to have her hair shaved based on religious grounds was met with harsh responses by her husband's kinsmen. Though the trial court dismissed the action on the ground that a fundamental right is not enforceable against a private individual, the Court of Appeal unanimously allowed the appeal stating that where fundamental rights are invaded not by the government agencies but by ordinary individuals, such victims have the right against the perpetrators. The Appeal Court declared the action as repugnant to natural justice, equity and good conscience. This case represents a positive response by the Court to the increasing wave of GBV in Nigeria.⁴⁸ This case not only highlights the legal challenges faced by women but also marks a crucial step towards addressing GBV in Nigeria. It reflects a growing recognition of women's rights and the need for legal frameworks that protect them from harmful cultural practices.

Sexual violence

In Nigeria, the legal landscape surrounding marital rape reveals a troubling acceptance of DV as a private matter. Under current laws, a husband cannot be prosecuted for raping his wife as long as their marriage subsists. This effectively relegates what should be considered a crime to the realm of domestic issues. This legal loophole was underscored in *Musa v State*,⁴⁹ where the court reinforced that rape is defined as unlawful sexual intercourse between a man and a woman who is not his wife. Thus, consent to sexual intercourse becomes irrelevant within the confines of marriage.

This judicial attitude transcends private settings, as evidenced in the case of *Mrs Izonebi Cook v The President of the Federal Republic of Nigeria*,⁵⁰ where, despite the plaintiff's brave testimony of violence and violation during the Odi conflict, the court condemned the action

46 Ibid.

47 *Theresa Onwo v Nwafor & 12 Others* 6 NWLR Pt 456, 1996, 584.

48 Izzi and Adiele (n 43 above).

49 *Musa v State* 9 NWLR, Pt 1359, 2013, 214.

50 Izzi and Adiele (n 43 above).

of the soldiers but ultimately dismissed her case, citing procedural technicalities and the protective shield granted to public officers under section 2(a) of the Public Officers (Protection) Act 2004.⁵¹ This ruling, while condemning the actions of the soldiers as barbaric, underscored a disheartening reality: accountability for state-sponsored violence is all but non-existent. These cases not only highlight systemic failures in addressing VAW but also serve as discouragement to women seeking justice. They reflect a broader societal reluctance to confront the deep-seated issues of VAW, revealing the urgent need for legal reform and greater protections for victims. In a landscape where women's voices are often marginalised, the struggle for recognition and justice remains a formidable challenge. It is the considered opinion of the author that the Court should have exercised judicial activism in stating that the provisions of section 2(a) of the Public Officers (Protection) Act 2004 should not apply in this case due to violating section 34(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, which guarantees the right to dignity of the human person, as well as sections 357, 358, and 282 of the Criminal Code and the Penal Code which respectively prohibit rape. The Court should also have declared that the Federal Government of Nigeria should compensate the victim since the soldiers committed the alleged offence in the course of their official duty.

This lack of judicial redress is emblematic of broader systemic challenges in prosecuting rape cases in Nigeria. The prosecution of rape cases in Nigeria is further compromised by a deep-rooted evidentiary burden that unequally affects victims. The need for corroboration – though not a statutory requirement – has become a judicially formulated obstacle. The cases of *Jegade v State*⁵² and *Iko v State*⁵³ become instructive on how VAW is sustained by laws which reinforce the patriarchal nature of Nigerian society⁵⁴ through the requirement for corroborative evidence, and this has made it extremely difficult for a victim of rape to access justice.⁵⁵ In *Jegade v State*, the Supreme Court held that ‘corroborative evidence capable of grounding a conviction on a charge of rape must be cogent, compelling and unequivocal so as to show without more that the accused committed the offence charged’. Reinforcing the same problematic pattern found in *Iko v State*,⁵⁶ the

51 Public Officers (Protection) Act 2004 (Cap P38, Laws of the Federation of Nigeria 2004).

52 *Jegade v State* FWLR 640–846 Pt 66, 722, 728.

53 *Iko v State* FWLR PT 68, 2001, 1161.

54 G A Arowolo, ‘Protecting women from violence through legislation in Nigeria: need to enforce anti-criminal laws’ (2020) 20(4) International Journal of Discrimination and the Law 247–288.

55 Izzi and Adiele (n 43 above) 34.

56 *Iko v State* (n 53 above) 1161.

Supreme Court in *Jegade v State* failed to reaffirm that corroborative evidence is not a requirement in rape cases. In *Iko*, the Supreme Court held that the law does not mandate corroboration in rape cases, but it is often necessary in practice to ensure a fair conviction. The author argues that, while the Supreme Court states that corroboration is not legally required, its insistence that it is highly desired in practice subtly undermines the credibility of rape survivors. It creates a *de facto* corroboration requirement, implying that a victim's testimony is inherently unreliable unless supported by external evidence. This approach overlooks the reality that rape often occurs without witnesses and without physical evidence, thus placing the unfair burden on victims and discouraging reporting.

It sounds contradictory that, despite the authority of *Jegade v State*, the prevailing judicial practice still emphasises the need for additional evidence to support a victim's account, compromising the prosecution of rape cases.⁵⁷ This requirement, lacking statutory foundation, raises concerns about underlying patriarchal influences in the legal system. The author is of the view that this inconsistency suggests a need for analysis through a feminist legal theory framework in order to highlight how structural violence manifests in judicial practices surrounding rape convictions.

Physical assault

The cases of *Akinbuwa v Akinbuwa*⁵⁸ and *Alausa v Lydia Ade Odusote*⁵⁹ illuminate a troubling legal perspective on DV in Nigeria, where the law often permits the subjugation of women under the guise of cultural practices. In *Akinbuwa*, the court deemed minor assaults by a husband on his wife as acceptable for 'corrective' purposes, reflecting a societal norm that condones violence as a means of discipline. This ruling aligns with section 51(1)(d) of the Penal Code Act in Northern Nigeria, which explicitly allows for wife chastisement, underscoring a legal framework that fails to protect women's rights. Similarly, in *Alausa*, the court reinforced this position by substituting a charge of indecent assault against a husband for the act of shaving his wife's pubic hair with a lesser charge of assault, reasoning that, since a husband cannot be convicted of raping his wife, he similarly should not face severe repercussions for acts of indecency.⁶⁰ This ruling revealed the court's view that a husband's violent conduct is rendered less significant simply by virtue of marital status, perpetuating the idea that a husband's control over his wife's body is legally permissible.

57 Izzi and Adiele (n 43 above).

58 *Akinbuwa v Akinbuwa* CA/B/6/94, 13, 1998.

59 *Alausa v Lydia Ade Odusote* 8 WACA 1941:140.

60 Izzi and Adiele (n 43 above).

These cases highlight a broader systemic issue – a legal culture that trivialises and normalises VAW. They reflect the urgent need for a re-evaluation of laws and societal attitudes that permit such injustices, emphasising the importance of safeguarding women's rights and autonomy in all contexts.

Trafficking in women

Quite contrary to the retrogressive developments discussed above, judicial responses to human trafficking have tilted towards a commitment to women's rights. The cases of *Attorney General of the Federation v Christy Egbule*⁶¹ and *Attorney General of the Federation v Samuel Emwinovbanhoe*⁶² highlight the courts' willingness to uphold anti-trafficking laws. The court in both cases convicted Egbule and Emwinovbanhoe for organising foreign travel and for attempting to sexually exploit four underage girls, respectively. These two cases marked significant victories in pursuing human dignity and signify not just legal victories but a broader societal acknowledgment of the urgent need to confront and dismantle trafficking operations. They reflect a growing determination to protect the rights and dignity of vulnerable populations, emphasising the importance of sustained efforts to eradicate human trafficking and promote justice in Nigeria.

However, how the judiciary addresses VAW in Nigeria underscores an intricate as well as conflicting judicial environment, oscillating between progress and regression. While cases like *Theresa Onwo v Nwafor* demonstrate the judiciary's willingness to confront harmful cultural norms and promote women's rights, other rulings such as *Musa v State* and *Akinbuwa v Akinbuwa* highlight structural failures that sustain violence perpetuated by patriarchal norms under the cloak of tradition or legal technicalities. Continued adherence to traditional norms in widowhood, non-recognition of marital rape through legislation, difficulty in sustaining rape charges due to an unnecessary evidentiary burden, and permissiveness in DV cases require urgent attention through legal reform and sensitisation programmes. The courts must also be more proactive in order to fall in line with international human rights standards vis-à-vis VAW, so as to live up to their mandate as custodians of justice and as the only hope of women to bring down the structures of inequality that help perpetrate and perpetuate violence in Nigeria.

61 *Attorney General of the Federation v Christy Egbule* FHC/S/29C/2008, 04/11/2010.

62 *Attorney General of the Federation v Samuel Emwinovbanhoe* B/20C/2005.

Manifestations of systemic violence against women in Nigeria

VAW stems from systemic gender inequality across countries – it is both a cause and consequence of gender inequality, an abuse of the power imbalance, and a means of social control that maintains unequal power relations between women and men; it reinforces women's subordinate status and is used to enforce gender roles and norms.⁶³ In addition, it has been maintained that discrimination includes GBV.⁶⁴ A proper interpretation of this would lead to the understanding that unequal access to rights, opportunities, and power structures supported by some pieces of legislation and encouraged by lack of judicial activism lead to perpetration and perpetuation of violence. VAW has very wide connotations which include 'any physical, psychological, emotional, financial or social harm caused to a woman by individuals, groups, institutions or states, based primarily or in part on the fact that she is a woman'.⁶⁵ Despite the existence of violence at the individual level and the efforts by the state to intervene in order to address it, the state also is complicit in facilitating the kind of violence targeted at women because of their gender. This facilitation is linked to other systems of inequality based on sexuality, race, and class.⁶⁶

In support of the above, it is argued that responses to abuse victims can unintentionally undermine broader challenges to patriarchy. For instance, providing therapy to a survivor as a means of addressing trauma might unintentionally individualise the issue. This has the potential of limiting the political space in which the survivors could comprehend the violence as a form of gendered oppression, and then unite to combat it.⁶⁷

Part of the problem is also cultural underpinning which plays a great role in shaping the attitudes and perceptions of a people.⁶⁸ In that sense, patriarchy with structural factors such as cultural conservatism and gender-based economic marginalisation lead to multiple kinds of violence, and being able to assess such a degree of structural violence requires an integrated ecological framework which involves the

63 International Planned Parenthood Federation, 'Gender Equality: The Key to Ending Violence Against Women'.

64 Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No 19: Violence against Women, UN Doc A/47/38 (1992).

65 A K Gill, G H Cote and E Williams, 'Introduction: violence' (2016) 112 *Feminist Review* 1–10.

66 Ibid.

67 Ibid.

68 R M Cusari and S F Abdullah, 'The influence of culture in domestic violence against women in Nigeria' (2017) 2(6) *Journal of Islamic, Social, Economics and Development* 275.

interplay of personal, situational, and sociocultural factors.⁶⁹ With the current state of affairs in Nigeria, laws are not adequately put in place to protect women from violence due to ‘so many factors including the strong influence of pervasive culture, religious gender bias and gender discrimination/male chauvinism’.⁷⁰ These have helped to sustain the tripartite legal system that was inherited from the colonial administration, which consists of statutory law, customary law, and Islamic/Sharia law. It is maintained that this type of legal system leads to difficulty in harmonising legislation and removing discriminatory measures against women.⁷¹

In response to the systemic reinforcement of discriminatory policies in Nigeria, the CEDAW Committee,⁷² in 2017, expressed concern about Nigeria’s ‘complex and lengthy legislative process, which was particularly detrimental to women’ and also pointed to the fact that ‘the Convention had still not been domesticated’ at the federal and state levels. The Committee also expressed concern that the simultaneous application of statutory, customary and religious laws could create differentiated degrees of protection for women’s rights. Additionally, other issues highlighted by experts were the grey areas of the Gender Equality and Opportunities Bill, sexism in the judiciary, the negative impact of Boko Haram on women’s and girls’ rights, blanket screening by the military, protracted detention of women, the high proliferation of small arms and weapons, the use of schools for military purposes, endemic VAW, and sexual exploitation of internally displaced women.⁷³

The author maintains that the laws in Nigeria fall short of expectation with regard to VAW. For example, despite positive efforts by the legislature at the federal level through the VAPP Act 2015 to recognise marital rape, there is no nationwide uniformity in prosecuting offenders since it has not been adopted by all states. Thus, since the offence of spousal rape is not known to any law in some states of Nigeria, a conviction cannot be secured against a man for spousal rape in non-compliant states. Critically viewed, the author submits that this law likens a woman to a piece of chattel belonging to a man, and, as far as the marriage subsists, there is an implicit agreement to sexual intercourse at the instance of the husband. More so, the Penal Code Act⁷⁴ of Nigeria provides that sexual intercourse by a man with

69 P Sinha et al, “Structural violence on women: an impediment to women empowerment” (2017) 42(3) *Indian Journal of Community Medicines* 134–137.

70 Arowolo (n 54 above).

71 Ibid.

72 United Nations Human Rights Office of the High Commissioner: Committee on the Elimination of Discrimination against Women examines the reports of Nigeria (2017).

73 Ibid.

74 Penal Code Act (n 22 above) s 282 (2).

his own wife is not rape if she has attained puberty. One might suggest that this piece of legislation, therefore, reinforces male dominance in social and sexual relations with women, and thus falls short of the expected adequacy needed for the protection of women from violence.

In furtherance of the proposition that VAW is sustained by some national laws or judicial practices which reinforce the patriarchal nature of the Nigerian society,⁷⁵ one could refer to *Jegade v State*,⁷⁶ cited earlier regarding the unnecessary requirement for corroborative evidence in rape cases.⁷⁷ This requirement, devoid of statutory foundation, raises concerns about underlying patriarchal influences in the legal system, and, critically viewed, the non-application of *Iko v State*⁷⁸ in *Jegade v State* underscores how structural violence manifests in judicial practices surrounding rape convictions.

CONCLUSION

This article has critically evaluated the legislative and judicial responses to VAW in Nigeria. The significance of this approach is to highlight the macro-level violence meted out to women due to structures supported by the cultural underpinnings of the Nigerian patriarchal society. The dominant narrative in the political and legal discourses has been that VAW takes place at an individual level. As a result of this, interventions and measures have been undertaken by employing a micro-level approach. But in this article, it has been demonstrated that the prevailing deep-rooted cultural influences have helped sustain patriarchy in Nigeria. As a consequence, patriarchal underpinnings have negatively impacted the legislative and the judicial spheres in making provisions and taking decisions with regard to protecting women from violence.

Looking at the situation of women's rights, there are apparent deviations from the obligations stemming from Nigeria's ratification of CEDAW in 1986 because, since CEDAW has not been domesticated, no Nigerian court can uphold women's rights on the basis of CEDAW, nor can any court in Nigeria strike down legal provisions that are inconsistent with the provisions of CEDAW. This is so because section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria makes it impossible for any treaty to have the force of law in Nigeria unless it is domesticated by the National Assembly. Although it may be easy for a treaty to be signed and ratified by Nigeria, its domestication and implementation often remain difficult to achieve,

75 Arowolo (n 54 above).

76 *Jegade v State* (n 52 above) 728.

77 Izzi and Adiele (n 43 above) 34.

78 *Iko v State* (n 53 above) 1161.

not only because Nigeria operates a dualist system, but also because of the lack of will at the institutional level to mitigate factors that foster gender discrimination and gendered violence. Action needs to be taken by the legislature to initiate constitutional amendment in order to expunge section 12(1) and replace it with a provision that will engender a monistic framework in the Nigerian constitutional tradition for domesticating international law.

On the other hand, since Nigeria has not yet incorporated CEDAW into its domestic law, it can learn from other like jurisdictions with dualist legal systems. While these countries have not specifically domesticated CEDAW, they have implemented various measures to safeguard women in line with their CEDAW obligations. For example, the United Kingdom Government has not taken any steps to directly incorporate CEDAW into domestic law, but a number of CEDAW rights have been given domestic effect.⁷⁹ More so, the devolved governments of Wales and Scotland are actively working to enhance human rights protections in domestic law on matters within their jurisdictions, including the potential further incorporation of UN treaties like CEDAW. In that regard, the Welsh Government promotes CEDAW principles through policies on gender equality and VAW such as the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 which aligns with CEDAW's recommendations. Scotland also has made some positive moves to integrate international human rights treaties into its framework such as in the Scottish National Action Plan for Human Rights (SNAP)⁸⁰ and gender equality policies which reflect CEDAW's goals. Furthermore, the Scottish Human Rights Incorporation Bill⁸¹ aims to make CEDAW enforceable in Scottish law, though it is still in progress.

It has thus been emphasised in this article that VAW in Nigeria exists both at the individual and structural levels. Even though there are laws against violence, there are no gender-specific ones intended for the protection of women against the kinds of violence inflicted on them just because they are women, except laws on rape, FGM and the like, and, unfortunately, there are still elements of gender-neutrality in these laws.⁸²

It is also worthy to note that the approach of judges in matters of violence ultimately hinders the protection of women especially in

79 A number of CEDAW rights are given partial effect through the Equality Act 2010, the Human Rights Act 1998 and other legislation, policies and programmes. See also Penal Code Act (n 22 above) s 1.1.

80 Scottish Human Rights Commission, *Scottish National Action Plan for Human Rights* (2013).

81 Scottish Human Rights Commission, *Human Rights Bill for Scotland* (2023).

82 See VAPP Act 2015. See also CRA 2003 (n 23 above).

the area of violence perpetrated at home. This judicial attitude plays down the seriousness of family violence, and the consequence is the reinforcement of androcentric dominant ideologies. As a result, protection and justice are denied while the wrongdoer remains unchecked, and this consequently encourages a social order where VAW is unofficially accepted as normal. It suffices to say that lack of adequate responses may be as a result of lack of knowledge of the dynamics of violence, particularly violence directed at women, because of resolute adherence to a dominant androcentric culture common in Nigerian families, fuelled by the prevailing patriarchal superstructure of the society. It should also be noted that this androcentric mentality leads to inadequate sentencing, inadequate fines, and inadequate imprisonment which are not enough to serve as a deterrent to offenders since oftentimes the male perpetrator is usually discharged conditionally or absolutely, with very few incarcerations.

Against this background, there is an urgent need for the legislative arm of the Government as a law-making institution to live up to expectations by enacting laws according to the immediate and foreseeable needs of the society. This is important in order to meet the internationally recognised standard of justice expected of Nigeria. In this sense, therefore, all international tenets as advanced by the UN and various international treaties must be closely followed so as to make laws that will be in tandem with standard customary international laws. For example, laws relating to the rights of the child must also be observed, and conventions regarding VAW, as well as discrimination on grounds of sex must be properly enacted into law. This will help in eliminating the cultural ideologies that make it impossible to achieve, through legislation, a violence-free society for women.

This article suggests that, because of the social, economic and political vulnerabilities that disproportionately affect women, positive measures should be taken to protect them against the neglect of the Government and the pervasive culture of lawlessness under which they live, orchestrated by other members of society.⁸³ This is crucial because it has been argued that violence causes serious short- and long-term physical, mental, sexual and reproductive health problems for women, which also affects their children's health and wellbeing, leading to high social and economic costs for them, their families and societies.⁸⁴

Finally, in identifying the various statutory and judicial responses to VAW in Nigeria, it has been revealed through some of their inadequacies that the relevant institutions have not played a particularly significant role in mitigating the problem posed by the prevalence of such violence. It has also been demonstrated in this article that part of the reason why

83 Obaji (n 10 above).

84 WHO (n 5 above).

legislation has not adequately addressed the issue of VAW in Nigeria is because of sociocultural factors that create an enabling environment for male dominance and gender inequality. It is, therefore, important that the Nigerian legislature and the judiciary do what is necessary through the lens of structural violence anchored on a feminist legal paradigm to save Nigerian women from the hegemony of an underlying patriarchal matrix that drives actions and measures even at the institutional level.

Having said that, it is a welcome development that the Federal Government of Nigeria had, on the 24 October 2024, inaugurated a committee to review and update archaic Nigerian laws within six months.⁸⁵ Hopefully, the laws on violence may benefit from the expected reform and update by including some gender-specific provisions in favour of women such as making clear provisions for DV as a distinct crime, as well as facilitating enforcement of modern protections for victims, such as restraining orders.

Nonetheless, despite this promising initiative, concerns have emerged regarding the committee's progress and transparency. As of September 2025, there is no publicly available confirmation that the committee inaugurated on 24 October 2024 has delivered its final report or draft volumes as mandated. This lack of clarity gives rise to several possibilities. It is conceivable that the committee may have completed its task and submitted the report, but that the Government has not announced or disseminated the outcome to the public. Alternatively, the work of the committee may still be ongoing, possibly due to an extension beyond the original six-month timeline, although no formal communication has confirmed such an extension. It is also possible that the Government has received the report but has chosen not to publish or publicise it, thereby leaving stakeholders and the general public uninformed. Until an official update is provided, the status of the committee's assignment remains uncertain, raising concerns about transparency and the overall pace of legal reforms in Nigeria.

85 Samuel Anyanwu, 'FG inaugurates 46 man committee to review, update outdated laws' (Federal Ministry of Information and National Orientation 24 October 2024).



The legal life of Lord MacDermott[†]

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ABSTRACT

Few figures have left a deeper imprint on the legal history of Northern Ireland than John Clarke MacDermott (1896–1979) and yet his career has never been the subject of a legally comprehensive study. This article offers that study, drawing on reported judgments, publicly archived papers, academic commentaries, and a small set of privately archived materials belonging to the MacDermott family. The analysis is largely chronological and selectively contextual, aiming to present a clear and accessible account of MacDermott's legal life without attempting an exhaustive social history. It traces his formation at the Bar and in wartime office, illuminates his early judicial craft in the High Court, and then assesses his distinctive independence as a post-war appellate court judge in the House of Lords. The study also covers his Privy Council work on constitutional law, which foreshadowed later encounters with emergency powers at home.

As Lord Chief Justice of Northern Ireland, MacDermott was involved in a very high number of reported cases. His court docket's emphasis on customs, charities, taxation and wills, and the then-limited scope of judicial review, contrasts sharply with the dockets of more recent times. Alongside an analysis of this work in the superior courts of Northern Ireland there is a quantitative and qualitative account of MacDermott's continuing contributions to the House of Lords on an *ad hoc* basis. The article further examines his extra-judicial voice, including through his Hamlyn Lectures on 'protection from power'; his inaugural 'MacDermott lecture', and several previously unpublished speeches. It also examines his institutional reform work (ranging from a report that shaped the Judicature (NI) Act 1978 to constitutional advice on the governance of the Isle of Man) and his publicly recorded interventions during the Troubles, including nuanced reservations

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about detention and rights proposals. The conclusion argues that 'unpredictability' best captures Lord MacDermott's career path and jurisprudence. His legal life was far from programmatic, but marked by clarity, candour and a readiness to stand apart when important principles were at stake.

Keywords: MacDermott; Lord Chief Justice; Law Lord; Northern Ireland courts; judiciary; legal history.

INTRODUCTION

Lord MacDermott was one of the most accomplished lawyers ever to emerge from Ireland or the United Kingdom (UK). He served as a High Court judge in Northern Ireland from 1944 to 1947, then as a Lord of Appeal in Ordinary in the House of Lords from 1947 to 1951 and finally as the Lord Chief Justice of Northern Ireland from 1951 to 1971. Surprisingly, no publication has previously been produced which records in some detail the extent of his contribution to the law over his long career. This article is intended to remedy that situation.

Our research methods are reflected in both the format and the focus of this biographical work. As legal scholars we have chosen to depict an understanding of Lord MacDermott's life primarily by reference to officially reported judgments and publicly archived papers. Those sources have been supplemented, occasionally, by reference to privately printed texts and reputable academic works. As a result we trust that our largely chronological narrative is a reliable one, though we openly acknowledge that it presents only a partial understanding of the man at the heart of it.

The social context to Lord MacDermott's legal life is mentioned at points where we have felt that necessary in the interests of clear exposition, just as some subsequent effects of his contributions to the law are noted here and there, but we have not attempted to place every turn of his career in its wider setting. Nor have we tried to compare his life systematically with others. Our single aim has been to produce a relatively comprehensive but readable account of a legal career which is widely regarded as one of enduring historical importance within Northern Ireland legal circles.

We hope to show that, by virtue of the voluminous paper trail he left in his wake, Lord MacDermott's legal life provides a vividly instructive window into the world that he inhabited between 1896 and 1979. A world which would not have been the same without him.

EARLY LIFE AND EDUCATION, 1896–1921

John Clarke MacDermott (known to his family as Clarke) was born on 12 April 1896 at Belmont Manse, Belfast.

The MacDermott family was politically unionist and religiously Presbyterian. In 1903 Clarke's father was elected Moderator of the General Assembly of the Presbyterian Church in Ireland. In 1912 he and his two older brothers, Willie and Robin, signed the Ulster Covenant and, in 1913, joined the Ulster Volunteer Force (UVF) – the paramilitary group promoted by Edward Carson and James Craig to oppose the British Government's idea of granting Home Rule to Ireland. Clarke regularly took part in drills and in shooting practice, presumably with rifles smuggled into the country, but in his privately published memoir, dated 1979, he is at pains to point out that he did not think he engaged in any illegal activities at that time:

Unionists were undoubtedly entitled to protest at what was being proposed. I do not believe that they did so in breach of the laws. I was not of an age to think in terms of the statute-book, but I never knew or heard of anyone saying that we had committed or were about to commit an offence; and if, as I believe is true, no one in the whole body, whether leaders or rank and file, was ever prosecuted for his activities as a member, it seems to confirm the view expressed.¹

Towards the end of 1916, like thousands of other UVF members, Clarke volunteered to serve in the British army and when he was demobilised in 1918 (having received a Military Cross for his bravery at the second Battle of the Marne) he returned to Belfast at the age of 23 not knowing what career he wished to pursue. In his memoir he explains that he really wanted to become a doctor (like his brother Willie) or an engineer but that the training for either of those professions would take too long. A few years earlier, towards the end of his schooling at Campbell College, he had bowed to his mother's insistence that he should explore the possibility of becoming a Presbyterian minister, but after an interview at the Assembly's College he realised he did not have a vocation for such a position. Strangely, he claimed not to understand what was involved in the role despite his own father being a prominent minister. He eventually chose the legal path primarily because the training period at that time for barristers was just two years. He may have been subconsciously pushed in that direction by the fact that

1 *An Enriching Life*, 43. The memoir also tells (at 53–58) of MacDermott's experiences during the week of the Easter Rising in 1916. He spent nearly all of it in Dublin but does not seem to have been aware of the intensity of the fighting there.

his older brother Robin, who had been killed in the war,² had almost qualified as a barrister. Indeed, Clarke was able to use some of Robin's old law books.

Between 1919 and 1921 Clarke undertook two simultaneous courses. While studying at Kings' Inns in Dublin for his bar exams he also undertook a law degree at Queen's University Belfast. He was given a one-year credit on account of having studied history there in the academic year 1914–1915. He came top of his year at Queen's, with first class honours in his LLB, but in Dublin he was outshone by Frances Kyle (the first woman to qualify as barrister in the UK or Ireland), who beat him to the highest prize, the John Brooke Scholarship. They were called to the Bar of Ireland on 1 November 1921 and a few days later she and Clarke MacDermott were also called to the newly created Bar of Northern Ireland. She was certainly the first woman to be called. He was the second man, the first being Herbert Macauley Sanders Brown.³

During his preparations for the Irish bar exams Clarke attended coaching classes given by William Lowry, who was a practising barrister in Dublin and a former Reid Professor of Law at Trinity College Dublin. He was 12 years older than Clarke but they struck up a friendship and later, after William had established a further thriving legal practice in Northern Ireland, the careers of the two families became very intertwined. As we shall see, Clarke became a unionist Member of Parliament (MP) in 1938 and William did so in 1939. When Clarke resigned from the role of Attorney General to become a judge in 1944, William succeeded him as Attorney General, and when Clarke moved to the House of Lords in 1947, William replaced him on the High Court bench. He died prematurely in 1949, at the age of 65, but meanwhile his son Robert Lowry had been called to the bar of Northern Ireland in 1947. Just two years later Robert Lowry became the pupil master to Clarke's son John, who had just been called to the bar (it was very unusual for such a recently qualified barrister to be allowed to take on a pupil). Robert himself joined the High Court bench in 1964 and in 1966, when Lord MacDermott CJ was appointed Chair of a Committee on the Supreme Court of Judicature in Northern Ireland, Lowry J was appointed as Deputy Chair. Lord MacDermott retired as Lord Chief Justice in 1971 and Lowry J succeeded him in that leading

2 He was the first officer of the 36th Ulster Division to die in the First World War. He had not quite qualified as a barrister before volunteering for the army in 1914.

3 Other accounts have suggested that Frances Kyle and John Clarke MacDermott were the first two persons called to the Bar of Northern Ireland. They are presumably based on MacDermott's own recollection of being called alongside Frances Kyle in *An Enriching Life* (n 1 above) 152–153. We base our account on the order of signatures in the Roll of Barristers maintained by the Bar Council of Northern Ireland.

role, remaining in place until his own retirement in 1988. When Lord MacDermott passed away in 1979 it was Sir Robert Lowry who delivered a tribute to him in the Nisi Prius Court in Belfast.⁴ He also wrote the entry relating to Lord MacDermott in the *Oxford Dictionary of National Biography*, where he stated:

As a judge, [MacDermott] was inspired by a deep sense of right and wrong based on Christian standards. Knowing every branch of the law, he was its master, not just its servant. His eye for the merits and his sense of justice, while not causing him to spurn the law (which he loved and respected), helped him to reach the goal by way of the law and not in spite of it.

Sir Robert was given a life peerage just a week after Lord MacDermott's death in July 1979 and he lived on until 1999. Clarke MacDermott's son, John, was called to the Bar of Northern Ireland in 1949, became a High Court judge in 1973 shortly after Robert Lowry had become Lord Chief Justice and was appointed a Lord Justice of Appeal in 1987 before retiring in 1998. He died in 2022.

One further experience shared by both Lord MacDermott and Lord Lowry was attempted assassination by republican paramilitaries: in 1977 Lord MacDermott was wounded in a bomb explosion when he went to the Jordanstown campus of what is now Ulster University to deliver a lecture⁵ and in 1982 Lord Lowry escaped being shot when he was fired at while attending Queen's University Belfast to give a lecture.

THE BARRISTER AND ATTORNEY GENERAL, 1921–1944

When MacDermott first embarked on his legal career, he would have been competing with the 40 to 45 other barristers already practising in Northern Ireland. He focused initially on county court work in Belfast, especially ejectment suits under the Rent Restrictions Acts and workmen's compensation claims relating to accidents at work. Throughout his 15 years as a junior barrister he appeared on no more than six or seven occasions in a magistrates' court.⁶ His first experience as a defence barrister in a criminal case led him to comment that it was

4 This is reprinted in MacDermott, *An Enriching Life* (n 1 above) 235–239 and also at (1979) 30 Northern Ireland Legal Quarterly 281–286. It is followed there by a tribute from Lord Hailsham, the then Lord Chancellor, at 287–288. The address given at the Thanksgiving Service for Lord MacDermott by Rev Young at Belmont Presbyterian Church on 14 September 1979 is also reprinted in *An Enriching Life*, at 241–244.

5 'Bomb in an Ulster college injures ex-judge, 9 others' *New York Times* (New York 25 March 1977).

6 *An Enriching Life* (n 1 above) 158.

strange that when, in 1898, England and Wales allowed defendants in criminal cases to give evidence on their own behalf the law was not extended to Ireland. The Parliament of Northern Ireland introduced it in 1923⁷ and the Irish Free State did so a year later.⁸ He added, more generally, that:

It is strange how often, despite changes in social conditions and living standards, we have been slow as a nation to alter our criminal law in a manner which, once adopted, has proved of benefit to the administration of justice.⁹

One of his suggestions was that if a *prima facie* case has been made out against a suspect that person should be *compelled* to give evidence.

In the wake of partition there was still ongoing violence in Northern Ireland in 1922, with some 230 people losing their lives in that year alone. Amazingly, no doubt inspired by public-spiritedness, MacDermott signed up to be a part-time Special Constable in East Belfast, patrolling one or two nights a week armed with a revolver.

He earned well from his involvement in criminal injury claims brought against local authorities for loss of life, personal injury or damage to property. And he acted as junior counsel in appeals in such claims to the Assize Court from county courts. In one such case, where a man had been kidnapped and taken to the Free State, compensation was denied: *Scarlett v Fermanagh County Council*.¹⁰ In 1926 he was appointed as Junior Crown Counsel for County Armagh and thereafter did only occasional civil business for the Assizes there. Chapter 13 of his autobiography is an interesting account of the various county Assizes, in Armagh, Enniskillen, Omagh, Derry/Londonderry, and so on, written a month or so before they were to be abolished by the Judicature (NI) Act 1978.

Surprisingly, in the official law reports for the period during which Clarke MacDermott practised at the bar, his name does not appear as counsel, but this is more a reflection of the small number of cases that were reported than of his personal stature as a barrister. In reality, of course, he did so appear, but the reports did not always give his name (or the search engine did not find it). In his own memoir he talks about *Walsh v Wightman*¹¹ and *Sproule v Triumph Cycle Co Ltd*.¹² The former was about whether the trustees of the Seaford Estate in County Down were entitled to repossess the manse of the minister of Seaford Presbyterian Church from the congregational

7 Criminal Evidence Act (NI) 1923, s 1.

8 Criminal Justice (Evidence) Act 1924, s 1.

9 *An Enriching Life* (n 1 above) 164.

10 [1923] 2 IR 48.

11 [1927] NI 1.

12 [1927] NI 83.

trustees. He was eventually on the losing side in this case, when it reached the Court of Appeal, and he laments that the case illustrated all too clearly how ‘feudal-bound, complicated and behind-the-times’ the land law of Northern Ireland was at that time.¹³ He thought it should be modernised. The *Sproule* case was about a police officer who had a bad accident when the brake of his Triumph motorbike became disconnected. He was so badly injured that he had to give up his job in the police. MacDermott and his legal colleagues succeeded in winning his case against the manufacturers of the motorbike by invoking section 14 of the Sale of Goods Act 1893. However, when the defendants indicated that they were going to appeal to the House of Lords the King’s Counsel in the case, Edward Murphy, persuaded the plaintiff to settle.

The Inn of Court of Northern Ireland was established in 1926. MacDermott recites how someone had wanted to name the institution ‘The Ulster Inn’ until it was pointed out that there was already a public house near the new courthouse that was being built called ‘The Ulster Tavern’.¹⁴ Prior to this time students who wanted to be called to the Bar of Northern Ireland still had to pass exams at the King’s Inn in Dublin, as MacDermott had done. Other functions of King’s Inns relating to barristers in Northern Ireland were delegated to a Northern Committee of the Inn, comprising judges and barristers who were already Benchers of King’s Inns.

It was also in 1926 that Clarke MacDermott married Louise Johnston, a Dubliner who had graduated in history and political science from Trinity College in 1924. She too was a child of the manse. Their first child, called John Clarke like his father, was born on 9 May 1927. As mentioned above, John himself became an eminent barrister and judge, serving for 14 years as a High Court judge and a further 11 as a Lord Justice of Appeal before retiring in 1998 and passing away in 2022 at the age of 95. Clarke and Louise went on to have three other children, Edith in 1930,¹⁵ Robert (nicknamed Robin) in 1934 and Elizabeth in 1939.

In 1934 Clarke made his first appearance in a case coming before the House of Lords, *McEvoy v Belfast Banking Co*,¹⁶ which concerned the law relating to bank deposit receipts issued in joint names (father and son in this instance). Again, although his client (the bank) won

13 *An Enriching Life* (n 1 above) 208.

14 *Ibid* 213.

15 Edith and her husband Sam Cunningham kindly encouraged and assisted us in the writing of this text. Edith sadly passed away just before it was finalised, though she had read an earlier draft. We are grateful for the continued support of the wider MacDermott family.

16 [1935] AC 24, [1934] NI 94. The Court of Appeal decision is at [1934] NI 67.

the case MacDermott admits that the judgments of the Law Lords were none too clear, leaving banks not much wiser as to how to handle such receipts.¹⁷ A year later, in 1935, MacDermott made his one and only appearance as a barrister in the Judicial Committee of the Privy Council.¹⁸ He was acting for the Belfast Corporation, which was challenging the validity of section 3 of the Finance Act (NI) 1934 in so far as it purported to require all county and borough councils to pay a sum of money to the Government to help make up the deficit in the overall budget for Northern Ireland. The rate, in the first year, was to be sixpence in the pound of the rateable value of property in the council areas and, in the second year, a shilling (ie double as much). The basis for the Corporation's claim was that it was beyond the powers of the Parliament of Northern Ireland to set such a charge since section 21(1) of the Government of Ireland Act 1920 prohibited it from imposing any tax of the same character as a tax on profits or on income. The Corporation lost the case, the only one to be taken to the Privy Council during the history of the Northern Ireland Parliament (1921–1972), but MacDermott said he nevertheless learned a lot from his senior counsel in the case, Wilfrid Greene, a future Lord Justice of Appeal and Master of the Rolls in England and Wales.

Shortly after his experience in the Lords and the Privy Council MacDermott decided to take silk, in 1936. Clearly by that time he had acquired a good reputation for himself and was earning a sufficient amount of money to allow him to make that leap. That said, MacDermott's daughter Edith has recorded how her father was particularly mindful of the risks associated with taking silk because by 1936 he had assumed 'the considerable burden' of being the only adult male in his extended family. As Edith put it, a 'senior barrister or silk could charge more for his briefs, but if the briefs did not materialise, he could not revert to being a junior, so it was a chancy business'.¹⁹

Just after becoming King's Counsel he made a second appearance in an appeal to the House of Lords, oddly enough in another case to do with the powers of the Northern Ireland Parliament – *Gallagher v Lynn*.²⁰ The appellant was a Donegal farmer who had been convicted in a petty sessions court in Derry/Londonderry for selling milk in Northern Ireland without a licence, as required by the recently enacted Milk and Milk Products Act (NI) 1934. He lost his appeals to both the

17 *An Enriching Life* (n 1 above) 226.

18 In the matter of a *Reference under Section 51 of the Government of Ireland Act 1920* [1936] AC 352. Lord Thankerton delivered the opinion of the Committee.

19 Edith Cunningham, *The MacDermott Sagas* (2018) 33 (this is a privately published account of Lord MacDermott's family history). For a scholarly article on the rank of a silk, see N M Dawson, 'The rank of Queen's Counsel: judicial perspectives' (2013) 24 *King's Law Journal* 38–59.

20 [1938] NI 21.

county court and the Court of Appeal,²¹ but then appealed for a third time to the House of Lords, where he lost again. MacDermott acted for the state in the case, though despite being a KC himself he was actually led by the Attorney General for Northern Ireland, Anthony Babington. This was because, as it happened, Babington had to go to Buckingham Palace to receive a knighthood on the very day when the state was to make its case against the appellant in the House of Lords, so MacDermott had to rise to the challenge instead. He tells of how he was ‘stopped’ by Lord Atkin after a while, meaning that the House did not need to hear more from him. He knew this was a good sign: it usually means that the judges have already heard enough to know that the case being put to them is a winning one, and so it transpired. The state won the case because the Act in question did not breach the prohibition in the Government of Ireland Act 1920 on the Northern Ireland Parliament making laws in respect of ‘trade with any place out of the part of Ireland within [its] jurisdiction’: rather, the ‘pith and substance’ of the Act was that it was to protect the health of the inhabitants of Northern Ireland.²²

Election to the Parliament of Northern Ireland

Lord MacDermott’s memoir, unfortunately, does not explain his reasons for the next turn in his career – standing for election as an MP for Queen’s University in the Parliament of Northern Ireland. It is clear that from a young age he was a supporter of the Union but there does not seem to have been earlier intimations that he was particularly interested in becoming a politician. But Northern Ireland had already adopted the practice prevalent at that time in other parts of Britain and Ireland whereby prominent lawyers would stand for political office. Examples include Edward Carson, Douglas Hogg (the future Lord Hailsham), Conor Maguire and, in Northern Ireland itself, Richard Best, Anthony Babington and Arthur Black. Like Carson, Best, Babington and Black, MacDermott stood for the Ulster Unionist Party, which in 1938 won 39 of the 52 seats in the Parliament’s House of Commons, gaining nearly 57% of all first-preference votes cast. MacDermott took the last of the four seats allocated to Queen’s University, depriving an independent unionist of his former seat. The election took place on a proportional representation basis and although MacDermott won fewer first preference votes than his independent rival, Mr Sims, he got

21 [1936] NI 131.

22 For critiques of the House’s decision in *Gallagher v Lynn*, see Harry Calvert, ‘*Gallagher v Lynn* re-examined: a legislative fraud’ [1972] Public Law 11 and Brigid Hadfield, *The Constitution of Northern Ireland* (Belfast, SLS Legal Publications 1989) 67–68 and 84–87.

over the line with the help of the transfer of second preference votes.²³ MacDermott's daughter points out that her father was an 'unusual' unionist in that he was not a landowner or a businessman and he was not a member of the Orange Order. She claims that her father admitted he would never have entered politics if he had not been able to stand for the 'pocket borough' of Queen's University. He would not have had the time for electioneering.²⁴

Notwithstanding his political and legal responsibilities, MacDermott wasted no time in signing up for army service as a major with the Royal Artillery after war was declared in September 1939, but after the Battle of Dunkirk in 1940 he was released from the army in order to take up the role of Minister of Public Security in Northern Ireland as from 25 June. That was also the day on which a prominent Northern Ireland Labour Party MP, Jack (properly John) Beattie, representing the working-class constituency of Pottinger in East Belfast, unsuccessfully proposed a motion calling for an 'All-Party Government' in Northern Ireland for the duration of the War.

MacDermott's post meant that he was in charge of civil defence. He tried to persuade his cabinet colleagues that more money should be spent on air-raid shelters in Belfast but this did not happen and as a result more people died in the ensuing 'blitz' bombing in April and May 1941 than might otherwise have been the case. It was he who asked the Government of Ireland to provide additional fire engines to help douse the fires resulting from the blitz: they sent 13 engines and 70 firefighters. He himself was involved in an air-crash when a plane taking off from Sydenham (now Belfast City) Airport for London came down almost immediately in the Connswater River. Apparently he got back home under his own steam, spent a day in bed and was back at work the next morning.²⁵

His time as a minister would have brought home to him how difficult the life of a politician can be, especially in a society which is highly conflicted along sectarian lines. In 1940, during a debate on the administration of the Royal Ulster Constabulary (RUC), he stood up for the 'efficiency' of the force, referring to its work on combating Irish Republican Army raids on banks and post offices. A motion by Mr Beattie calling for the establishment of a Select Committee to investigate the police's performance was rejected by the House of Commons by 20 votes to one.²⁶ In 1941 he clashed with both Thomas Henderson (MP for Shankill) and John Nixon (MP for Woodvale) over

23 The overall number of votes cast for the constituency was just 2,448, of which MacDermott received 253.

24 Cunningham (n 19 above) 35.

25 Ibid 40.

26 HC Deb (NI) 8 October 1940, vol 23, cols 2288–2339.

civil defence measures, in particular the ‘stinking’ shelters that were being provided in parts of Belfast,²⁷ and a few months later, in a debate on the Appropriation Bill, he had to listen to this jibe from Mr Beattie:

I know how you got your job. If it had not been for your father’s position in the Orange Order you would not be where you are now.

MacDermott’s reaction to this was ‘Say that outside’ – the implication being that if Beattie repeated his words outside of privileged legislative proceedings MacDermott would sue him for defamation – to which Beattie replied ‘I say it now’.²⁸ During that same debate MacDermott justified the use of internment during the Second World War, a practice also used in Great Britain.²⁹

Years later, MacDermott was sent draft chapters of an official history of the Northern Ireland war effort that had been written by Professor John W Blake.³⁰ Extensive correspondence then ensued between MacDermott and Blake, driven by MacDermott’s disapproving view of Blake’s initial texts. In a letter dated 15 July 1955, and following a page-by-page analysis of the draft chapters which had been sent to him, MacDermott wrote:

I do not dispute your right as an historian to criticise and no doubt there is plenty to be critical about, for we made mistakes which time and greater experience might have avoided. But I think you do less than justice to the Ministry of Public Security and in fairness to those who so devotedly and ably helped me to discharge the duties of that Ministry under most difficult circumstances, I feel I must let you know my views and reserve full liberty to challenge hereafter the suggestions and imputations to which I have taken exception.³¹

In general terms MacDermott was discontent with the initial drafts because they created an impression that the Ministry of Public Security rather than the Ministry of Home Affairs was to blame for various deficiencies during the war effort. Blake duly redrafted the text several times and MacDermott eventually conceded that his points had been ‘very fairly’ taken into account.³²

Appointment as Attorney General

Just a year or so after his appointment as Minister of Public Security, MacDermott switched to the role of Attorney General for Northern

27 HC Deb (NI) 26 February 1941, vol 24, cols 76–83.

28 HC Deb (NI) 22 July 1941, vol 24, col 1308.

29 Ibid, col 1302.

30 These would eventually be published as *Northern Ireland in the Second World War* (Belfast, Blackstaff Press 1956).

31 Public Record Office of Northern Ireland, CAB/9/CD/177/10.

32 Ibid. The quotation is taken from a letter dated 26 October 1955.

Ireland (on 10 November 1941, to be exact),³³ a post previously held by Richard Best (1921–1925), Anthony Babington (1925–1937), Edward Murphy (1937–1939)³⁴ and Arthur Black (1939–1941).³⁵ The first three of those Attorneys resigned when they were offered a position as Lord Justice of Appeal, and Black, a much more modest man, resigned in order to take up the role of Recorder of Belfast (effectively the senior county court judge in Northern Ireland), later becoming a High Court judge (1943–1949) and then a Lord Justice of Appeal (1949–1964). It is conceivable that MacDermott went down the political route because he saw it as enhancing his chances of eventually gaining judicial preferment, a common phenomenon in both the UK and Ireland at the time. No doubt he was relieved to have been moved from the very difficult portfolio of public security to one which was more in tune with his personal legal skills.

One of the functions of the Attorney General is to give advice on the current state of the law when asked to do so by a court: he or she is then acting as an *amicus curiae*, a friend of the court. MacDermott fulfilled that role in a case heard by the House of Lords in 1942, *Benson v Northern Ireland Transport Board*.³⁶ Mr Benson had been prosecuted under the Road and Railway Transport Act (NI) 1935 for using a motor vehicle to carry merchandise for payment without first having obtained the consent of the Transport Board. In his defence he argued that the relevant provision in the Act was *ultra vires* the Parliament of Northern Ireland because it took away his property (ie the goodwill established by his business) without granting him any compensation, in breach of section 5(1) of the Government of Ireland Act 1920. The magistrate who heard the case held for Mr Benson, as did the Deputy Recorder of Belfast on appeal, but the latter then referred the case to the Court of Appeal asking for its opinion on issues of law. MacDermott KC was one of the barristers lined up to represent the Transport Board at the Court of Appeal hearing but the law report indicates that this role was actually played by William Lowry KC.³⁷ When the Court of Appeal proposed to invite the then Attorney General (Arthur Black) to address the court as *amicus curiae*, Mr Benson's barrister objected, arguing that there were no rules allowing such an intervention. But the Court of Appeal was satisfied that under the common law the Attorney General

33 Public Record Office of Northern Ireland, CAB/9/1/15/7.

34 Murphy's wife's sister was married to Sir Denis Henry, the first Lord Chief Justice of Northern Ireland (1921–1925).

35 MacDermott makes complimentary remarks about Babington, Murphy and Black in *An Enriching Life* (n 1 above) 167–172. He also speaks highly of James McSparran KC, who became a close friend.

36 [1942] AC 520.

37 [1940] NI 133, 141. This may well have been because MacDermott was serving with His Majesty's forces at the time.

could be called upon and, having listened to Black's arguments, both Andrews LCJ and Murphy LJ held that the 1935 Act was not *ultra vires* (because there had been no 'taking' of property, as required by the 1920 Act). Babington LJ issued a lengthy dissent.

Matters did not rest there because there was a third appeal in the case, this time brought by Mr Benson to the House of Lords. Again the court was assisted by the Attorney General, a post now occupied by MacDermott. However, having listened to the arguments from all sides on the constitutional question at issue, their Lordships realised that there was a more fundamental problem with the appeal. This was a criminal case as Mr Benson had been acquitted by the magistrate and the prosecution had no right of appeal against an acquittal. The Transport Board – and the two appeal courts in Northern Ireland – had misconstrued the relevant statutory provision,³⁸ which allowed appeals 'by any party against whom an order is made for payment of any penal or other sum'. The magistrate had ordered the Board to pay Mr Benson's costs and that had been assumed to be a 'penal or other sum'. Declining to hear the appeal any further, Viscount Simon LC said:

the proposition that it is the imposition of costs on the prosecutor that creates his right to appeal would lead to the extraordinary result that in Northern Ireland, when a court of summary jurisdiction dismisses a criminal charge, the prosecution, if dissatisfied, should beg to be ordered to pay costs in order thereby to purchase a right of appeal, and the accused, if he wished to make sure of his acquittal, should be astute not to ask for costs against the prosecution.³⁹

MacDermott left his post as Attorney General to take a seat in the High Court in 1944 on the death of Mr Justice Brown. He was succeeded as Attorney General by William Lowry who, as mentioned above, likewise resigned in 1947 to become a High Court judge. It will also be recalled that William was the father of Robert Lowry, who in his time was also appointed as a High Court judge, then as Lord Chief Justice (as successor to Lord MacDermott in that role) and finally as a Lord of Appeal (the second Lord of Appeal to be appointed from Northern Ireland after MacDermott).

The Parliament of Northern Ireland was not particularly active during the years when MacDermott served as Attorney General. Two Acts were passed in 1941, but none in 1942 or 1943. In 1941 the Government of Northern Ireland took a decision that it would be a good idea to introduce conscription in Northern Ireland, as had already occurred in the rest of the UK, and presumably this was supported by the Attorney General. But the UK Prime Minister, Winston Churchill, told Westminster that 'it would be more trouble than it is worth to

38 Summary Jurisdiction and Criminal Justice Act (NI), s 24(1).

39 [1942] AC 520, 525.

enforce such a policy'.⁴⁰ Sir Hugh O'Neill, then the Unionist MP for North Antrim, retorted that:

Will it not make a rather bad impression throughout the Empire that, once again, the Government have had to burke this issue, obviously because of pressure from Southern Ireland?⁴¹

Naturally, MacDermott supported the unionist position throughout his time as Attorney General, speaking at length against a censure motion that challenged the then Minister of Home Affairs, Dawson Bates,⁴² and justifying an amendment being made to the Civil Authorities (Special Powers) Act 1922 which allowed minor offences to be tried by just one rather than two magistrates and accepted that more serious offences could be tried by a judge sitting with a jury.⁴³ He made it clear that it was he who was in charge of public prosecutions in Northern Ireland and that he would not allow himself to be influenced by anyone else, including the Minister of Home Affairs (who, from May 1943, was his friend William Lowry). During 'the Belfast Strike' in 1944 he defended his decision to prosecute five workers at Short and Harland's for leading a stoppage of work that affected the supply of essential war equipment. The workers were found to have breached the law and were sentenced to three months' imprisonment with hard labour.⁴⁴

A revealing incident dating from the early 1940s has been recounted to the authors of this piece by Rev Harold Good, a former President of the Methodist Church in Ireland and a prominent figure in peace and reconciliation circles in Northern Ireland for many years. As a young boy he suffered badly from a tubercular spine and his father used to wheel him around in a makeshift trolley. Once, while in Portstewart, his father left Harold in the trolley while he went into the Post Office. When he returned he noticed that someone had left an envelope under Harold's pillow. It contained a note saying that the writer had noticed Mr Good wheeling his son around and he hoped that the donation enclosed might help to pay for the child's care; the donation was £10, a lot of money in those days. Mr Good looked up and saw the stranger

40 HC Deb 27 May 1941, vol 371, col 1718.

41 Ibid. O'Neill's nephew, Terence O'Neill later served as Prime Minister of Northern Ireland from 1963 to 1969. The word 'burke' here means 'suppress' or 'postpone'.

42 HC Deb (NI) 15 July 1942, vol 25, cols 2102–2110. In response to the suggestion that Bates had sought to meddle in MacDermott's area of responsibility, the latter asserted (at col 2110): 'there has been no attempt to interfere with the privileges and rights and the due function of the Attorney General on the part of the Minister who is impugned'.

43 HC Deb (NI) 11 March 1943, vol 26, cols 271–282. The draft legislation in question was the Civil Authorities (Special Powers) Bill 1943.

44 HC Deb (NI) 4 April 1944, vol 27, cols 1025–1036. The strike violated the Northern Ireland Conditions of Employment and National Arbitration Order 1940, which was worded identically to an order applicable in Great Britain.

disappearing down the street. He thought he recognised him from the newspapers as Clarke MacDermott, an MP. More than 50 years later, when Harold was living in Holywood, he became acquainted with Clarke MacDermott's son, who by that time was himself a senior judge. He showed him the note left under his pillow all those years previously, which he had retained, and Clarke's son was able to confirm that the handwriting was indeed that of his father. The story surely indicates something of the measure of the man.

THE HIGH COURT JUDGE, 1944–1947

Our research has revealed no fewer than 330 *reported* cases in which MacDermott sat as a judge throughout his career.⁴⁵ While we will attempt an overall analysis and evaluation of those judgments, we obviously cannot deal with each of them separately. We agree, in any event, with a statement made by one of MacDermott's successors as Lord Chief Justice of Northern Ireland, Sir Robert Carswell: '[T]he qualities required to be a good judge go well beyond the ability to write well-constructed judgments.'⁴⁶

As far as we can ascertain MacDermott sat as a High Court judge in nine reported High Court cases and three reported Court of Appeal cases.⁴⁷ None of these raised a particularly important point of law and none was appealed all the way to the House of Lords. But it is apparent from several of MacDermott J's judgments that he was a most accomplished legal analyst and writer. His first reported judgment in the High Court appears to be in *Pig Marketing Board (NI) Ltd v IRC*, where he held that the Board was not established for charitable purposes only.⁴⁸

Later, he sat alongside his friend Mr Justice Black in a Divisional Court case dealing with a request for a writ of *habeas corpus*. It had been applied for in a family law case where the mother of an 11-year-old boy wanted to reclaim custody of him from his father; both judges gave a judgment in the case, holding for the mother.⁴⁹ He delivered a detailed judgment in an insurance law case, where he held that the insurance company did not have to pay damages to two plaintiffs who were injured in an accident involving a taxi driven by someone who

45 For the full list, see the Appendix to this article, which comprises four parts, each dealing with a separate phase in MacDermott's judicial career.

46 Lord Carswell, 'Founding a legal system: the early judiciary of Northern Ireland' in Felix Larkin and Norma Dawson (eds), *Lawyers, the Law and History* (Dublin, Four Courts Press 2012) 15, 16.

47 For the full list, see the Appendix, part 1.

48 [1945] NI 155.

49 *In re B, An Infant* [1946] NI 81.

had been authorised to drive it but whose name did not appear on the insurance policy.⁵⁰ In *Fitzgerald v Great Northern Railway (Ireland)* he ruled that a visitor to a workplace who was allowed to assist one of the employees with his job was owed a duty of care by the occupier.⁵¹ Even a relatively simple case turning on whether the plaintiff should be completely denied damages because of his contributory negligence in an accident led to a lucid explanation of why substantial contributory negligence does not necessarily exonerate a defendant from all blame.⁵² He again held for a plaintiff who had been injured when using a machine in a factory without having received adequate training: the fact that it was another employee of the company who caused the injury did not trigger the doctrine of common employment which, at that time, let employers off the hook for such incidents.⁵³

It has been common for most of the history of the Northern Ireland legal system for High Court judges to sit on the Court of Appeal from time to time. MacDermott J's first *reported* judgment in the Court of Appeal was in *Baptist Union of Ireland (Northern) Corp Ltd v Inland Revenue Commissioners*, decided on the same day as *Pig Marketing Board (NI) Ltd v IRC* (mentioned above), where he gave lengthy reasons why, contrary to the view of the Special Commissioners of the Inland Revenue, the trust in question was a charitable one and therefore all the income from its investments qualified for an exemption from income tax.⁵⁴ He also sat alongside Porter LJ and Black J in *R v Stephenson*, where a man appealed against his conviction and sentence following a trial before Babington LJ and a jury at the Belfast City Commission (what we today would call the Crown Court).⁵⁵ The alleged crime was the manslaughter of a girl named Eileen Bowden by using an instrument to procure an abortion which resulted in her death. The main grounds for the appeal were that the dying declaration of Ms Bowden and the testimony of her boyfriend, who had taken her to the defendant's premises for the abortion, were inadmissible in the absence of corroboration, a matter on which the jury had not been properly directed. The appeal court dismissed the defendant's appeal against conviction but reduced his prison sentence from six years to

50 *Goodwin v Leckey* [1946] NI 40.

51 [1947] NI 50.

52 *Ross v McQueen* [1947] NI 81. The defence of contributory negligence was reformed shortly after this case by the Law Reform (Miscellaneous Provisions) Act (NI) 1948, s 2.

53 *Shearer v Harland and Wolff Ltd* [1947] NI 102. The defence of common employment was abolished by the Law Reform (Miscellaneous Provisions) Act (NI) 1948, s 1.

54 [1945] NI 99. At that time such cases stated were dealt with by the King's Bench Division of the High Court.

55 [1947] NI 110.

four years. The fact that MacDermott J was the judge who delivered the judgment of the court suggests that it was he who contributed most to its composition, even though he was the most junior of the three judges involved. He also sat in a case about the interpretation of a will, *Re Dunville*.⁵⁶ He wrote a judgment siding with Andrews LCJ rather than with Babington LJ.

THE LORD OF APPEAL IN ORDINARY, 1947–1951

MacDermott's expertise in legal matters was such that by April 1947 he had so impressed the then Labour Lord Chancellor, Viscount Jowitt, that he was named as the first ever Lord of Appeal in Ordinary to be appointed from Northern Ireland since its establishment in 1921 (the second such appointment would not occur until 1988). He was just 51 years of age. The choice was probably due to the fact that he was one of two Law Lords appointed so as to increase the membership of the Appellate Committee of the House of Lords from seven to nine.⁵⁷ The other was Lord Morton, a Scot who plied his trade as a lawyer in England and who had already served as a High Court judge there for three years and as a Lord Justice of Appeal for a further six. He ranked above MacDermott in the pecking order. The Lord Chancellor, Viscount Jowitt, no doubt saw it as an opportune moment to ensure that the Committee was more representative of the Kingdom as a whole.⁵⁸ That said, in a letter from Jowitt informing the then Prime Minister of Northern Ireland, Viscount Brookeborough, that MacDermott had been selected for appointment, it was emphasised that his decision to recommend MacDermott had not been a tokenistic choice:

I should not have desired that he should be appointed merely because he came from Northern Ireland unless I had been satisfied that he was a man fully qualified to maintain and uphold the great position to which he has been called, but I may confess to you now that I am singularly happy that I was honestly able to make such a recommendation, more

56 [1947] NI 50.

57 Appellate Jurisdiction Act 1947. The prime reason for the increase in judges was the need to have enough Law Lords so that the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council could sit in benches of five at the same time (Viscount Simon, a retired Lord Chancellor, was available and keen to sit as an *ad hoc* judge, as were a few other retired judges). Delay in getting appeals dealt with quickly was also cited as a problem, but the Lord Chancellor and his predecessor did not attribute that to the judges themselves but rather to the parties to the litigation. See HC Deb 7 February 1947, vol 432, cols 2099–2106; HL Deb 20 February 1947, vol 145, cols 847–851.

58 MacDermott's daughter Edith wrote that her father's appointment as a Lord of Appeal was 'a gesture ... to keep Northern Ireland within the judicial system' and that 'he felt it his duty to accept the appointment': Cunningham (n 19 above) 45.

especially because this strengthens the ties which bind our two countries together.⁵⁹

In a letter dispatched to inform MacDermott himself on the same day, the Lord Chancellor shared his news in the following terms:

My dear Judge,

May I just write you this line to tell you how very glad I am that the [UK] Prime Minister has seen fit to accept the recommendation I made that you should come and join us in the House of Lords. You will find that we are a very happy body and I have no doubt but that you will be able to make a most valuable contribution to our deliberations.

It is all too long since we had anybody from Ireland to help us and all my colleagues as well as myself are delighted to think that that is now being repaired. You are assured of a most hearty welcome.

I am afraid I must tell you that we shall want your services as early as we can arrange to get them. I understand that the technicalities about the title you are adopting have been arranged with the Garter. Owing to the absence of The King in South Africa and the fact that the Counsellors of State have not power to create peers the warrant has to be flown out to The King for his signature. I understand it is being arranged that this shall be done on Wednesday next and as soon as The King has signed we shall be notified by telegram. It will be necessary to arrange for your formal introduction and this could be done either on the afternoon of Wednesday, 23rd April, or if this proves impossible on the morning of Thursday, 24th. In any event we shall hope to have your services so that you can sit with us on the latter date as we shall not be able to get five Law Lords for the case that day unless these preliminaries have been fulfilled.

I do hope that this will not put you to any inconvenience, but for the time being until you have fixed up on a more permanent basis no doubt you will stay at a Club or Hotel.

If there is anything else I can do to help in any way please do not hesitate to let me know.

Yours sincerely,

J.⁶⁰

59 Letter dated 14 April 1947, Jowitt to Brookeborough, National Archives, LCO 6/2711. In a letter dated 22 April 1947, Brookeborough responded to Jowitt thanking him for his letter, remarking: 'I am delighted particularly at your choice of the individual, as MacDermott is a man of the finest character and integrity who will, with his profound legal background, make his own contribution to the work and judgments of the House of Lords.'

60 Letter dated 14 April 1947, Jowitt to MacDermott, National Archives, LCO 6/2711. The case he started hearing on 24 April was *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 (see n 79 below).

Before making the appointment Viscount Jowitt no doubt consulted the then Lord Chief Justice of Northern Ireland, Sir James Andrews,⁶¹ as to who (if not himself) would be the best serving judge to take up the role. Sir James was 70 at the time. The senior of the two Lords Justices of Appeal, Sir Anthony Babington, was 69 and the junior Lord Justice, Samuel Porter, was 72. The latter had been appointed in 1946, having not previously served as a judge. MacDermott's only colleague in the High Court was Arthur Black, his senior in that post by a year (having previously served as a county court judge for two years) and still only 59. In his memoir MacDermott is very generous in his estimation of Black, but implies that, although he was not married, he may not have been the kind of person who would have wanted to uproot himself from Northern Ireland to take up a position in London. After praising his intellect as the equal of any at the bar or on the bench, he describes him as 'essentially a simple and gentle soul', someone who 'shunned publicity and was very hard to get to a party'.⁶² The Lord Chancellor's estimate may have been that while MacDermott was very young and had little judicial experience his appointment was nevertheless a risk worth taking. Sir Edward Jones, who was later appointed to the High Court in 1968 and then to the Court of Appeal in 1973, offered a similar hypothesis in the following excerpt from his autobiography:

[T]he problem was who, from among the judges, would want the appointment because it was not an appointment which would suit everyone. Well, the rest of the story really depends on speculation; but it does seem to be a reasonable and sensible speculation because the outcome was that only much the youngest of the then existing Bench indicated readiness to accept the appointment which had the great advantage that, when the Chief Justiceship here fell vacant on the death of Sir James Andrews and there was no obvious candidate to fill his vacancy, it was easy to transfer MacDermott back to assume the office of Chief Justice in Belfast. No doubt that did in fact deprive Northern Ireland of a Law Lord but that was not an inevitable loss as it turned out it was only a temporary or partial deprivation.⁶³

61 James' older brother, John, had been Prime Minister of Northern Ireland from 1940 to 1943 and a second older brother, Thomas, had built the *Titanic* and died when it sank in 1912. According to the *Dictionary of Irish Biography*, Andrews was appointed as Lord Chief Justice only because his brother John, who was still an important minister in the Government of Northern Ireland at the time, insisted upon it. Lord Craigavon, the then Prime Minister, had allegedly promised the role to the serving Attorney General, Sir Anthony Babington. Instead Babington took up the vacancy on the Court of Appeal created by Andrews' promotion.

62 MacDermott, *An Enriching Life* (n 1 above) 167.

63 Edward Jones, *Jones LJ: His Life and Times – The Autobiography of The Right Honourable Sir Edward Jones* (The Impartial Reporter 1987) 98.

At the time of his appointment MacDermott was the youngest person to be made a Lord of Appeal in Ordinary since the inception of the role in 1876. He was created a Lord of Appeal in Ordinary under the Appellate Jurisdiction Act 1876, as amended, ‘with the dignity of a Baron for life by the style and title of Baron MacDermott of Belmont in the City of Belfast’.⁶⁴ It was on Wednesday 23 April 1947, almost immediately after confirmation was received by telegram that his warrant had been signed by the King, that Baron MacDermott was introduced to the House of Lords.⁶⁵ His wife and son, who was studying in Cambridge at the time, joined Baron MacDermott to mark the occasion.⁶⁶

In the years since his appointment only one appointee to the House of Lords or to its successor, the Supreme Court, has been younger – Lord Radcliffe, who was elevated to the role directly from the bar in 1949 at the age of 50. Louis Blom-Cooper and Gavin Drewry point out that in the period from 1876 to 1968 MacDermott was also the only Law Lord to have been educated at a so-called ‘redbrick’ university.⁶⁷ To this day he remains one of only two Law Lords or Supreme Court Justices to have graduated from Queen’s University Belfast, the other being Lord Kerr, who served for just three months in the House of Lords and then in the Supreme Court from 2009 to 2020. A further anomaly is that, because in 1944 it was not yet the custom and practice to confer a knighthood on every High Court judge in Northern Ireland, MacDermott was made a life peer without having first attained the lower honour. He became a Privy Counsellor in Northern Ireland when he was made a Minister in 1940, entitling him to be referred to as the ‘Right Honourable’ John Clarke MacDermott. When appointed as a Lord of Appeal in 1947 he became a member of the UK Privy Council. While serving as a Law Lord MacDermott lived in a flat in London during the week but frequently returned to Belfast at weekends.

The seven Law Lords already *in situ* when Lord MacDermott and Lord Morton joined them on 24 April 1947, apart from Viscount Jowitt as Lord Chancellor, were, in order of seniority, Lords Thankerton, Wright, Porter, Simonds, du Parc, Uthwatt and Normand. In 1947 Lord Wright retired and was replaced by Lord Oaksey, in 1948 Lord Thankerton was replaced by Lord Reid (who remained in post until 1975), and in 1949 Lord du Parc gave way to Lord Radcliffe and Lord Uthwatt to Lord Greene. In 1950 Lord Greene (who had been appointed Master of the Rolls) was replaced by Lord Tucker and in 1951, when Lord Simonds was appointed Lord Chancellor, his seat as

64 National Archives, LCO 6/2711.

65 Ibid. See too *Hansard*, ‘Lord MacDermott’ 23 April 1947, vol 147.

66 Ibid.

67 Louis Blom-Cooper and Gavin Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford, Clarendon Press 1972) 167.

a Lord of Appeal went to Lord Cohen. So in that short post-War period of 1947 to 1951 Lord MacDermott had an opportunity to work closely with a substantial number of the leading judges of his day. He is bound to have learned a great deal not just about legal appellate work but also about what is expected from the nation's topmost judges in terms of leadership, industriousness and example-setting. By the time he stepped down as a Lord of Appeal he was the fourth most senior of the nine then in post.

His decisions as a Lord of Appeal in the House of Lords

Lord MacDermott seems to have borne his fair share of the workload of Law Lords. Like his colleagues he would have had little choice over which appeals he heard. He had quickly to become expert on a range of legal topics with which he would have been relatively unfamiliar until then. As far as we can determine, during his four years as a full-time Lord of Appeal he sat in 55 cases in the House of Lords and 28 cases in the Privy Council.⁶⁸ In the House of Lords he delivered a judgment in 40 of his cases and in the remaining 15 he simply concurred with one of the other judgments. In no fewer than 14 of his 55 cases (25%) he expressed his dissent, either in full or in part. This is a remarkably high percentage of dissents. It demonstrates Lord MacDermott's independence of mind: he was not easily captured by group-think.

As many as 19 of his 55 cases (34%) concerned tax law. This is largely because in 1948 there was a whole series of mainly Scottish appeals relating to a provision in the Finance Act 1943 designed to retrospectively invalidate a scheme aimed at avoiding excess profits tax, which at that time was levied at the rate of 100%.⁶⁹ The scheme mainly benefited whisky distilleries and bonded warehouse companies. The appeals were heard over a period of 22 days in November and December 1948 by a panel of five Law Lords led by Lord Thankerton and of whom Lord MacDermott was the most junior member.⁷⁰ On 12 March 1949 judgments were delivered in 12 separate cases, some of which involved more than one appellant. In the lead case, *Inland Revenue Commissioners v Ross and Coulter (Bladnoch Distillery Co Ltd)*, Lord MacDermott was the lone dissenter on a crucial issue: he did not think that the retrospective legislation should apply to companies which had been unaware of the tax avoidance scheme in question because it had been organised by third parties.⁷¹ After a meticulous

68 For the full list, see the Appendix, part 2.

69 Finance Act 1943, s 24.

70 The three other Law Lords were Lord Porter, Lord Simonds and Lord Morton.

71 [1948] 1 All ER 616. The majority in the Lords endorsed the view taken by the Court of Appeal in England and Wales and reversed a contrary position adopted by the Court of Session in Scotland.

examination of the wording of the relevant legislation – an example of the brilliance of his analytical powers – Lord MacDermott concluded:

I would hold in favour of the knowledge construction as that which accords best with the language the legislature has seen fit to use. While I do not suggest that this interpretation leads to an ideal distribution of the burden of the full tax, I find it less generally inequitable in this respect than the alternatives which have been discussed.⁷²

Having set out his position in *Bladnoch Distillery* Lord MacDermott then dutifully applied the majority's precedent in subsequent appeals on the same section, although in three of them he again dissented on the application of the majority's viewpoint to the facts of the case.⁷³

The next largest category of case dealt with by the Baron during his time as a Lord of Appeal (9 out of 55, or 16%) concerned employment matters, including employers' liability for accidents at work. Amongst these was *Paris v Stepney Borough Council*,⁷⁴ where his final judgment swung the outcome in favour of the injured party. Mr Paris had sight in only one eye and had been injured in his other eye while working in a garage. Goggles were supplied to some workers in the garage but not to his category of worker. The Lords held that he too ought to have been provided with goggles as the employers knew about his having only one good eye. In two other cases Lord MacDermott joined with Lord Reid in disagreeing with the majority's view that the claim for workmen's compensation should fail. One was *Hogan v Bentinck West Hartley Collieries (Owners) Ltd*, where the majority found that an 'ill-advised' operation on the plaintiff's thumb meant that the injury in question could no longer be said to have been caused by the accident at work;⁷⁵ the other was *London Graving Dock Co Ltd v Horton*, where an experienced welder was denied compensation because he 'voluntarily' took a risk in using certain inadequate staging at his place of work.⁷⁶ However, Lord MacDermott was not invariably predisposed to hold in favour of injured workers: in *Hales v Bolton Leathers Ltd* he joined the majority in finding that Mr Hales fell within a statutory exception to the right to workmen's compensation, though one of his fellow judges, Lord Oaksey, found to the contrary.⁷⁷ Likewise he did not join in Lord Reid's dissent in *Harrison v National Coal Board*, where the majority ruled that the doctrine of common employment meant that the Coal

⁷² Ibid 651.

⁷³ *Inland Revenue Commissioners v Barr* [1948] 1 All ER 682; *Inland Revenue Commissioners v Lord Saltoun* [1948] 1 All ER 654; *Tootal Broadhurst Lee Co Ltd v Inland Revenue Commissioners* [1949] 1 All ER 261.

⁷⁴ [1951] AC 367.

⁷⁵ [1949] 1 All ER 588. The operation was said to be a *novus actus interveniens*.

⁷⁶ [1951] AC 737.

⁷⁷ [1951] AC 531.

Board was not liable to a workman injured by a fellow shot-firer in a mine.⁷⁸ It would have been in the midst of hearing this case that Lord MacDermott learned of the death of the then Lord Chief Justice of Northern Ireland, Sir James Andrews, on 18 February 1951. It must have immediately prompted him to wonder whether he might be offered the opportunity to become Sir James's replacement.

The remaining 27 cases dealt with by Lord MacDermott as a full-time Lord of Appeal ranged across 11 different areas of law: land law (7 cases), contract law (4 cases), family law, intellectual property law and private international law (3 cases each), administrative law (2 cases) and charity law, company law, maritime law, tort law and restitution law (1 case each). In this publication we can itemise only a handful of these.

Amongst his land law cases was the first he ever heard as a Lord of Appeal – *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* – and the hearing continued on and off for a total of seven days.⁷⁹ When he delivered his judgment (the case concerned the termination of a licence) Viscount Simon, who was the presiding judge, paid handsome tribute to his new colleague:

He has so precisely and clearly expressed the view which I had formed in the case before us that it becomes unnecessary to deal independently with the application of the principles I have endeavoured to formulate to the matter in hand.⁸⁰

Lord MacDermott's first dissenting judgment was issued in only the second case he heard as a Lord of Appeal, *Boy Andrew v St Rognvald*, a dispute over which of two ships had caused a collision between them, leading to the death of 11 seamen. While his four colleagues attributed blame to both ships, Lord MacDermott thought it should be pinned solely on the crew of the *Boy Andrew*. In *Hill v William Hill (Park Lane) Ltd* he was involved in a seven-judge case where the Law Lords split four to three.⁸¹ He sided with the majority in holding that the company could not recover alleged betting debts owed by Mr Hill because, under the Gaming Act 1948, they were 'a sum of money alleged to be won upon a wager'. In *Kahler v Midland Bank Ltd* he and Lord Reid dissented: they would have allowed Mr Kahler's

78 [1951] AC 639. The doctrine was abolished in Great Britain by the Law Reform (Personal Injuries) Act 1948, but Mr Harrison's accident occurred before that Act came into force. See too *Winter v Cardiff Rural District Council* [1950] 1 All ER 819, where the Lords, including Lord MacDermott, unanimously rejected the plaintiff's claim because of the doctrine of common employment.

79 [1948] AC 173. See too n 60 above.

80 Ibid 191.

81 [1949] AC 530.

appeal because in their view the law governing the contract was the law of England, not the law of Czechoslovakia.⁸² He also dissented in an important case on what constitutes ‘public benefit’ for the purposes of the law on charities: *Oppenheim v Tobacco Securities Trust Co Ltd*.⁸³ His four colleagues held that, even though the trust in question could potentially benefit more than 110,000 employees, that did not make the benefit a ‘public’ one. Referring to the Charitable Uses Act 1601, Lord MacDermott said that the current law was unsatisfactory: ‘[w]hat is needed is a fresh start from a new statute’.⁸⁴ The last case heard by Lord MacDermott as a Lord of Appeal, on 27 and 28 February 1951, seems to have been *Crowther v Crowther*, which was about whether a period spent in a mental home interrupted what counted as ‘desertion’ for the purposes of the then law on divorce.⁸⁵

His decisions as a Lord of Appeal in the Privy Council

The Judicial Committee of the Privy Council is the court which handles appeals from a variety of Crown dependencies, former Commonwealth countries and one or two other bodies. The Lords of Appeal (and, today, the Supreme Court Justices) were called upon to deal with those appeals, and it has long been customary for a single judgment to be delivered in the name of only one judge. Our research indicates that Lord MacDermott sat in 36 Privy Council cases, 28 while he was a full-time Lord of Appeal and eight while he was later the Lord Chief Justice of Northern Ireland.⁸⁶ He delivered the Court’s judgment in five of these cases⁸⁷ and in a sixth case he concurred with a dissenting judgment of Lord Pearson on a taxation issue.⁸⁸ Occasionally, he had to consider sensitive constitutional questions. Thus, in his judgment in *Ningkan v Government of Malaysia* he dismissed a challenge by a former Chief Minister of Sarawak to the proclamation of a state of emergency in the territory⁸⁹ and in *Liyanage v R* he concurred in the ruling that Acts of the Ceylon Parliament could not be struck down on

82 [1950] AC 24.

83 [1951] AC 297.

84 Ibid 319.

85 [1951] AC 723. Judgments were issued on 9 May 1951. Lord MacDermott simply concurred with Lord Reid.

86 Those eight cases are included in the Appendix, part 4.

87 *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565; *Tumahole Bereng v The King* [1949] AC 253; *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458; *Wong Pooi Yin v Public Prosecutor* [1955] AC 93; *Ningkan v Government of Malaysia* [1970] AC 379.

88 *McClelland v Taxation Commissioner of the Commonwealth of Australia* [1971] 1 WLR 191.

89 See n 87 above.

the vague and unspecified basis that they were contrary to fundamental principles of justice or the laws of natural justice.⁹⁰ These cases may well have come to his mind just two or three years later when Northern Ireland was facing the kind of civil unrest which had already provoked emergency measures in both Sarawak and Ceylon.

Lord MacDermott also dealt with three Canadian cases where the question was whether a provincial Parliament had the legislative competence to make certain laws. In *Attorney General for Alberta v Attorney General for Canada* part of Alberta's Bill of Rights Act 1946 was declared to be *ultra vires*,⁹¹ in *Attorney General for Saskatchewan v Attorney General for Canada* a similar conclusion was reached in relation to a provision in the Farm Security Act 1944⁹² and in *Canadian Federation of Agriculture v Attorney General for Quebec* a provision in the Dairy Industry Act 1926 was likewise declared invalid. He also sat in *Commonwealth of Australia v Bank of New South Wales*, where the Privy Council affirmed the High Court of Australia's view that legislation prohibiting private banking was constitutionally invalid; the appeal in this case was heard over the course of 36 days ('a record').⁹³ In *Sambasivam v Public Prosecutor, Federation of Malaysia* MacDermott was a member of the Privy Council which set aside a conviction for carrying a weapon because the jury had not been informed that the accused had earlier been acquitted of possessing ammunition. The Baron would later cite this precedent in two cases which came before him in the Court of Criminal Appeal in Northern Ireland.⁹⁴

In his Privy Council work Lord MacDermott was certainly exposed to a wide range of foreign courts from which appeals were brought. They included the Supreme Court of Canada, the Court of Appeal of Saskatchewan, the High Court of Australia, the Supreme Court of New South Wales, the Supreme Court of Ceylon, the High Court of Calcutta, the Supreme Court of the Federation of Malay, the Federal Court of Malaysia, the Supreme Court of Palestine, the Western African Court of Appeal, the High Court of Basutoland and the Court of Appeal of Malta. He also heard an appeal from the President of the Probate, Divorce and Admiralty Division of the High Court of England and Wales sitting in exercise of its Prize jurisdiction.

90 [1967] 1 AC 259.

91 [1947] AC 503.

92 [1949] AC 110.

93 [1950] AC 235, 240.

94 See n 87 above and the text at n 128 below.

THE LORD CHIEF JUSTICE OF NORTHERN IRELAND, 1951–1971

Following the death of Sir James Andrews on 18 February 1951, Lord MacDermott returned to Northern Ireland to be sworn in as Lord Chief Justice on 9 April. He continued in that role for the next 20 years of his life. Back in 1951 the process for choosing a successor to a senior judicial post was rather murky. The era of application forms and competence-based interviews was still far ahead. But it seems that by this time Lord MacDermott had acquired what Lord Carswell later called a ‘redoubtable’ stature, one that indicated that ‘the Ulster judiciary had finally come of age’.⁹⁵ His chief rivals for the role would have been the two serving Lords Justices of Appeal, Arthur Black and Samuel Porter. The former, however, was probably no more inclined to take on the role than he had been four years earlier when MacDermott was appointed to the House of Lords. The latter was already 75 years of age, although he continued to serve as a Lord Justice until his death in 1956 at the age of 81. The two High Court judges in office at the time were Lancelot Curran and Charles Sheil, but each of them had been appointed only two years earlier and would probably have been deemed to have insufficient judicial experience to serve as the Lord Chief Justice.

Lord MacDermott’s own willingness to leave the House of Lords and return to Northern Ireland was not without reservations. His daughter Edith has recalled:

This was a major decision and he did not decide overnight. On the one hand he revelled in the stimulation and variety of work in the House of Lords but his domestic arrangements were far from satisfactory, and even when the children had left home, it was doubtful if Mum would consider moving from her beloved fortress of Glenburn. Above all, a nagging sense of duty probably told him that he owed it to his province to return. He did not do this with his eyes closed. Of all people, he would have been aware that firm leadership was needed in the Northern Ireland courts at this time, and that the administrative load would be heavy. True as ever to his principles he returned and took up office as Lord Chief Justice of Northern Ireland.⁹⁶

Likewise, in a contemporaneous letter to Sir Basil Brooke, the then Prime Minister of Northern Ireland, Lord MacDermott admitted that he had felt conflicted about his decision:

... though I am glad to come home on many grounds, I have found the choice a difficult one.⁹⁷

⁹⁵ See Carswell (n 46 above) 16.

⁹⁶ Cunningham (n 19 above) 47.

⁹⁷ Letter dated 13 March 1951, Public Record Office of Northern Ireland, CAB/9/I/15/14.

Lord MacDermott seems to have warmed very quickly to his new role just the same. In Northern Ireland he had the opportunity not only to deal with knotty legal problems in the High Court and Court of Appeal, but also to oversee the running of a whole judicial system. Early in his tenure he delivered a lecture in Oxford to members of the Society of Public Teachers of Law (now the Society of Legal Scholars) in which he displayed his interest in two particular features of Northern Ireland's judicial system – the ability of the higher courts to determine the constitutionality of legislation passed by the Stormont Parliament and the continuing use of the simple 'civil bill' procedure for handling relatively small civil claims in the county court, a jurisdiction with roots in English law but which had fallen out of favour there.⁹⁸ In fact he suggested in that lecture that the civil bill procedure should be extended to some claims made in the High Court, where he thought that the system of writs and pleadings had already become a contributing factor to delay and complexity. Alas, his proposal fell on deaf ears.

As Lord Chief Justice Lord MacDermott would have been very influential in the filling of all the judicial vacancies arising in Northern Ireland during his tenure, although at the High Court level and above it would have been the Lord Chancellor who had the final say over who should be elevated. Those who did get appointed at that level were, in chronological order, Lancelot Curran (1956, to the Court of Appeal), Herbert McVeigh (1956, to the High Court; 1964, to the Court of Appeal), Edward (Ted) Jones (1968, to the High Court), Robert Lowry (1964, to the High Court), Maurice Gibson (1968, to the High Court) and Ambrose McGonigal (1968, to the High Court). Jones, Gibson and McGonigal would all be promoted to the Court of Appeal in the years after MacDermott retired from the top job. He himself was succeeded as Chief by Sir Robert Lowry in 1971, the year in which Lord MacDermott turned 75. As we shall see, he continued to sit in the House of Lords as an *ad hoc* Law Lord for a further two years, and indeed in the High Court of Northern Ireland for seven years.⁹⁹

In a recent book,¹⁰⁰ we recounted Lord MacDermott's efforts to avoid disadvantaging a Catholic candidate for one judicial post in 1956:

... the then Lord Chief Justice, Lord MacDermott, listed a range of candidates whom he considered eligible for consideration by the Lord Chancellor, Lord Kilmuir, in respect of a vacancy created by the death

98 'The Supreme Court of Northern Ireland – two unusual jurisdictions' (1954) 2 Journal of the SPTL (new series) 201.

99 See too n 136 below.

100 Conor McCormick and Brice Dickson, *The Court of Appeal in Northern Ireland* (Bristol, Bristol University Press 2025) ch 2.

of Porter LJ.¹⁰¹ Cyril Nicholson QC was among those suggested by Lord MacDermott to Lord Kilmuir,¹⁰² but ‘secret’ minutes of a meeting between these two reveal that Nicholson was apparently ruled out because ‘it would be too difficult to appoint another Catholic to the Bench at present’.¹⁰³ This view was reinforced by a subsequent letter sent to Lord Kilmuir from the Prime Minister of Northern Ireland, Sir Basil Brooke, in which the latter stated that ‘politically I couldn’t support Cyril Nicholson as in my opinion it would unbalance the Judgeship and I would be open to very severe criticism’.¹⁰⁴ Shortly thereafter, in a ‘confidential’ letter from Lord MacDermott to Lord Kilmuir, the following admission was committed to page:

I went to the P.M. at Stormont last week to see if there was any possibility of him having second thoughts about C.A. Nicholson, Q.C. who on his own merits would rank high. Personally, the P.M. would have no objection to Nicholson but he felt that a second Roman Catholic in a Judiciary of five would be politically embarrassing, and on that account he could not acquiesce in his appointment.¹⁰⁵

Following these exchanges, Nicholson was not appointed.¹⁰⁶ Curran J was elevated to the Court of Appeal seat made vacant upon the death of Porter LJ and Herbert Andrew McVeigh QC was appointed to the High Court seat vacated by Curran J.

Two tragic events

Before we undertake a brief survey of the judgments issued by Lord MacDermott between 1951 and 1971 it is worth stressing that in his first two years in the role he had to deal with the fall-out from two dramatic events. The first was the shocking murder of one of his own colleague’s family members – Patricia Curran, the daughter of Mr Justice Curran. Curran, like MacDermott, had been a unionist MP and the Attorney General for Northern Ireland. At the time his daughter, aged 19, was a first-year student at Queen’s University Belfast. Her body, riddled with stab wounds, was found in the grounds of the family home in Whiteabbey, just north of Belfast, on 12 November 1952. In March 1953, a 20-year-old Scottish man named Iain Hay Gordon, who was a technician within the RAF working at an airbase in Edenmore near

101 Correspondence and minutes relating to this episode are accessible from the National Archives at LCO/2/8153 and from the Public Record Office of Northern Ireland at CAB/9/I/10/4.

102 Ibid LCO/2/8153, letter dated 21 July 1956, wherein Lord MacDermott stated, *inter alia*, that ‘Mr. Nicholson is a Roman Catholic of good standing’.

103 Ibid LCO/2/8153, minutes dated 7 August 1956.

104 Ibid CAB/9/I/10/4, letter dated 5 September 1956.

105 Ibid LCO/2/8153, letter dated 11 September 1956.

106 His son, Sir Michael Nicholson, was appointed to the High Court in 1986 and then to the Court of Appeal in 1995.

Whiteabbey, was tried for the murder before Lord MacDermott CJ and a jury. He had allegedly voluntarily confessed to the killing and his lawyers advised him to plead guilty but insane, partly to ensure that if convicted he could not be sentenced to death. The jury believed his confession and confirmed that he was guilty but insane, a verdict which, at the time, could not be appealed.¹⁰⁷ He was sentenced to indefinite detention in a mental hospital in Antrim, where he languished for the next seven-and-a-half years. There would have been a sense of relief that the case was closed. It had revealed some personal details about members of the Curran family which they would not have wanted to be known. A close-knit judicial fraternity such as then existed did not welcome a public focus on aspects of their private lives.

After his release from detention in 1960 Mr Gordon led a quiet life in Glasgow but he always maintained his innocence. It was only in the 1990s that prominent lawyers, including Sir Louis Blom-Cooper QC, took up his case. Their work eventually led to a referral of the case by the Criminal Cases Review Commission to the Court of Appeal in Northern Ireland in 1998. The Court held that it had no jurisdiction to hear an appeal because of the particular verdict in question, whereupon campaigners went about securing a change to the Criminal Appeal Act 1995 in order to extend it to such verdicts.¹⁰⁸ When the case was referred again to the Court of Appeal in 2000 it quickly held that the confession in question should have been ruled inadmissible because of undue pressure placed upon Hay Gordon at the time. With no other evidence to corroborate the confession the appeal was allowed.¹⁰⁹ The judgment of Carswell LCJ explains that if Lord MacDermott had been shown the evidence which was now available about the psychological vulnerability of Mr Gordon, and the consequent risk that his ‘confession’ was not freely given but was based on his answers to a series of questions put to him by a police officer, there is little doubt that he would have rejected the confession as inadmissible. The miscarriage of justice reflects badly on the police at the time, not on the trial judge. At the time it was not the custom to take much account of the ‘vulnerability’ of a defendant and the rules governing the admissibility of confessions were not as detailed as they are today.¹¹⁰

The second traumatic event of MacDermott’s early years as Chief Justice was the sinking of a ferry, *The Princess Victoria*, as it sailed from Stranraer in Scotland to Larne in Northern Ireland on Saturday

107 There is no law report of this trial because it did not involve new or interesting points of law.

108 See the Criminal Cases Review (Insanity) Act 1999.

109 *R v Gordon* [2000] NICA 28.

110 For a book-length analysis of this case, see Kieran Fagan, *Who Killed Patricia Curran?* (2022). A heavily fictionalised account of the murder and trial was later written by Eoin McNamee: *The Blue Tango* (London, Faber 2022).

31 January 1953. The ferry was caught in a terrible gale and took on water when the doors to the car deck were forced open by strong waves.¹¹¹ Of the 177 people on board, 133 died, including the captain. There was a formal investigation into the disaster, conducted by a resident magistrate in Belfast sitting with three assessors appointed in accordance with section 466 of the Merchant Shipping Act 1894. Amongst the findings of the investigation were that the disaster was caused or contributed to by wrongful acts or defaults on the part of the ferry's registered owners (the British Transport Commission) and the registered manager (John Reed). Those two parties appealed against the findings to the High Court, where Lord MacDermott sat, again with three specialist 'assessors'.¹¹² The only question for the High Court was whether the investigators were entitled in law to reach those findings. Lord MacDermott began his judgment by affirming that *The Princess Victoria* was unseaworthy when she embarked on the crossing: her stern doors were not sufficiently strong to withstand the onslaught of the heavy seas which could be reasonably expected to occur from time to time in the North Channel and there were inadequate 'freeing arrangements' for seas which might enter the car space from any source. He then held that the legislation in question did not confine the investigators to using the phrase 'wrongful act or default' only in situations where acts or omissions were of such a serious nature as to justify the description of 'criminal' or 'quasi-criminal' and to merit, in the case of certificated officers, the suspension or cancellation of their certificates. Applying that principle to the facts he ruled that the Commission had committed a wrongful act or default but that Mr Reed had not. He based his reasoning on the policy underlying the relevant legislation:

I am clear it was never the intention of the legislature that the court investigating a shipping casualty should have to wander about inside the organisation of a public authority, such as the Commission, in order to find whether a breach of duty personal to it was default on its part. My conclusion, therefore, is that default, in the sense of a breach of personal duty, is within the scope of the expression 'wrongful act or default' and may be found against the owners once the personal nature of the duty and its breach are established.

There is a common law duty on owners of ships to ensure that they are seaworthy and the British Transport Commission's breach of that duty meant that it could be found to have committed a 'wrongful act or default'.

111 For a detailed account of the tragedy see the post by Miriam Bibby, '[The loss of the Princess Victoria](#)' (*Historic UK* nd).

112 *The Princess Victoria* [1954] NI 172.

The Statutes Revised, Northern Ireland

One of Lord MacDermott's more pleasant duties as Lord Chief Justice was to write the Foreword to a selection of volumes called 'Statutes Revised, Northern Ireland', published by Her Majesty's Stationery Office in 1956. The series was compiled by the Department of Finance in accordance with legislation and was of huge assistance to lawyers and judges working in Northern Ireland.¹¹³ As the Baron wrote:

The object of the Edition, to put it shortly, is to present the text of the statutes in force in Northern Ireland in as authoritative, up-to-date and convenient a form as possible, with nothing included which does not affect this part of the United Kingdom and nothing omitted which does ... Its sixteen volumes contain the enactments of the legislatures of five jurisdictions and span a period of over seven centuries. In their number alone they manifest not only the need but how much has been done in order to meet it; as late as 1950 a person seeking the full text of the statute law in force in Northern Ireland would have had to consult no less than ninety-one volumes.

A second edition of the Statutes Revised was issued in 1982. The need for such a publication has been superseded in this digital age, but there is no doubt that the initiative taken by the Northern Ireland Parliament in the 1950s was a seminal one.

His judgments as Lord Chief Justice

For most of the 1950s and 1960s Lord MacDermott continued as Lord Chief Justice without having to face any significant crises. While he would have sat in a large number of cases, both at first instance and on appeal, we can only refer briefly to a few of his *reported* cases. We have uncovered and examined 189 of these, plus five that he decided after having retired.¹¹⁴ Given the discretion afforded to editors of series of law reports regarding the cases they choose to report, it is impossible to say how representative these 190 cases are of Lord MacDermott's overall caseload during his 20 years as Chief Justice, either in terms of the split between High Court cases (of which 51 were reported) and Court of Appeal cases (of which 138 were reported) or in terms of how many were criminal cases (of which 52 were reported) and how many were civil (of which 137 were reported).¹¹⁵ His High Court cases included many where the King's or Queen's Bench Division or the Divisional Court of the High Court sat to hear appeals from courts of summary jurisdiction, but he also sat from time to time to hear Chancery cases, matrimonial cases and bankruptcy cases. There were several cases on

113 The Statute Law Revision Act (NI) 1952.

114 For the full list, see the Appendix, part 3.

115 The criminal cases include cases on issues of criminal procedure and claims for criminal injuries compensation.

the interpretation of wills too. Occasionally, we know from a reported Court of Appeal decision that an unreported first instance judgment of the Chief Justice was affirmed¹¹⁶ or overruled.¹¹⁷

When one compares the types of cases coming before the Court of Appeal between 1951 and 1971 with those coming before that Court in a more recent 20-year period (2004 to 2023), it is remarkable how much more time is spent by today's Court (and therefore by its President – the Lord or Lady Chief Justice) on appeals against convictions for serious offences and on challenges to sentences. A number of the criminal cases dealt with by Lord MacDermott had to do with breaches of customs laws applying to trade between Northern Ireland and the Republic of Ireland, especially trade in livestock. No such cases occur today and there are also fewer civil cases dealing with charities, taxes and wills. Of course, Lord MacDermott's era was also relatively unfamiliar with the concept of judicial review of administrative action, although he did deal occasionally with applications for writs of *certiorari* and, more generally, with the powers and duties of local authorities.

Interestingly, it seems that Lord MacDermott's son John, who was called to the Bar of Northern Ireland in 1949, sometimes argued cases before him.¹¹⁸ Common law rules on apparent bias, as an aspect of procedural fairness, would probably not permit this to happen today.

Lord MacDermott retired as Lord Chief Justice of Northern Ireland in the summer of 1971. By that time the 'Troubles' were about to reach their height and he had already had to deal with some cases related to the civil unrest. One of the most prominent was the case involving Bernadette Devlin, the civil rights leader who in 1969 was elected as the MP for Mid-Ulster in the Westminster Parliament when she was still only 21. Later that year she was convicted by a magistrates' court of riotous behaviour in Derry/Londonderry and was handed a sentence of six months' imprisonment. Lord MacDermott CJ presided in her hearing before the Court of Appeal.¹¹⁹ Her defence to the charge was 'justification' in that she believed that the police were about to enter the Bogside area of Derry/

116 *Eg McGuigan v Pollock* [1955] NI 74.

117 *Eg Re Sergie* [1954] NI 1.

118 *Eg Porter v Boomer* [1957] NI 122, where his son appears to have acted as junior counsel for the successful appellant.

119 *Devlin v Armstrong* [1971] NI 13. The lawyers prosecuting on behalf of the state were Brian Hutton QC and Robert Carswell BL, each of whom would later become the Lord Chief Justice of Northern Ireland and subsequently a Lord of Appeal. Bernadette Devlin was defended by Sir Dingle Foot QC, who served as a Labour MP at Westminster from 1957 to 1970 and as Solicitor General for England and Wales from 1964 to 1967 in Harold Wilson's Government. He lost his seat in Parliament in the general election held just two months before the appeal hearing took place in this case. See too *Cyril Lord Carpets Ltd v IRC* [1966] NI 178 and *McCullough v Glass* [1971] NI 238, two cases in which John MacDermott appeared before his father as senior counsel, winning on both occasions.

Londonderry in order to assault the people there and to damage their property. Unsurprisingly, her appeal was dismissed. In the course of yet another meticulously reasoned judgment Lord MacDermott said this:

At any rate one common purpose of the rioters and the appellant was, beyond any question, to keep the police from entering or establishing themselves in the Bogside and to achieve this by force. The appellant's contention that the honesty and reasonableness of her apprehension (as I have assumed them to be for the sake of the argument) robbed her actions of the *mens rea* necessary to constitute the offences charged must, to my mind, fail once the nature of this common purpose has been demonstrated. If it were conceded that her apprehensions supplied a motive for her actions and incitements, that in itself would fall well short of neutralising her intentions as manifested by the manner of her participation.¹²⁰

In another early Troubles-related case, *R v Corr*, Lord MacDermott revealed his concern to ensure that criminal processes are fair.¹²¹ The case revolved around whether the way in which police had questioned a suspect while he was in custody made his answers involuntary, even though there had been no threats issued, or promises made or any 'oppressive cross-examination'. Lord MacDermott went out of his way to say that other circumstances could make a suspect's answers involuntary:

The effect of a vigorous cross-examination ... on one who is not free to get away from his questioner may, in certain circumstances, be to arouse hope of release or fear of further detention or other prejudicial result in the mind of the suspect ... But it may also act more directly by subjecting the person questioned to a degree of pressure which saps his will and makes him talk.¹²²

On the facts of the case Lord MacDermott CJ decided that the answers given by the suspect were admissible, but his *dictum* was approved by two prominent academic commentators¹²³ and was later endorsed by legislation.¹²⁴ This ruling by Lord MacDermott makes one confident that if, in the Iain Hay Gordon case mentioned earlier, he had been made aware of the circumstances in which the alleged confession had been made, he would indeed have declared it inadmissible.

120 Ibid 32. Curran and McVeigh LJJ concurred with Lord MacDermott's judgment.

121 [1968] NI 193.

122 Ibid 210–211. He made the same point in his Bentham Club Address later the same year: see 255–256 below. See too *R v Flynn and Leonard* (unreported, 24 May 1972).

123 F W Newark, '*R v Corr*' (1971) 22 Northern Legal Quarterly 336; D S Greer, 'Admissibility of confessions and the common law in times of emergency' (1973) 24 Northern Ireland Legal Quarterly 199, 200–201.

124 Northern Ireland (Emergency Provisions) Act 1973, s 6 and its replacement, Northern Ireland (Emergency Provisions) Act 1978, s 8.

In his last few months as Lord Chief Justice the Baron heard three appeal cases relating to convictions for possession of explosive substances, including firearms. Here again he reveals how alive he was to the need for the law to be applied with rigorous fairness. In *R v Downey* he set aside two convictions because the prosecution had not shown that the defendant had knowledge of the guns and ammunition found in the premises.¹²⁵ In *R v Murphy, Lillis and Burns* he held that the appellants' convictions for possession were inconsistent with their acquittal on two other counts.¹²⁶ And in *R v Fagan* he ruled that for there to be a conviction under section 4 of the Explosive Substances Act 1883 it had to be shown that the defendant was knowingly in possession of the substances in such circumstances as to give rise to a reasonable suspicion that the possession was not for a lawful object;¹²⁷ here the trial judge had not made it clear that it was open to the jury to find on a balance of probabilities that the appellant's possession was for a lawful purpose, so the conviction was set aside. In the first two of these cases the Lord Chief Justice cited a Privy Council case he had dealt with 20 years earlier, *Sambasivam v Public Prosecutor, Federation of Malaya*.¹²⁸

In an unpublished article penned by Lord MacDermott which we unearthed in papers preserved by his son John, and kindly made available to us by John's family, the Baron examined the concept of non-jury trial of indictable offences. The piece is undated but from its content it seems to have been written in 1977. In it Lord MacDermott looked back at how Troubles-related cases were tried by a judge and jury after 1922:

It is only fair to say that my experience in Belfast was that fair and reasonable verdicts were pronounced. I could, but do not propose to, go into instances which would justify that assertion. Suffice it to say that I, in my various capacities as counsel, law officer and judge know of only two cases in which a Belfast jury brought in a wholly unjustified verdict and those two cases were really trivial ones which certainly did no violence to the administration of justice generally – and incidentally they were not wholly out of step with common sense.¹²⁹

He then went on to examine the position after the commencement of the Northern Ireland (Emergency Provisions) Act 1973, section 2 of which introduced non-jury trials for 'scheduled offences' relating to the Troubles in Northern Ireland. He prophetically noted that, although the idea of introducing such trials could be backdated to the 1880s,

125 [1971] NI 224.

126 [1971] NI 193. Jones J dissented, a most unusual step in a criminal appeal.

127 [1972] NI 80.

128 [1950] AC 458. See the text referred to in n 94 above.

129 'The non-jury trial of indictable offences', unpublished paper, 9. Sadly, Lord MacDermott did not give any further details of the two cases he had in mind.

and in particular to the Prevention of Crime (Ireland) Act 1882, the relevant provisions of which were never brought into force:

the change [in 1973] only applied to certain, namely scheduled cases, and it purported to be a change to meet an emergency which makes it reasonable to call it a temporary change. But one cannot but feel that it might be one of these so called temporary changes which it might be difficult to reverse.¹³⁰

He was right: such trials continue to this day in Northern Ireland, albeit under more recent legislation.¹³¹ Trials without a jury are also possible in Northern Ireland in cases of jury tampering, as they are in England and Wales.¹³² In the Republic of Ireland the Special Criminal Court, sitting with three judges and no jury, continues to hear not just terrorist cases but also those involving serious organised crime.¹³³ Lord MacDermott outlined some of the arguments for and against trials without a jury but he studiously refused to come down on one side or the other, save to say that 'I join every right thinking person in hoping that in the context of terrorism temporary will mean what it says, namely temporary.'¹³⁴

A feature which stands out in Lord MacDermott's judgments is his scrupulous interpretation of legislation in light of comprehensive examination of precedents. While that should be a characteristic of all judicial work, the Baron went about achieving it more systematically than most. He did not seem driven by any particular ideology, being content to arrive at his conclusions by dint of the careful application of his finely honed analytical skills.

But not everyone was a huge fan. In the estimation of Sir Edward Jones, who was 16 years younger than Lord MacDermott and served as the unionist MP for Derry/Londonderry from 1951 to 1968, acting as Attorney General for Northern Ireland during the last four years of that period before himself becoming a High Court judge presumably on Lord MacDermott's recommendation and a Lord Justice of Appeal in 1973, retiring in 1984, Lord MacDermott could be somewhat domineering. As he put it:

130 Ibid 11.

131 Justice and Security (NI) Act 2007, ss 1–9. These have to be considered for renewal every two years. To date they have always been renewed after such consideration. The latest extension was provided by the Justice and Security (NI) Act (Extension of Duration of Non-Jury Trial Provisions) Order 2025 (SI 2025/875).

132 Criminal Justice Act 2003, ss 44–50.

133 The Court is authorised under the Offences Against the State Act 1939. For more details see Brice Dickson, *The Irish Supreme Court: Historical and Comparative Perspectives* (Oxford, Oxford University Press 2019) 200–207. See too Fergal Davis, *The History and Development of the Special Criminal Court 1922–2005* (Dublin, Four Courts Press 2007).

134 Ibid 16.

I did not find him to have been a great judge but I fully realize that others may not share my view. There is no doubt that he was industrious to a degree and he administered the courts very well indeed. In fact he was a very impressive head of the profession and whether or not one actually liked him no one could fail to respect him. On the whole he rather filled the position of a schoolmaster and in that capacity he was greatly missed when he came to retire. On one occasion, when he made some observation which called in question my experience, I was reminded of Tony Babington's riposte when a similar suggestion had been made to him when he was at the Bar: 'My Lord,' he said, 'I have been in practice at the Bar for ten years. I am therefore of sufficient experience to be a judge. Thereafter there are no degrees of experience.'¹³⁵

Although the context in which Lord MacDermott is said to have questioned Sir Edward's experience is unclear, it seems likely that Sir Edward's overall estimation of the Baron was to some extent coloured by this insult. However, even his close friend Sir Robert Lowry admitted that he did have a prickly side:

Although he inspired affection, MacDermott was often severe. To those who did not know him, and to some who did, he was not only formidable but frightening, an impression not lessened by his dominating presence. Some felt that, appointing himself the agent of retribution, he adopted as his text the words 'Whom the Lord loveth he correcteth'.¹³⁶

Clearly, Lord MacDermott greatly enjoyed being a judge. As we will see in the next section, he agreed to sit as an *ad hoc* Law Lord in four further cases (one in 1972 and three in 1973) after he had retired from his role as Lord Chief Justice. What is even more public-spirited is that during retirement he also sat in several High Court cases in Northern Ireland, four of which were reported and one of which went on to the Court of Appeal, where his judgment at first instance was actually overturned.¹³⁷ His very last reported judgment in Northern Ireland was delivered on 23 June 1975. It is interesting to note that Lord MacDermott's son, John, was appointed as a High Court judge in Northern Ireland in 1973. This is likely to be the only example within the UK or Ireland of a father and son each hearing cases at the High Court level or above at the same time.

135 Jones (n 63 above) 99.

136 Robert Lowry, 'MacDermott, John Clarke, Baron MacDermott' in *Oxford Dictionary of National Biography* (nd).

137 *Heron v Ulster Bank Ltd* [1974] NI 44. The case turned on the meaning of 'my other children' in a will. According to a letter sent by Lord Lowry CJ to the Lord Chancellor's Department on 27 July 1983, where he was referring to the assistance which retired judges can give to the workload of the High Court: 'Lord MacDermott, although 75 when he retired gave considerable help mainly on wardship from 1971 until his death in 1979' (National Archives LCO 58/24; NI 22/36/05).

THE *AD HOC* LAW LORD, 1951–1973

Even while serving as Lord Chief Justice of Northern Ireland – and for two years thereafter – Lord MacDermott often sat as an *ad hoc* Law Lord in the House of Lords. Blom-Cooper and Drewry calculated that he did so on at least 25 occasions between 1952 and 1967, giving 19 full judgments.¹³⁸ Unfortunately, those authors did not list the cases in question. Our own research has identified only 24 such occasions. It may be that he sat in an unreported case (of which there were 25 during this period),¹³⁹ as we have not been able to discover which judges sat in those cases. We do know that after 1967 he sat on a further nine occasions, his last appearance being in July 1973.¹⁴⁰ This means that in our estimation he sat as an *ad hoc* Law Lord in a total of 33 cases. Adding that figure to the one relating to his years as a full-time Lord of Appeal, we calculate that altogether he sat in 88 reported cases in the House of Lords. After having sat in 28 Privy Council cases when he was a full-time Lord of Appeal, he then sat in a further eight Privy Council cases after becoming Lord Chief Justice of Northern Ireland, making a total of 36 reported cases.¹⁴¹ We alluded to his Privy Council cases earlier in this article and so in this section we consider only his *ad hoc* cases in the House of Lords.¹⁴²

It seems that Lord MacDermott never sat in an appeal from Northern Ireland: there were 22 such appeals during his time as Lord Chief Justice and of the 18 which were reported he had been involved in all but one of them in the courts of Northern Ireland – in two when sitting in the High Court and in the other 15 as a Court of Appeal judge – so he was disqualified from hearing them in the House of Lords. The one case in which he did not sit in Northern Ireland was a company tax case.¹⁴³ We know that he did not sit in the Lords in one of the four unreported cases because he was again a member of the Court of Appeal in that case.¹⁴⁴ It is possible that he sat in one or more of the other three unreported appeals from Northern Ireland, but if so they are the only examples of that phenomenon.¹⁴⁵ There is no principle which dictates

138 Blom-Cooper and Drewry (n 67 above) 176.

139 Ibid 250–251.

140 Four of his appearances in the House of Lords occurred after he had retired as the Lord Chief Justice.

141 For the full list of all the reported cases in which the Baron sat as an *ad hoc* Law Lord, see the Appendix, part 4.

142 See the text at nn 86–94 above.

143 *Cyril Lord Ltd v Inland Revenue Commissioners* [1965] NI 77 (CA), 42 TC 463 (HL).

144 *Smyth v Cameron* (1959).

145 These cases were *McKeown v Thomas Burrell* (1959), *Rental Holdings Ltd v Hall* (1959) and *O'Hagan v Northern Ireland Farmers' Bacon Co Ltd* (1966).

that a judge from Northern Ireland cannot sit in an appeal to the UK's apex court from Northern Ireland. Indeed, it is now customary for the Supreme Court Justice from Northern Ireland to sit in appeals from that jurisdiction and very often it is that judge who gives the lead judgment in such appeals. As a retired Lord Chief Justice of Northern Ireland Sir Declan Morgan has sat and given the single judgment of the court in an appeal against sentence in a criminal case from Northern Ireland¹⁴⁶ and the current Lady Chief Justice, Dame Siobhan Keegan, has sat both in a matter referred to the Supreme Court by the Attorney General for Northern Ireland¹⁴⁷ and in an appeal in a judicial review application from Northern Ireland.¹⁴⁸ This latter case is, we believe, the first occasion on which a sitting Chief Justice of Northern Ireland has sat in the apex court in an appeal against their fellow judges in the Court of Appeal in Northern Ireland.

As is to be expected, the subject-matter of the 33 cases in which Lord MacDermott served as an *ad hoc* judge was highly varied. But, as with the cases he dealt with as a full-time Lord of Appeal between 1947 and 1951, the dominant subject matter was taxation law (12 cases, or 37.5%). The other legal fields he had to examine were criminal law (8 cases, or 25%), land law (4 cases), employment law (including compensation for work accidents) and family law (3 cases each), and tort law, charity law and patent law (1 case each). He gave a substantive judgment in 25 of the 33 cases, dissenting on only three occasions. Two of the dissents were in tax cases¹⁴⁹ and the third was in an accident at work case where he alone found that the operator of a lathe should have been able to claim compensation for an injury to his hand occurring while he used the lathe.¹⁵⁰ Perhaps his reasoning in that case was influenced by his own work in a munitions factory during the First World War.¹⁵¹ As Lord Lowry reminds us in his short biography of MacDermott: 'He was a practical expert, as befitted an old machine-gunner, knew about cameras and car engines, and was a first-class woodworker.'¹⁵²

146 *R v Maughan* [2022] UKSC 13, [2022] 1 WLR 2820.

147 *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505.

148 *In the Matter of an Application by Rosaleen Dalton for Judicial Review* [2023] UKSC 36, [2025] AC 235.

149 *Southern Railway of Peru Ltd v Owen (Inspector of Taxes)* [1957] AC 324 and *Inland Revenue Commissioners v Lord Rennell* [1964] AC 173.

150 *Sparrow v Fairey Aviation Co Ltd* [1964] AC 1019.

151 In *An Enriching Life* (n 1 above) 60–61, MacDermott mentions his awareness of the dangers of an unguarded moving belt.

152 See Lowry (n 136 above).

Amongst his other important judgments as an *ad hoc* Law Lord one could point first to *Bonsor v Musicians' Union*, where he upheld the right of a trade union member to claim compensation from his union for being wrongfully expelled, supposedly for late payment of his membership fee. After the expulsion the plaintiff found it very difficult to get employment because the Musicians' Union favoured a closed-shop policy and would not allow non-union musicians to play alongside its members.¹⁵³ Mr Bonsor, who died during the course of the litigation but whose widow was allowed to take up his case, was represented by a young Anthony Lester, who many years later became a leading human rights lawyer and a peer (Lord Lester of Herne Hill QC). The Lords' decision in this case upheld a dissent by Denning LJ in the Court of Appeal and built on the foundation stone laid down in the famous case of *Taff Vale Railway Co v Amalgamated Society of Railway Servants*, where the House of Lords ruled that a trade union can sue and be sued even though it is not a 'juristic person'.¹⁵⁴ Lord MacDermott addresses the problem posed when a member of an organisation is suing a large number of their fellow members and a year later, in his Hamlyn Lectures, as we shall see, he devoted his final talk to 'The power of numbers', citing the *Bonsor* case as an example of how the law can control that power.¹⁵⁵

In *National Deposit Friendly Society Trustees v Skegness Urban District Council* Lord MacDermott set out clearly why a convalescent home did not qualify for rate relief as an institution 'concerned with the advancement of social welfare' because the Friendly Society which ran the home was established entirely for the benefit of its own members and lacked the element of altruism or public benefit required by legislation.¹⁵⁶ In doing so he drew upon his own judgment in the charity law case of *Oppenheim v Tobacco Securities Trust Co Ltd* in 1950, where he dissented.¹⁵⁷ On the other hand, in *Dingle v Turner*, he joined his colleagues in ruling that a trust for 'poor employees' was charitable, again citing the *Oppenheim* case.¹⁵⁸ In *AMP Incorporated v Hellermann Ltd* he sided with the majority in a 3:2 decision upholding the right of a patentee of a crimping tool to have the specification of the patent amended.¹⁵⁹ In the last case he heard, *Williams v Beasley*,

153 [1956] AC 104.

154 [1901] AC 426.

155 John Clarke MacDermott, *Protection from Power under English Law* (London, Stevens 1957) 189.

156 [1959] AC 293, interpreting the Rating and Valuation (Miscellaneous Provisions) Act 1955, s 8(1)(a).

157 [1951] AC 297.

158 [1972] AC 601.

159 [1962] 1 WLR 241. A crimping tool is a device which facilitates the connection of wires to other equipment.

on 18 July 1973, he and his colleagues reversed the Court of Appeal when ruling that a solicitor who was being sued for negligence was not entitled to have the issue resolved with the help of a civil jury.¹⁶⁰

Before concluding this brief survey of Lord MacDermott's work as an *ad hoc* Law Lord we will look at two further batches of House of Lords cases, those dealing with criminal law and those dealing with family law.

Criminal law cases

Lord MacDermott gave a judgment in four of the eight criminal law cases he dealt with. In 1966, in a case which mirrors *Williams v Beasley*, just mentioned, he held in *Toohey v Woolwich Justices* that a defendant who was charged in a magistrates' court with the offence of assaulting a constable was not entitled to opt for trial by jury because the relevant legislation precluded such a mode of trial if the offence was an 'assault'.¹⁶¹ In 1969 he explained in *S (An Infant) v Manchester City Recorder* that a court of summary jurisdiction can allow a plea of guilty to be withdrawn at any time up to the announcement of a sentence.¹⁶² In 1973 he gave two judgments interpreting provisions in the recently enacted Theft Act 1968. The first was in *DPP v Ray*, where he was part of the majority in a 3:2 decision holding that the defendant had been guilty of deception when he left a restaurant without paying for his meal even though when he first entered the restaurant and ordered his meal he had intended to pay.¹⁶³ The second was in *DPP v Turner*, where paying for something by handing over a worthless cheque was found to be 'obtaining a pecuniary advantage by deception'.¹⁶⁴ In four other criminal cases Lord MacDermott entered a simple concurrence.¹⁶⁵

Family law cases

In his last four years as an *ad hoc* Law Lord, Lord MacDermott gave a judgment in a trio of important cases dealing with family law issues.¹⁶⁶ The first was *J v C* in February 1969, after a seven-day hearing in

160 [1973] 1 WLR 1295. Judgment was given just a week after the hearing, on 25 July 1973. Just three months later Lord MacDermott's son, John MacDermott QC, was elevated to the High Court bench in Northern Ireland.

161 [1967] 2 AC 1. The legislation was the Magistrates' Courts Act 1952, s 25(1).

162 [1971] AC 481.

163 [1974] AC 370. The two dissenting judges were Lord Reid and Lord Hodson.

164 [1972] AC 601.

165 *Churchill v Walton* [1967] 2 AC 224; *Athanassiadis v Government of Greece* [1971] AC 282; *Crickitt v Kursaal Casino Ltd (No 2)* [1968] 1 WLR 53; *Atkinson v US Government* [1971] AC 197.

166 These cases were also highlighted by Sir Declan Morgan in his lecture on Baron MacDermott given at the Spring Discourse of the Irish Legal History Society in the Inn of Court of Northern Ireland on 12 April 2024.

December 1968.¹⁶⁷ The case pitted the Spanish parents of a 10-year-old boy against his English foster parents. The boy had lived most of his life with the latter and was well settled with them and their own five children. His Spanish parents were unimpeachable but were now objecting to the fact that the English foster parents wished to bring the boy up within the Church of England rather than the Roman Catholic Church and they therefore asked that he be returned to Spain to live with them. The trial judge and the Court of Appeal both held that the boy should remain with his foster parents in England and the House of Lords unanimously agreed. It was a case where the welfare of the child needed to take priority even over the right of the parents to bring up their own child.

Lord Guest gave the lead judgment but Lord MacDermott followed up with an even fuller one.¹⁶⁸ He drew in particular on *Ward v Laverdy*, the first ever appeal from the Court of Appeal in Northern Ireland to reach the House of Lords, which also concerned the religious upbringing of a child.¹⁶⁹ Shortly after that decision Parliament enacted the Guardianship of Infants Act 1925, section 1(1) of which enshrined in legislation for the first time the principle that:

Where in any proceeding before any court ... the custody or upbringing of an infant ... is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

The precedential value of Lord MacDermott's carefully structured judgment lies in the clarity with which he expressed his understanding of what the last part of that subsection means in practice:

Reading these words in their ordinary significance, ... it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.¹⁷⁰

He went on to add:

While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be

167 [1970] AC 668.

168 Lord Upjohn and Lord Donovan also issued judgments.

169 [1925] AC 101. He also considered *In re O'Hara* [1900] 2 IR 232, a decision of the Irish Court of Appeal.

170 [1970] AC 668, 710–711.

capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute ...¹⁷¹

J v C is still regularly cited in the courts today as, for example, in *Re P (Circumcision: Child in Care)*,¹⁷² *Re G (A Child) (Care Proceedings: Welfare Evaluation)*¹⁷³ and *Re G (Children) (Residence: Same Sex Partner)*.¹⁷⁴

A year or so later Lord MacDermott and his fellow Law Lords had to consider *J v C* when issues arose in two appeals about whether blood tests should be conducted on young children in order to determine who their fathers were: *S v S*; *W v W*.¹⁷⁵ In reaching the same conclusion as his colleagues, Lord MacDermott set out the history of how courts have dealt with children's issues and said that 'while the court should be alert to exercise its protective jurisdiction on behalf of an infant, it does not need to be satisfied before ordering a blood test that the outcome thereof will be for the benefit of the infant'.¹⁷⁶ He effectively distinguished *J v C*, or at least limited its application. That he felt able to do so indicates that he was prepared to move with the times, although he clearly felt uncomfortable about the changing *mores*:

My Lords, I confess I have come to this last conclusion without any certain view as to its ultimate, general effect. I suppose this conclusion ... might ... bring about more paternity issues and thus produce an increase in the number of bewildered and unhappy children. I hope not. I do not regard such a deplorable consequence as inevitable. But if it happens, I venture to think that the underlying cause will not be the use of serological science to get at the truth; and that it is far more likely to be found in the changes which have occurred in the standards of marriage and family relationships, and in the legislation which has reflected those changes. This is not to suggest that the plight of the children has been ignored. Parliament has done much for them, but it has been a salvage operation.¹⁷⁷

The Baron's third important family law case was *Re W (An Infant)*,¹⁷⁸ where what was at issue was whether the mother's refusal to consent to the adoption of her child was 'unreasonable' within the terms of

171 Ibid 715.

172 [2021] EWHC 1616 (Fam), [2022] 4 WLR 53.

173 [2013] EWCA Civ 965.

174 [2006] UKHL 43, [2006] 1 WLR 2305.

175 [1972] AC 24.

176 Ibid 51.

177 Ibid.

178 [1971] AC 682.

section 5(1)(b) of the Adoption Act 1958.¹⁷⁹ On the facts the House of Lords unanimously held, reversing the Court of Appeal, that it was. They did not apply the *J v C* approach – indeed that case was not even cited to them – but they did point out that under section 7(1)(b) of the 1958 Act a court could not make an adoption order unless it was satisfied ‘that the order if made will be for the welfare of the infant’. Lord MacDermott, in his judgment, followed a pattern he had used many times before, whereby he first asked what was the natural meaning of the words used in the legislation and then checked to see whether that meaning was supported by the relevant case law.¹⁸⁰ Here he concluded that it was. It must have gone against the grain for him to conclude that this mother had to give up her child for adoption, but on the sad facts before him he was clearly of the view that doing so was in the best interests of the child.

Having briefly surveyed Lord MacDermott’s judgments as an *ad hoc* Law Lord, we will next turn our attention to how the Law Lords treated Lord MacDermott’s judgments within Northern Ireland when they were appealed to the House of Lords.

THE VIEWS OF THE HOUSE OF LORDS ON LORD MACDERMOTT’S JUDGMENTS

A recurring feature in the appeals heard from Northern Ireland during the 1950s and 1960s by the Appellate Committee of the House of Lords was the deference they tended to pay to the relevant judgments of Lord MacDermott CJ in the courts below. In two cases his view as the trial judge was preferred by the Law Lords to that of the Court of Appeal in Northern Ireland,¹⁸¹ in one case his views as part of the majority in the Court of Appeal were approved¹⁸² and in a further three cases his *dissenting* judgments in the Court of Appeal were approved.¹⁸³ On the other hand, there were five cases in which his views in the Court of Appeal were *not* approved. It is not unusual for the views of senior judges to differ on knotty legal questions, so nothing significant

179 This read: ‘(1) The court may dispense with any consent required by paragraph (a) of section 4 (1) of this Act if it is satisfied that the person whose consent is to be dispensed with – (a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably.’

180 See *Re W (An Infant)* (n 178 above) 707–715.

181 *Attorney General for Northern Ireland v Gallagher* [1963] AC 349; *Northern Ireland Hospitals Authority v Whyte* [1963] 1 WLR 88.

182 *IRC v Herdman* [1969] 1 WLR 1919.

183 *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145; *Bill v Short Bros and Harland Ltd* [1963] NI 7; *Irwin v White, Tomkins and Courage* [1964] 1 WLR 387.

should be read into the fact that of his 11 judgments which were later considered by the House of Lords, five of them were not endorsed. The cases in the three categories just mentioned each deserve separate attention.

Lord MacDermott's views approved over those of the Court of Appeal

The first of the two cases in which the House of Lords endorsed the first instance judgments of Lord MacDermott rather than the judgments of the Court of Appeal is *Attorney General for Northern Ireland v Gallagher*.¹⁸⁴ Lord MacDermott CJ tried Patrick Gallagher in 1961 for the murder of his wife, Rose. Gallagher's defences were that he was either insane at the time or, by reason of the consumption of alcohol, incapable of forming the intent necessary to constitute murder. It was clear, however, that he had formed the intention to kill his wife even before he consumed alcohol on the day in question. (In 1961 Northern Ireland's law did not permit a defendant to plead 'diminished responsibility', a defence which allows the defendant to be found guilty of manslaughter.)¹⁸⁵ Lord MacDermott directed the jury on how to apply the law to the facts and they then found the defendant guilty of murder. In the Court of Criminal Appeal, however, the three judges took the view that Lord MacDermott had misdirected the jury by telling them to consider whether the defendant was insane before he started drinking on the morning of the killing rather than when he carried out the killing. They therefore directed that Gallagher should be acquitted, as they had no power to convict him of manslaughter or to order a retrial.

On appeal by the prosecution to the House of Lords – one of the first criminal cases to reach that court under the new appeal procedures introduced by the Administration of Justice Act 1960 – two issues were considered, each very important. The first was whether, in considering the appeal, the Law Lords were restricted to examining only the specific point of law which had been deemed of sufficient public importance to merit their Lordships' consideration of the case, that is, whether Lord MacDermott had been correct to tell the jury to assess Gallagher's state of mind before he started drinking. Their Lordships held that they were not so restricted: once leave to appeal had been granted they could consider other matters as well (though they suggested that totally irrelevant matters could not be). Here – and this is the second issue considered – the other matter was what kind of order the House of

184 [1963] AC 349.

185 The defence of diminished responsibility was introduced for England and Wales by the Homicide Act 1957 but not in Northern Ireland until the coming into force of the Coroners and Justice Act 2009, s 53, on 1 June 2011.

Lords was able to make having answered the point of law in question. Had they not had that power then whatever decision they came to on the point of law could have no effect on the order issued by the Court of Criminal Appeal – that Gallagher should be acquitted. But the Law Lords unanimously held that the outcome should be that his conviction for murder should be restored.¹⁸⁶ As Lord Goddard pointed out:

this case affords a striking illustration of what may result from the Court of Criminal Appeal in Northern Ireland, as in England, having no power to order a new trial in an appropriate case. Had it not been possible for the court to certify that a point of law of general importance arose in the case and for this House to hold it was fit for their consideration, a man who had brutally murdered his wife and whom a jury had declined to find was insane would have had to be set at liberty free of any consequence of his crime.¹⁸⁷

The second of the two cases where the Law Lords favoured Lord MacDermott's position over that of the Court of Appeal is *Northern Ireland Hospitals Authority v Whyte*.¹⁸⁸ At first instance Lord MacDermott had to consider whether, on the construction of his contract of employment, a consultant physician was able to charge fees for the work he carried out in assessing chest and lung X-rays of applicants wanting to join the RUC: there had been a worrying increase in cases of pulmonary tuberculosis amongst RUC officers because many of them lived in barracks in close contact with other officers. His Lordship's conclusion was that this was work which the consultant was obliged to undertake as part of his salaried employment, but the Court of Appeal disagreed (Curran LJ and Sheil J, with Black LJ dissenting). It is unusual for a dispute over the interpretation of a contract to reach the House of Lords but on this occasion leave was granted for a hearing (which lasted three days). The Law Lords held unanimously that Lord MacDermott was right and the Court of Appeal wrong. The assessments conducted were not to ensure that police recruits were fit so much as to prevent the spread of tuberculosis and it was therefore an appropriate task for the Tuberculosis Authority to require a consultant to perform as part of his routine work within hospital and specialist services without any extra pay.

186 See, in particular, the judgment of Lord Reid at [1963] AC 349, 364–368.

187 Ibid 369.

188 [1963] 1 WLR 882.

Lord MacDermott's views in the Court of Appeal approved

On four occasions the views expressed by Lord MacDermott in the Court of Appeal were approved when the cases reached the House of Lords. What is remarkable is that in the first three of those cases it was his dissenting judgments that were approved. They were all cases on an employer's liability towards their employees and they illustrate well the Chief Justice's confidence that juries should be left to make up their own minds on whether, on the particular facts of the case, there had been negligence on the part of the employer. (It should be noted that civil juries remained in use in Northern Ireland for negligence cases for much longer than in England and Wales. They did not stop being used until the mid-1980s.)

In *Cavanagh v Ulster Weaving Co Ltd* a civil jury, directed on the law by Black LJ, held the defendant company was liable for negligence when one of its employees fell from a roof because he had been supplied with rubber boots which, when wet, were slippery. On appeal the Court of Appeal (Curran LJ and Sheil J in the majority, Lord MacDermott CJ dissenting) held that the employer should not be liable because the 'set up' in question was in line with custom and practice in that line of work. The House of Lords, however, restored the verdict of the jury.¹⁸⁹ In doing so they pointed out that the majority in the Court of Appeal had fallen into the error of treating evidence of custom and practice as virtually conclusive, entitling them to say that the case should have been withdrawn from the jury. Instead, said the Law Lords, Lord MacDermott's statement of the law was more accurate. He had, after all, been a member of the House of Lords bench which had decided *Paris v Stepney Borough Council* almost a decade earlier, a case where a worker succeeded in proving negligence even though standard practice had been adopted by the employer, the crucial point being that he was a particularly vulnerable individual who had already lost the sight of one eye and not enough care had been taken to protect that particular person from further injury.¹⁹⁰

In *Bill v Short Bros and Harland Ltd* the plaintiff was a worker who tripped over an airhose on the floor of his workplace. Sheil J withdrew the case from the civil jury when evidence was produced that the plaintiff could have avoided the accident himself. In the Court of Appeal both Black LJ and Curran LJ upheld the trial judge's decision but Lord MacDermott was of the view that the decision on whether there had been negligence on the part of the employer should have been left to

189 [1960] AC 145.

190 [1951] AC 367. See too p 223 above.

the jury.¹⁹¹ The Law Lords unanimously agreed with him, saying that, while it is for the trial judge to say whether there is evidence that the employer might have been negligent, if there is such evidence the judge should then leave it to the jury to decide whether it is enough to hold the employer liable. Just because there may also have been evidence of the employee's contributory negligence does not mean that the case should be taken away from the jury.¹⁹²

In *Irwin v White, Tomkins and Courage* a civil jury had found an employer to be liable even though the employee had been killed by part of a machine which, while itself operational, was not yet connected to another part of the machine to make the whole machine operational; moreover there was no explanation for why Mr Irwin was in a certain position at the time of the accident. The Court of Appeal (Curran LJ and Sheil J, Lord MacDermott CJ dissenting) overturned the jury's decision but again the House of Lords unanimously reversed the Court of Appeal, preferring Lord MacDermott's approach.¹⁹³ They concluded that the high threshold for an appeal court overturning a jury's decision had not been reached and that it was reasonable for the jury to assume that Mr Irwin had got into the position in which he was found because he had accidentally slipped.

The Court of Appeal case in which Lord MacDermott's *concurring* judgment was approved by the House of Lords was *IRC v Herdman*, a rare appeal from Northern Ireland in a taxation case. As part of the Court of Appeal Lord MacDermott CJ allowed an appeal by the controlling shareholder of Herdman's Ltd on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. The dispute turned on whether income received by Mr Herdman in the Republic of Ireland from the company he controlled in Northern Ireland should be liable to tax within the UK. On the interpretation of the relevant statutory provision¹⁹⁴ the Court of Appeal, reversing the Commissioners' decision, concluded that no tax was payable on that income¹⁹⁵ and the House of Lords endorsed that conclusion.¹⁹⁶ Lord Wilberforce summed up their Lordships' position thus:

The reasoning of the learned Lord Chief Justice seems to me unanswerable. Since I see no prospect of improving upon the language he has used, it is sufficient to express my entire concurrence with it.¹⁹⁷

191 [1963] NI 1.

192 Ibid.

193 [1964] 1 WLR 387.

194 Income Tax Act 1952, s 412(1).

195 [1968] NI 74.

196 [1969] 1 WLR 1919.

197 Ibid 328.

Lord MacDermott's views in the Court of Appeal not approved

As previously stated, there were five occasions on which Lord MacDermott's views as a Court of Appeal judge were *not* endorsed by the House. One of them is unreported,¹⁹⁸ but the other four each require a mention. First, In *Belfast Corporation v OD Cars Ltd* Lord MacDermott CJ and Black LJ had held that a company was entitled to compensation under the Planning (Interim Development) Act (NI) 1944 because its planning application had been rejected by the Corporation, but the House of Lords unanimously held that the right to use property in a particular way is not itself 'property' and that therefore the restrictions imposed by the Planning Acts did not contravene the statutory provision which banned the Parliament of Northern Ireland from allowing the taking of property without compensation.¹⁹⁹ There was clearly some unease on the part of the Law Lords at differing from Lord MacDermott, expressed most diplomatically by Lord Radcliffe:

It is no disrespect to the learning and weight of the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland if I say that my principal reason for disagreeing with his conclusion is that I do not believe that the present case raises the issues that he has dealt with quite in the form in which he considers them.²⁰⁰

Second, in *McClelland v Northern Ireland General Health Services Board*, in which MacDermott LCJ had supposedly 'overborne' his colleague Black LJ to get his agreement to hold that the Board was free to dismiss Mrs McClelland because she was getting married (Porter LJ dissenting),²⁰¹ the House of Lords held by three to two that such a conclusion was unjustified.²⁰² The majority interpreted the terms of the employment contract in question as precluding the implication of any implied right to dismiss a female officer who was getting married. Lord MacDermott, on the other hand, had decided that there was no implied term to the effect that the Board could *not* dismiss someone

198 *Smyth v Cameron* (1959), referred to in *Final Appeal* (n 67 above) where, at 229, Blom-Cooper and Drewry suggest that the case was given leave to appeal on the strength of the dissenting judgment of Lord MacDermott in the Court of Appeal. The case concerned the reasonableness of a civil jury's verdict that a 'master' (whom we would today call an employer) was not guilty of negligence causing damage to his 'servant' (employee), but the appeal was unsuccessful: *ibid* 387 and 460.

199 [1960] AC 490. The ban was imposed by the Government of Ireland Act 1920, s 5(1).

200 *Ibid* 522.

201 [1956] NI 127.

202 [1957] 1 WLR 594. The story of this case is told in Jones (n 63 above) 69–70. Sir Edward Jones was the senior counsel representing Mrs McClelland.

for that reason. Sadly, the House of Lords decision did not mean that employers could not *expressly* impose a marriage ban in employment contracts. That injustice was removed only when the Sex Discrimination (NI) Order 1976 came into effect.

Third, in *Scottish Cooperative Wholesale Society Ltd v Ulster Farmers' Mart Co Ltd*, the issue was whether the actions of the Society in setting up an abattoir in Enniskillen and a scheme for the sale and disposal of live pigs and carcasses was a 'disturbance' of the existing market rights of the Farmers' Mart (which derived from letters patent issued by King James I in the early 1600s). Lord MacDermott, together with Black LJ and Sheil J, held that it was,²⁰³ but the House of Lords unanimously disagreed.²⁰⁴ They said that Lord MacDermott had stated the correct legal principles but that he had erred in the way he applied them: he had concluded that a 'disturbance' was caused by the fact that contracts for the sale of live pigs had been made on the Society's premises, when, in the Law Lords' view, the contracts had in fact already been concluded by the time the pigs were brought to the premises. The case raised the interesting question of what kind of commercial conduct should constitute an actionable tort in the eyes of the law: when should a commercial competitor be liable to an existing enterprise for damage caused to the latter by the establishment of a rival business? Another interesting feature of this case is that one of the barristers representing the successful appellants was none other than Lord MacDermott's son, John. As mentioned earlier, in those days it was not deemed inappropriate that one of the lawyers in a case should be a close relative of one of the judges.²⁰⁵

Fourth, and finally, Lord MacDermott's views were not accepted in the constitutionally important case of *McEldowney v Forde*,²⁰⁶ although the Law Lords were split three to two on the matter. The case illustrates well, we think, Lord MacDermott's approach to 'the rule of law', even if that phrase is not explicitly used by him in his judgment, nor in those of the two Law Lords who agreed with him.²⁰⁷ The question at issue was whether the Minister for Home Affairs in Northern Ireland had the power, by a regulation he made in 1967, to add 'republican clubs and any like organisation howsoever described' to the list of organisations that were unlawful in Northern Ireland. The answer depended on whether such a regulation was 'making further provision for the preservation of peace and maintenance of order',

203 [1958] NI 78.

204 [1960] AC 63.

205 See too n 118 above.

206 [1971] AC 632. The case is often referred to as 'the Republican Clubs case'.

207 But just four years after delivering his judgment in *McEldowney v Forde*, Lord MacDermott, then retired from the judiciary, devoted the first of the MacDermott Lecture series to 'The decline in the rule of law': see below at n 231.

as required by section 1(3) of the Civil Authorities (Special Powers) Acts (NI) 1922–1943. In the Court of Appeal McVeigh and Curran LJJ held that it was, but Lord MacDermott dissented.²⁰⁸ On appeal to the House of Lords, Lords Hodson, Guest and Pearson agreed with McVeigh and Curran LJJ, while Lords Pearce and Diplock agreed with Lord MacDermott, so the appeal was dismissed. Lord MacDermott's apparently more liberal stance was based on the argument that the regulation in question was far too vague and wide to be embraced by the enabling legislation. He maintained that the phrase 'any like organisation howsoever described' made the regulation even vaguer. The two dissenting judges in the House of Lords were of the same view.

McEldowney v Forde is one of those cases about which lawyers can argue interminably. When the Court of Appeal's decision was announced it was subjected to rigorous scrutiny by the editor of the *Northern Ireland Legal Quarterly*, Professor Harry Calvert.²⁰⁹ He did not agree with every part of Lord MacDermott's judgment but he certainly agreed with its conclusion. He called the regulation in question 'utterly ludicrous' and went on to say that 'the qualities of the 1967 regulation highlighted by Lord MacDermott CJ in his dissenting judgment render the regulation indubitably offensive in some respects'.²¹⁰ It is safe to say, however, that in this context Lord MacDermott was on the right side of history. Today it is almost unthinkable that such a wide-ranging regulation, even when issued against the kind of background that obtained in Northern Ireland in 1967, would be considered lawful by the courts. Judges have become much stricter in the way they scrutinise executive powers.

THE LECTURER

No appraisal of Lord MacDermott's legal life would be complete without attention being given to his extra-judicial legal work. This took the form of, first, contributions to the academic study of law and, second, reports that he compiled on improvements to the administration of the law. This section of the article deals with the former and its next section will deal with the latter. Lord MacDermott's most notable academic contributions include his Hamlyn Lectures of 1957, entitled *Protection from Power under English Law*,²¹¹ his address as President of the Holdsworth Club in Birmingham entitled 'Murder in 1963', his Bentham Club lecture in 1968 on 'The interrogation of suspects in

208 [1970] NI 11.

209 Harry Calvert, 'Special powers extraordinary' (1969) 20 *Northern Ireland Legal Quarterly* 1.

210 Ibid 16.

211 MacDermott, *Protection from Power* (n 155 above).

custody',²¹² and his address in 1972 which inaugurated the annual lecture series named in his honour, his chosen topic being 'The decline of the rule of law'.²¹³ We shall consider each of these academic works in turn and then briefly consider his other academic writings.

The Hamlyn Lectures

The Hamlyn Lectures series began in 1949 as a result of arrangements made under the Hamlyn Trust. Emma Hamlyn was the daughter of a solicitor in Devon. While she never practised law herself she took a keen interest in its study and left a fund of money in her will for a series of annual lectures. They are delivered by a highly esteemed judge, legal practitioner or academic and are usually given as a series of three talks, later written up into book form. Lord MacDermott's lectures were the ninth in the series and remain the only Hamlyn Lectures delivered by someone with a close connection to Northern Ireland. His choice of topic indicates his concern for the ordinary citizen:

What I am principally concerned with are those concentrations or regions of power which, by their weight or their nature, conduce to the oppression of the individual. How and to what extent does the law react towards power of that order? How far does it succour those upon whom such power bears? Is it the law's function to keep a fair balance between those who have and those who are subject to such power? And, if so, does the law discharge that function?

He then proceeds to closely examine six different examples of the exercise of power, three in the public realm – the power of prosecution authorities, the power of Parliament and the power of the government – and three in the private – the power of wealth and status, the power of monopolies and restrictive associations and the power of 'numbers' (where he talks mainly about the power of trade unions).

This is not the place to engage in detail with Lord MacDermott's arguments but three general points are worth stressing. First, as was observed in a review of the lectures by a prominent French jurist, the lectures cover a surprisingly wide range of topics and illustrate clearly how a common law system is able to arrive at concrete solutions to difficult legal problems, often without the need for resort to legislation.²¹⁴ Second, and this was a matter stressed in a longer,

212 John Clarke MacDermott, 'The interrogation of suspects in custody' (1968) 21 *Current Legal Problems* 1–22.

213 John Clarke MacDermott, 'The decline of the rule of law' (1972) 23 *Northern Ireland Legal Quarterly* 475–496. See too n 207.

214 Denis Levy, 'Book review' (1964) 16(1) *Revue internationale de droit comparé* 253–254. He said that he could not recommend the lectures too highly to lawyers from outside the common law world.

anonymous, review of the lectures in a leading English legal journal,²¹⁵ Lord MacDermott foresees the need for greater judicial control over legislative and executive power. At one point he advocates for the establishment of an Administrative Council:

composed of a number of distinguished administrators and experienced lawyers, to which an executive department could, at the discretion of its Minister, refer an administrative problem, involving the rights, welfare or livelihood of the subject, for guidance or decision.²¹⁶

No such council was established, but Lord MacDermott did live long enough to witness the early blossoming of judicial review applications throughout the UK, a development which he no doubt heartily approved of.

A third feature of these lectures is the frankness and pragmatism they display. It is easy to detect that before he was a judge Lord MacDermott was a politician. In that role he had to operate not just within the cauldron of Northern Ireland's politics, which even in the 1930s and 1940s were highly sectarianised, but also in the context of the Second World War. For those who did not live through the 1940s and 1950s it is difficult to comprehend the impact which the struggle against Nazism must have had on those in positions of responsibility in the UK. In the case of Lord MacDermott it seems to have marked him deeply. He would have been more aware than most, having served as Minister of Public Security and then as Attorney General, that it is all too easy for a state to slip into bad habits when seeking to defeat a ruthless enemy. He seems to have been very conscious of the need to fight oppression by methods that do not sink to those which are resorted to by the oppressors themselves. As he puts it in the conclusion to his Hamlyn Lectures, 'the proper measure of protection necessitates the holding of a just balance between power and liberty'.²¹⁷

The Holdsworth Club Address

Lord MacDermott's Holdsworth Club Lecture, 'Murder in 1963', is an incisive critique of the then state of the law of murder in England and Wales. The lecture was given on 8 March 1963 during his presidency of what is still possibly the UK's best known student law society, that of the University of Birmingham. It has been in existence since 1928 and Lord MacDermott was its President in 1962–1963. The lecture is a startling one in that it is an example of a very senior serving judge intruding into a particularly important area of the law in order to make suggestions as to how the law should be amended by specific legislation

215 'C' (1958) 21 *Modern Law Review* 569–573.

216 MacDermott, *Protection from Power* (n 155 above) 78.

217 *Ibid* 195.

which the judge attempts to draft. He does so, first, in relation to the *mens rea* ('guilty mind') required for the crime of murder: he joins critics of the objective test adopted by the House of Lords in *Director of Public Prosecutions v Smith*²¹⁸ and instead favours introducing a more subjective element, whereby a person is not guilty of murder if the jury decides not to infer that they intended the natural and probable consequences of their conduct. It is difficult to assert that Lord MacDermott's draft clause directly prompted a change in the law, but just four years later, through section 8 of the Criminal Justice Act 1967, Parliament provided as follows:

A court or jury, in determining whether a person has committed an offence

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.²¹⁹

This provision is still in place for England and Wales, but there has been a lot of additional case law on what it means in practice and on where the courts should draw the boundary line between murder and manslaughter.²²⁰ It is safe to assume that Lord MacDermott would have been content that serious thought continues to be given to how to make this area of law more certain and effective.

The second aspect of the law on murder addressed by the Baron in his Holdsworth Lecture is the one relating to the mental condition of the accused. He points out some deficiencies in the common law's so-called M'Naghten rules on the topic, and also in section 2 of the Homicide Act 1957, which (except in Northern Ireland)²²¹ allowed for a charge of murder to be reduced to manslaughter if the accused is suffering from 'diminished responsibility'. To address these deficiencies Lord MacDermott drafted four clauses, one of which has four sub-clauses.²²² There is not the space to explain his proposals in detail here, but his goal was obviously to rationalise the law in what is a difficult area. There was no immediate legislative reaction to his proposals and, although there have been subsequent developments in the field, his suggestion that if a person is to be exonerated from

218 [1961] AC 290.

219 For Northern Ireland see the Criminal Justice Act (NI) 1966, s 4.

220 See eg Jonathan Herring, *Criminal Law: Text, Cases, and Materials* 10th edn (Oxford, Oxford University Press 2022) 129–135.

221 A separate provision was made for Northern Ireland in the Criminal Justice Act (NI) 1966, s 5.

222 Holdsworth Lecture, 'Murder in 1963' (1963) 22–24.

murder on grounds of insanity the insanity would need to be proved beyond reasonable doubt rather than on the balance of probabilities has certainly not been endorsed. However, the most recent amendments to the law on impaired mental responsibility in cases of homicide do go some way to recognising the concerns which Lord MacDermott had with the law as it stood in his time.²²³

Lord MacDermott's third focus in his Holdsworth Lecture is on whether the categories of 'capital murder' should be expanded. Five such categories were listed in the Homicide Act 1957 and he suggests that three further categories should be added, such as 'any murder done for the purpose of destroying evidence of the commission of any offence'. But the concept of capital murder was removed from English law when capital punishment was abolished in 1965,²²⁴ so the extent of its reach is no longer an issue. Capital punishment was abolished in Northern Ireland in 1973.²²⁵ A report from the Law Commission of England and Wales in 2006 called for a distinction to be made between first degree murder and second degree murder,²²⁶ as is common in the United States and some other countries, but the idea has not been taken up by Parliament.

The Bentham Club Address

The topic chosen for this lecture was one with which Lord MacDermott had already had to grapple on many occasions as a judge. In 'The interrogation of suspects in custody' he refers frequently to the man after whom the Club he was presiding over for a year was named, Jeremy Bentham, a political philosopher who was notoriously suspicious of lawyers and judges. The first three sections of the lecture take us on an historical tour of the development of three important legal topics – the right of suspects not to incriminate themselves when being questioned by the police, the inadmissibility in evidence of a suspect's confession unless it was given voluntarily and in the absence of oppression, and the judges' discretion to exclude evidence that has been obtained unfairly. He then explains the origins and development of 'the Judges' Rules', first set out in 1912 and then added to in 1918. They were superseded (although not in Northern Ireland) by a further set of Judges' Rules issued in 1964.

Lord MacDermott criticises the Judges' Rules for being too general and leaving too much to the interpretation of the police. He actually declares that he prefers the Scottish approach to police interrogation:

223 See the Criminal Justice Act (NI) 1966, s 5(1), inserted by the Coroners and Justice Act 2009, s 53(1).

224 By the Murder (Abolition of Death Penalty) Act 1965.

225 By the Northern Ireland (Emergency Provisions) Act 1973, s 1.

226 *Murder, Manslaughter and Infanticide Report* (LC 304 2006).

'have each case decided on its own facts and in the light of the applicable principles'.²²⁷ He suggests that the Government should issue instructions to the police setting out those principles:

The instructions should ... forbid any treatment of a suspect in any kind of custody which would savour of oppression, of threats or promises, or of anything in the nature of 'grilling' or cross-examination. This conclusion seems to me on balance to favour the administration of criminal justice rather than the contrary. It would make for fairness; it would protect the reputation of the police; and it would not be altogether lost in its effect on the criminal classes.²²⁸

Lord MacDermott adds that in certain cases the police should be allowed to detain a suspect for examination before a magistrate (a system that is common in civil law countries), though not under caution and before being charged. He even thinks that senior police officers could be sworn in as justices in districts where it is difficult to obtain the services of a trained magistrate.²²⁹ These proposals were made because of the 'tide of crime' which he thought the country was witnessing at that time (little did he know what the future held).²³⁰

Clearly, Lord MacDermott had a deep desire to ensure that suspects were treated fairly while being questioned by the police. He was more than 15 years ahead of his time in terms of making definite recommendations for change. It is likely that he would have been very pleased with the rules and codes of practice that were eventually put in place in England and Wales in this area by the Police and Criminal Evidence Act 1984, and in Northern Ireland by the Police and Criminal Evidence (NI) Order 1989.

The MacDermott Lecture

The inaugural lecture in the MacDermott Lecture series was, appropriately, given by the man himself. He was asked to speak on a topic of his own choosing, and he chose 'The decline of the rule of law'.²³¹ The theme is close to that adopted for his Hamlyn Lectures²³² and it has been much written about by subsequent judges, most notably

227 See MacDermott, 'The interrogation of suspects' (n 212 above) 16. See too 19.

228 Ibid 20.

229 Ibid 21.

230 Lord MacDermott's proposals were cited with some approval by Alec Samuels in 'Interrogation of the suspect' (1972) 23 Northern Ireland Legal Quarterly 393.

231 See MacDermott, 'The decline' (n 213 above). See also the text at nn 253 and 254 below.

232 In fact he quotes from his Hamlyn Lectures: *ibid* 479.

Lord Bingham.²³³ Lord MacDermott was clearly worried that adherence to the rule of law was slipping. He provides evidence for that and then makes various suggestions as to how the decline could be halted, including in Northern Ireland. It should be remembered that he was speaking at Queen's University Belfast in 1972, the worst year of the Troubles, during which 470 people were killed and 4,876 were injured.

However, Lord MacDermott's main evidence for a decline in the rule of law was a rise in criminality. He points out that between 1961 and 1971 the number of indictable offences known to the police in the UK rose by more than 100 per cent – from 924,250 to 1,857,632. His comments on this are probably typical of his time, though they may jar with present day sentiments:

[T]he specific causes of this malignant disease remain difficult to ascertain and isolate, and remedial measures may have to take various forms. It is to be remarked, moreover, that it has spread during a period of affluence and of educational facilities available on a greater scale than ever before. Poverty and ignorance would not, therefore, appear to be major contributory factors; but it seems likely that at any rate a partial explanation of the phenomenon is to be found in a loss of moral values in an increasingly permissive society, the break up of family life and a lack of national purpose. Yet, whatever the causes, there can be little doubt that the general attitude to the law and law breaking has altered for many. I remember when to be 'summoned' by the police was widely regarded as a family disgrace. Now it is different and repentance is often more related to the error of being caught than to the commission of the offence. The idea that the law is the bond of the community and that the community suffers when it is broken seems to be on the way out.²³⁴

Lord MacDermott found further evidence for a decline in the rule of law in the industrial action being taken by trade unions (he talks again about the difficulty with 'numbers', as he did in his Hamlyn Lectures) but he also calls out the British state for its tolerance of the infamous 'five techniques' used during 'in depth' interrogation of criminal suspects in Northern Ireland (these were hooding, wall-standing, continuous loud noise, reduced diet and lack of sleep).²³⁵ He then made one of his most controversial statements, claiming that the physical mistreatment of detainees:

233 See Tom Bingham, *The Rule of Law* (London, Penguin 2011). This won the Orwell Prize for Political Book of the Year in 2011. See too Sir Robert Carswell, 'Human rights and the rule of law' (1999) 6 *Journal of Clinical Forensic Medicine* 249. On 20 November 2002 Sir Robert delivered a lecture at the University of Cambridge on the same theme entitled 'The breastplate of judgment: human rights in the House of Lords'.

234 See MacDermott, 'The decline' (n 213 above) 485.

235 Ibid 486–488. The abuses had been called out by the 'Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August, 1971', chaired by Sir Edmund Compton (Cmnd 4823 1971).

not only slighted the Rule [of Law], but it did perhaps more than anything else to bring the policy of internment into disrepute. Repugnant though it is, there is a place, compatible with the Rule of Law, for internment, as an instrument of almost last resort, which is authorised by Parliament in times of emergency. But the methods I have described are no part of statutory internment and their use serves to show how the Rule may suffer at the hands of authority.²³⁶

This is not a publication in which to argue the pros and cons of internment but it is perhaps safe to say that on this matter Lord MacDermott was on the wrong side of history. Internment continued for more than four years and nearly all academic commentators, whether contemporary or subsequent, legally informed or not, are of the view that the policy set back a resolution of the conflict in Northern Ireland by many years.²³⁷ Of course, we do not know the answer to the counter-factual question: would the level of violence have been even worse if internment had not been used?

Lord MacDermott ends his inaugural lecture by mentioning some ideas for halting the slide in the rule of law. The first two of these are a call for '[a]n all-round effort to restore the moral standards of the nation' and promulgation of the rule of law 'through the medium of a general education'. He added that government should take preservation of the rule of law more seriously, particularly in Northern Ireland where, as he also observed in his contemporaneous *Juridical Review* article,²³⁸ more needed to be done to clarify and strengthen emergency legislation, the law on explosives and firearms, powers of arrest and the use of force relating to the prevention of crime, the capture of criminals and the restoration of order. In particular he called for it to be an offence to go about masked or otherwise disguised, irrespective of whether any malevolent intent could be proved. He seemed to be hoping that the armed forces would be given greater powers to deal with the disorder in Northern Ireland but was careful to add that:

the degree and extent of the executive's power of control and direction cannot be left at large, and the history and nature of the Rule of Law call for a careful approach to this problem with the powers of the executive reasonably defined and openly declared.²³⁹

His final thought was that the rule of law:

236 See MacDermott, 'The decline' (n 213 above) 488.

237 See eg Tom Hadden, Kevin Boyle and Paddy Hillyard, *Law and State: The Case of Northern Ireland* (London, Martin Robertson 1974) 75–77; Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester, Manchester University Press 1989) 86–100; David McKittrick and David McVea, *Making Sense of the Troubles* (Belfast, Blackstaff Press 2000) 67–75.

238 John Clarke MacDermott, 'Law and order in times of emergency' (1972) *Juridical Review* 1 (see text at n 250 below).

239 See MacDermott, 'The decline' (n 213 above) 493.

... does not tell us how to engender brotherly love afresh but that a way of getting to that point some day would be to open all of Northern Ireland's schools to the children of all religions ... [I]t would in time substitute friendship and respect for hate and suspicion.²⁴⁰

Alas, this early call for universally accessible integrated education in Northern Ireland went unheard. Half a century later, in the academic year 2024–2025, only 8 per cent of children in Northern Ireland were benefiting from that type of learning environment.²⁴¹

Fifty years after Lord MacDermott inaugurated the annual lecture series which continues under his name to this day, a Special Issue of the *Northern Ireland Legal Quarterly* collated and reproduced some of the subsequent lectures that had been included in that learned journal between 1998 and 2022.²⁴² In their editorial introduction to the Special Issue, Professors David Capper, Heather Conway and Mark Flear summarised its contents as follows:

In this supplementary special issue we bring together, for the first time, lectures published in these pages from 1998–2022. Contributions are, fittingly for such a prestigious lecture series, by world-leading and renowned commentators. With just two exceptions, Twining, Professor of Law at University College London, whose lecture was in 1998, and Beloff, King's Counsel, whose lecture was in 2014 (although at the time of speaking – and writing in these pages – he was, of course, Queen's Counsel), most contributors serve(d) as judges (or equivalent). These contributions comprise (in (chronological) order of publication): Goldstone, writing in 1999 as Justice of the Constitutional Court of South Africa; Sedley, writing in 2001 as Lord Justice of Appeal, Judge *ad hoc* of the European Court of Human Rights and a Member *ad hoc* of the Judicial Committee of the Privy Council; McLachlin, writing in 2003 as Chief Justice of Canada; Higgins, writing in 2008 as President of the International Court of Justice; Hogan, writing in 2021 as Advocate General of the European Court of Justice (and who is now Judge of the Supreme Court of Ireland); and O'Leary, writing in 2022 as Vice-President of the European Court of Human Rights (and who is now President of that court).

Beyond the following, we largely let the contributions speak for themselves. Indeed, the range of contributions themselves clearly underscores the MacDermott Lecture series as an immensely valuable and much-needed vehicle for the exchange of often fresh and provocative thinking between leading lights of the judiciary, bar and academy, and a deeply engaged audience at Queen's University Belfast. That audience includes legal academicians, members of the judiciary of Northern Ireland, and representatives from the legal professions and across wider society. We hope that you, the reader, find the individual lectures

240 Ibid 496.

241 See 'School Census Key Statistics 2024–25' (Department of Education).

242 See (2022) 73(S1) *Northern Ireland Legal Quarterly*.

interesting and original contributions that push forward discourse around the law, as well as providing engaging and enjoyable reads.

Most importantly, we hope you share our view that the contributions are a fitting testament to the life and work of Lord MacDermott, a towering figure in the legal history of Northern Ireland, the island of Ireland, and indeed these islands. We are proud to take the opportunity presented by the 50th Anniversary of the Lecture Series to honour Lord MacDermott's contribution and legacy in the pages of this journal.²⁴³

Other academic writings

'Law and practice in Northern Ireland' is the title of a talk given by Lord MacDermott at University College London on 20 February 1953.²⁴⁴ It is an erudite account of the differences between the laws and legal system of Northern Ireland and those of England and Wales. He ranges across land law, equity, contract and tort, criminal law and statute law. On the last topic he refers to the case law governing the legislative competence of the Northern Ireland Parliament.²⁴⁵ He then describes the court system in Northern Ireland, pointing out that the county courts still make use of the simplified 'civil bill' procedure and that nine out of 10 civil suits in the High Court are heard with a jury. The latter feature has long since disappeared, but civil bills continue in use. The informative and scholarly lecture ends with a consideration of the legal professions in Northern Ireland, where he stresses that barristers work out of a library, not chambers, and that they do not make use of clerks to negotiate their fees.

A year later Lord MacDermott chose to focus on two particular aspects of the legal system of Northern Ireland when he gave a lecture to the Society of Public Teachers of Law.²⁴⁶ As is still relatively common in academic circles, research conducted for one lecture can often be re-mined for a future lecture on a related theme. In 'The Supreme Court of Northern Ireland – two unusual jurisdictions' the Baron talked in more detail about, first, 'the constitutional jurisdiction' of the higher courts in Northern Ireland and, second, the civil bill procedure within the county courts.

243 David Capper, Heather Conway and Mark Flear, 'Celebrating the 50th Anniversary of the MacDermott Lecture Series at Queen's University Belfast' (2022) 73(S1) Northern Ireland Legal Quarterly i, ii.

244 John Clarke MacDermott, 'Law and practice in Northern Ireland' (1953) 10 Northern Ireland Legal Quarterly 47.

245 Especially *In Re a Reference under the Government of Ireland Act 1920* [1936] AC 352 (Privy Council) and *Gallagher v Lynn* [1937] AC 863 (House of Lords).

246 John Clarke MacDermott, 'The Supreme Court of Northern Ireland – two unusual jurisdictions' (1954) 2 Journal of the SPTL (new series) 201.

With regard to the former, Lord MacDermott focuses on the higher courts' power to consider whether an Act of the Northern Ireland Parliament, or some action of the Northern Ireland Government, is consistent with the provisions of the Government of Ireland Act 1920. He looks in particular at the wording of section 5(1) of the Act:

In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to establish or endow any religion, ... or take any property without compensation.

Any law made in contravention of section 5(1) was declared by section 5(2) to be void and any existing legislation disadvantaging someone on account of religious belief 'ceased to have effect'. Lord MacDermott analyses case law on when a law can be said to have 'directly or indirectly' done something. He explains, as well, why he chose in *Ulster Transport Authority v James Brown & Sons Ltd* to give a broad interpretation of the word 'take' in the last line of section 5(1).²⁴⁷ He noted, in a tone which resonates with more modern controversies over the status of 'constitutional' legislation, that 'the exercise of this constitutional jurisdiction does not, so far as I have been able to discern, necessitate any radical departure from the ordinary canons of statutory interpretation'.²⁴⁸

On civil bills he tracks their history since the thirteenth century and sets out their practical advantages: 'The absence of pleadings has, in particular, proved advantageous. It keeps down costs, saves delay and I believe it also makes for an expeditious trial.'²⁴⁹

Lord MacDermott's 'Law and order in times of emergency', delivered at the University of Dundee on 4 February 1972, just five days after Bloody Sunday (which he does not expressly allude to but which would certainly have been in his mind and in that of each member of his audience too), addresses some of the issues he looked at in his eponymous lecture later that same year, which we have already summarised.²⁵⁰ He bemoaned the rise in crime and intimated that in the criminal justice process 'the scales of justice are weighed too heavily on the side of the modern offender'.²⁵¹ He favoured the abolition of repeated cautioning and other formal requirements such as those contained in the Judges' Rules and he was now of the view that the accused should be made 'a compellable witness in his own defence'

247 [1953] NI 79.

248 MacDermott, 'The Supreme Court of Northern Ireland' (n 246 above) 208. This seems to chime with what the Supreme Court said more than 60 years later in *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.

249 MacDermott, 'The Supreme Court of NI' (n 246 above) 208, 211.

250 MacDermott, 'Law and order' (n 238 above).

251 Ibid 5.

once the prosecution has made a *prima facie* case, though he did continue to insist that confessions should be inadmissible if they were not truly voluntary or if they were made as a result of oppressive or unfair treatment and he wanted judges to retain a discretion to excuse an accused from having to give evidence if this was just and fair.²⁵² He felt that such reforms would lead to fewer pleas of 'not guilty' in cases where there was no real answer to the charge.

Lord MacDermott went on to explain that he thought the law on what constitutes reasonable force by the police (or army) should be clarified. Somewhat surprisingly, he also lamented the fact that the immunity provided to law enforcers under the Riot Act 1787, even for the killing of rioters, had been repealed by the Criminal Law Act (NI) 1967 and he went on:

if the legislature could devise a way of according a similar immunity to those who may hereafter have to bear the burden of restoring law and order, it would, I think, conduce to vigorous action where that is needed, and be commonly regarded as a reasonable safeguard for those whose thankless task it is to keep the peace in times of tumult and disturbance.²⁵³

In his consideration of how to deal with 'organised subversion' the Baron considers the practice of internment. He notes that it was introduced in Northern Ireland on 9 August 1971 and says: 'The decision to apply it has been the subject of much bitter controversy into which I cannot enter.'²⁵⁴ But later he states:

On balance, and speaking generally, my conclusion is that internment is capable of affording the public a degree of protection which, in the course of a serious emergency, it might not otherwise get; and that no case has yet been shown for abandoning it altogether as a means of restoring order.²⁵⁵

He thought the current statutory regime concerning internment should be replaced by a clearer and more up-to-date instrument, one that accorded better with the European Convention on Human Rights. Moreover, as was the case in his lecture at Queen's University some months later,²⁵⁶ Lord MacDermott was resolute in agreeing with the Compton Committee's finding that the 'five techniques' used by security forces when questioning detainees in Northern Ireland amounted to ill-treatment. As he put it:

252 Ibid.

253 Ibid 11.

254 Ibid 12.

255 Ibid 15.

256 See the text at n 231 *et seq* above.

I would conclude that the interrogation of suspects in times of emergency cannot, as the law now stands, be lawfully aided by methods producing mental or physical stress amounting to ill-treatment or ill-usage.²⁵⁷

Two further unpublished papers

Reference was made earlier in this article to an unpublished piece by Lord MacDermott which we came across in the papers preserved by his family.²⁵⁸ We found two other unpublished pieces within those papers.

The first was the handwritten transcript of a talk entitled 'The law is alive', a title which is written below an earlier one that has been struck through and appears to read 'The leaven of the law' (the Baron's handwriting was notoriously difficult to decipher). It is dated 14 January 1947, when he was still a judge of the High Court,²⁵⁹ and is the text of a talk delivered to trainee solicitors in Northern Ireland.²⁶⁰ In it he encourages the trainees to commit to their profession by stressing to them how relevant and interesting the law can be as it moves with the times:

How can we come to realise not only that the law is alive but that its impact on our fellows is such as to demand of all who would follow it the best they can give of mind and character?²⁶¹

He expresses his admiration for authors who have the skill to convey new ideas 'in good and understandable English', citing as a model

257 MacDermott, 'Law and order' (n 238 above) 20. At this time the Parker Committee was still considering whether the procedures governing the interrogation of persons suspected of terrorism required amendment. In due course it found that, even though some of the techniques employed amounted to criminal assaults, they should continue so long as they had ministerial approval and occurred in the presence of an army officer and a doctor with psychiatric training; the practices also did not amount to humiliating and degrading treatment, cruelty or torture: *Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism* (Cmd 4901 March 1972). Lord Gardiner, a former Labour Lord Chancellor from 1964 to 1970, dissented. See, for further commentary, Ian Brownlie, 'Interrogation in depth: the Compton and Parker Reports' (1972) 35 *Modern Law Review* 501–507. In *Ireland v UK* (1979–80) 2 EHRR 25 the European Court of Human Rights ruled that the five techniques did amount to inhuman or degrading treatment, but not to torture.

258 See the text at n 129 above.

259 Rather touchingly, the notebook in which this address is written has a press clipping tucked in at the back taken from the *Belfast News Letter* of 14 April 1947: it celebrates the elevation of Mr Justice MacDermott to the role of Lord of Appeal in Ordinary.

260 John Clarke MacDermott, 'The law is alive' (unpublished paper 1947); at 23 he refers to 'this country' as opposed to England, but at 36 he refers to 'this kingdom'.

261 *Ibid* 4 (addendum).

Sir James Jeans' well-known work on astrophysics, *The Mysterious Universe* (1930), and he repeatedly emphasises the importance of speaking plainly ('your first objective must be to master the language of the community rather than the language of the profession').²⁶² He urges the students to read 'the authorised version of the scriptures [which] is still the greatest storehouse of the language',²⁶³ and also older classics, but he refers as well to more modern literature by the likes of Winston Churchill, Arthur Conan Doyle, John Buchan, John Galsworthy and the Northern Ireland novelist Forrest Reid.

The 1947 address is a testament to Lord MacDermott's own approach to judgment-writing: he values clarity and precision above all else, while seeking to avoid jargon or very specialised vocabulary. As an example of 'a masterpiece of lucidity' he cites the judgment of Lord Macnaghten in *Van Grutten v Foxwell*, which concerned the powers of the owner of a freehold estate.²⁶⁴ He admits that '[s]ometimes one finds a judge at his best when dissenting', giving as instances of this the dissents by Kennedy LJ in the shipping contract case of *Biddle Bros v E Clements Horst Company*²⁶⁵ and by Lord Atkin in the administrative law case of *Liversidge v Anderson*.²⁶⁶ As regards the latter, Lord MacDermott strongly implies that he would have agreed with Lord Atkin's lone dissent if he himself had been sitting in the case. He then cites several judgments in Irish cases which in his view again demonstrate that the law is 'alive'.

MacDermott moves on to speak of how important it is for lawyers to be aware of legal history:

you must realise from the outset that you cannot divorce the political or social or economic history of a people from its laws ... [I]t is not too much to say that the growth of a nation can best be traced in the development of its laws. They are the skeleton to which the flesh and sinews of society cling. If the bones stop growing all that they support is stunted as well.²⁶⁷

He proceeds to mention current trends in the law, such as 'a man's right to earn his livelihood depends increasingly on his status as a trade union member rather than on his capacity to contract to perform a particular service'²⁶⁸ and he illustrates the value of legal history by reminding us of how the modern law of rating can be traced back

262 Ibid 14.

263 Ibid.

264 [1897] AC 658; the doctrine he elaborated was known as the rule in *Shelley's Case* 1 Co Rep 93b (1581).

265 [1911] 1 KB 934.

266 [1942] AC 206.

267 MacDermott, 'The law is alive' (n 260 above) 32–33.

268 Ibid 38.

to the fallout from the dissolution of the monasteries by Henry VIII and the subsequent Elizabethan Poor Law (the Poor Relief Act 1601). Furthermore, he advises students to brighten their study of the law by reading about the lives and times of great lawyers of the past (eg in Baron Campbell's *The Lives of the Lord Chancellors and Keepers of the Great Seal of England*, first published in 1847). He finished his address by reminding his audience that 'a mastery of the facts [in a case] need not discourage the exercise of an intelligent imagination in the work of your profession' and in his final stirring sentence he writes:

The law will lead you to many duties. In their performance your unprecedented opportunity for service to the community will be great – perhaps greater today than ever. But you may only grasp it as it should be grasped if you have learned that the law is ALIVE.

The second unpublished paper we discovered was entitled 'Simple justice'. It seems to have been written in 1950, as it refers to 'the Legal Aid and Advice Act of last year', to a committee chaired by Sir Raymond Evershed that was currently examining Supreme Court procedure, and to 'the Annual Practice – the White Book – for 1949'.²⁶⁹ It is an address to the President of a club or society, most of the audience again comprising students 'getting to know the law and taking the first steps to enter the legal profession'.²⁷⁰ He understandably borrows to some extent from his 1947 address, again alluding to 'the life of the law':

To meet the never ending changes in the fabric of our life as a community the law must be a live thing, capable of growth, to some degree responsive and accommodating so that its bonds while giving support and control never grow tight enough to choke the society it governs.²⁷¹

Lord MacDermott lauds the goal of simplifying the law, giving as examples of legal fields that would benefit from simplification the law on 'money claims' (sometimes referred to as 'the law of quasi-contract'), defamation and charities. Although he hinted in 'The law is alive' that codifying the law can lead to its stultification,²⁷² he here boldly calls for the codification of criminal law and (but surely not too seriously?) for a 'bonfire' to be made of old law reports ('say up to 1873'), with a commission being appointed 'to press all the juice out of the old reports ... into a single volume of principles'.²⁷³ Turning to matters of legal practice and procedure, he expresses his support for dispensing

269 John Clarke MacDermott, 'Simple justice' (unpublished paper 1950) 2 and 14. *The Final Report of the Committee on Supreme Court Practice and Procedure* (HMSO Cmd 8878) was published in 1953, but there were three interim reports published in 1949 (Cmnd 7764), 1951 (Cmnd 8176) and 1952 (Cmnd 8617).

270 Ibid 2.

271 Ibid 6.

272 MacDermott, 'The law is alive' (n 260 above) 32–33.

273 MacDermott, 'Simple justice' (n 269 above) 12.

with the wearing of wigs in courtrooms²⁷⁴ and recounts at some length the story of how the ‘civil bill’ procedure developed in Northern Ireland and how it had its roots in an English procedure whereby in the fourteenth century the Court of King’s Bench was already dealing separately with legal actions begun not by a writ but by a bill.²⁷⁵ That is a topic which, as we have seen, Lord MacDermott returned to in his lecture at University College London in 1953 and also in his address to the Society of Public Teachers of Law in 1954.

An underlying motif in ‘Simple justice’ is the notion that, up to a point, judges should be trusted to mould the law in accordance with their perceptions of justice – not in a ‘palm-tree justice’ way but in accordance with collective judicial expectations:

For some reason we have still a great repugnance to claims *ex aequo et bono*, founded that is, essentially on what is just and right. To simplify matters by encouraging that sort of claim would, of course, be a great test of the judiciary. But why not try the Judges? Every now and again one gets the expression in a statute or SR&O [a Statutory Rule or Order] ‘as the Court shall deem just’. I cannot but think it means that the draftsman has come to the end of his tether. But why not try it – not all the time – but more frequently than at present? I sometimes doubt if we will ever make full use of the high qualities of our judges if we remain reluctant to treat them as *judges of justice* in cases where to do so will not rob the law they administer of the requisite degree of certainty.²⁷⁶

In closing his address the Baron says he ‘must resist the temptation to dilate on judicial attributes’ but he tells his audience that if they want a short summary they can find it in the book of the prophet Micah at chapter 6, verse 8.²⁷⁷ This reads, in the King James’ version of the Bible:

He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?

THE REPORT WRITER

During his tenure as Lord Chief Justice of Northern Ireland, Lord MacDermott’s workload was not confined to hearing cases and writing judgments. As some of the above commentary has shown, he was also responsible for a range of other tasks which included making recommendations to the Lord Chancellor in respect of senior judicial appointments, allocating cases to his colleagues, and making

²⁷⁴ Ibid 4.

²⁷⁵ Ibid 16–22.

²⁷⁶ Ibid 10.

²⁷⁷ Ibid 23.

administrative decisions essential to the running of the local court system. However, in addition to ensuring the smooth running of that system, it is important to highlight Lord MacDermott's involvement in a significant review of the superior courts' governing legislation, a review which ultimately led to legislative reforms brought about by the Judicature (NI) Act 1978. He was also a member of the Gardiner Committee which made proposals on measures to deal with terrorism in Northern Ireland. However, before outlining Lord MacDermott's involvement in each of those notable projects, we shall begin this section by mentioning the first major report that he was appointed to produce alongside his duties as Lord Chief Justice, in his role as Chairman of the Commission on the Isle of Man Constitution.²⁷⁸

Report on the Isle of Man Constitution

On 18 March 1958, the Lieutenant Governor of the Isle of Man, Sir Ambrose Dundas Flux Dundas, appointed Lord MacDermott as the Chairman of a new Commission established 'to enquire into and report upon the Constitution of the Isle of Man and its working, and to make recommendations for any changes that they may consider desirable and practicable'.²⁷⁹ Lord MacDermott was joined on the Commission by J Chuter Ede, Sir Lionel F Heald, Sir Frederick Armer and Sir Francis Mudie.²⁸⁰ Together, they spent 12 months working in accordance with the terms of reference quoted above.²⁸¹

The Commission was appointed because of 'certain differences' which had emerged between the various branches of government on the Isle of Man, including in particular the emergence in 1957 of 'a reforming group' in the House of Keys (the House of Keys being the only wholly elected branch of the Government).²⁸² The Commission itself took the view that those events were underpinned and explained by two broad considerations: firstly, the gathering of momentum towards a more representative form of government on the island, and secondly,

278 We also note, for completeness, that Lord MacDermott took on a further range of non-judicial responsibilities during his lifetime that we do not explore here because we have been unable to discover anything of substance about them, certainly as regards their relevance to the law. For instance, in the posthumous tribute published by Sir Robert Lowry (n 4 above), the following responsibilities are listed: Chairman of the Joint Select Committee on Road and Rail Transport in 1939, Chairman of the National Arbitration Tribunal from 1944 to 1946, Pro-Chancellor of Queen's University Belfast from 1951 to 1969, Chairman of the Northern Ireland Branches of the Multiple Sclerosis Society and Cancer Research Centre, and President of the Boys' Brigade.

279 *Report of the Commission on the Isle of Man Constitution: Volume 1* (14 March 1949). A copy of the Warrant of Appointment is included on p 3 of this volume.

280 *Ibid.*

281 *Ibid.* The report of the Commission was published on 14 March 1959.

282 *Ibid* para 18.

a widening of the island's financial powers at a time of economic uncertainty, which had focused popular attention on the importance of having a constitution which was not only more representative but also as efficient as possible.²⁸³

Guided by these contextual considerations, the Commission embarked upon an extensive work programme. It visited the Isle of Man both collectively and individually, studied previous reports and other literature, received lengthy written submissions in response to a call published through the 'insular Press', and sat in the Tynwald Court Chamber between 23–26 September 1958 in order to hear evidence from various bodies and persons in public, including some who had submitted written evidence previously, before finally arriving at a unanimous set of recommendations and conclusions.²⁸⁴

The 34 recommendations and conclusions of the Commission traverse a range of issues in connection with the composition and operation of the Legislative Council, the House of Keys, the Tynwald Court, the Executive Government and other administrative bodies.²⁸⁵ Two examples may suffice to illustrate the way in which those recommendations and conclusions sought to meet the concerns which had led to the Commission's creation. Firstly, the Commission recommended an increase in the elected membership of the Legislative Council (such that it would have five elected members and three appointed places).²⁸⁶ Secondly, the Commission recommended that the Lieutenant Governor's functions relating to the control of finance should be shared by and eventually transferred to a statutory Finance Board (consisting of five members elected by Tynwald).²⁸⁷

In 1961, an Act of Tynwald gave legal effect to many of the recommendations made in the report that Lord MacDermott and his fellow Commissioners had diligently devised for official consideration.²⁸⁸ This much shows that at least some of MacDermott's hopes that those recommendations might be used to further 'the prosperity of the Isle and its people'²⁸⁹ were widely accepted and taken forward by those in power.

283 Ibid paras 19–20.

284 Ibid paras 1–4.

285 Ibid. The recommendations and conclusions are summarised in a list at para 99. For an explanation of the Isle of Man's constitutional organs and their history, see Peter Edge, *Manx Public Law* (Isle of Man Law Society 1997) chs 8 and 9.

286 Ibid para 42.

287 Ibid paras 80–86.

288 Isle of Man Constitution Act 1961.

289 Commission Report (n 279 above) para 100.

Report on the Supreme Court of Judicature

Northern Ireland had no standalone Law Commission during Lord MacDermott's tenure as Lord Chief Justice – indeed, Lord MacDermott was reportedly 'lukewarm' about proposals to create a dedicated Northern Ireland Law Commissioner²⁹⁰ – but the region was occasionally visited by Neil Lawson QC in his capacity as a member of the newly established Law Commission of England and Wales. On one such visit in June 1965, Mr Lawson met with a range of individuals connected to the running of the legal system and prepared a note for the UK Lord Chancellor which recorded the following issue in a list of 'emergent proposals':

The Government of Northern Ireland and the Lord Chief Justice are extremely anxious that we should include in our first programme the following topic:

‘a modernised Judicature Act for Northern Ireland’

The Supreme Court of Judicature of Northern Ireland is a matter in respect of which the Northern Irish Parliament is prohibited from legislating. The Supreme Court is at present controlled by a multiplicity of statutes, many of them long out of date, the principal among which is the Supreme Court of Judicature (Ireland) Act, 1877. A good deal of work has already been done by various individuals and committees by way of recommendations for reform. The Lord Chief Justice and the Attorney-General both stressed that they regarded a modern Act as an urgent need, and this view was clearly shared by members of the profession of both branches with whom I also had discussions on this matter. I therefore recommend that we should include this subject in our first draft programme.²⁹¹

In a letter addressed to the Lord Chancellor some months later, Lord MacDermott explained that while he had taken a 'close interest' in securing a modernised Judicature Act, and while he had made 'a number of efforts to obtain such a measure', he had 'no official responsibility in relation to the preparation or content' of such an Act.²⁹² Lord MacDermott concluded, that his role should be 'mainly advisory and

²⁹⁰ Letter from the Attorney General to the Minister of Home Affairs, 9 March 1965, Public Record Office of Northern Ireland, CAB/9B/241/2A. For a wider account of the relevant landscape, see Neil Faris, 'Fifty years of law reform – a note on the Northern Ireland style' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Oxford, Hart 2016) ch 5.

²⁹¹ 'Report on and Recommendations Following the Law Commissioner's Visit to Northern Ireland 29th/30th June, 1965', dated 1 July 1965, National Archives, LCO 65/333/1.

²⁹² Letter dated 10 December 1965, MacDermott to Gardiner, National Archives, LCO 65/333/1.

consultative'. Nonetheless, MacDermott was obviously keen to shape the direction of this law reform project from its outset, as this revealing excerpt from the same letter makes plain:

Perhaps I should say here, in a word or two, why I regard the task as extensive. The new Act will hardly be worthwhile if it is only a new edition of the Act of 1877. What is wanted is a statute which makes a fresh start: which will (A) speak with a minimum of reference to the past and repeal all ancient statutory procedures; (B) incorporate and modernise jurisdictions habitually exercised by members of the Judiciary – e.g. the protection etc. of minors and persons of unsound mind; (C) provide for terms and conditions of service for the Supreme Court staff – we have, for example, no retiring age; (D) simplify and expedite existing procedures. We have done a fair amount in this direction administratively by new rules; but I think we could make things quicker and cheaper, say in Chancery Chambers, if we repealed most of the old Acts; and (E) give us (if it can be devised) a rule-making power that will be less at the mercy of professional inhibitions and allow of a certain measure of experimentation. There are other more controversial matters – e.g. the restriction of the right to trial by jury, and the provision for certain well-known types of case (e.g. personal injury claims) of a summary procedure with no pleadings.

It will be seen, below, that many of these proposals came to pass, but we pause at this point to display another excerpt from Lord MacDermott's letter to the Lord Chancellor in which, as far back as December 1965, he floated what would have been fairly radical ideas about establishing a UK Supreme Court, among other things:

I note with interest that you are contemplating an examination of the structure of the Courts in England and Wales. This raises the possibility of a wider survey than that which I have just outlined. Has the time come to envisage a United Kingdom Supreme Court? This need not necessarily injure local professional interests, and it would help lift us from the ridiculous situation that besets us now with three different domiciles and three jurisdictions each foreign to the other, with no common, prevailing power of enforcement. Again, is the distinction between the County Courts and the High Court to continue unmodified? In Northern Ireland the political responsibility for the two systems is divided and it may not be the right time to change that. I have often thought, however, that there is much to be said for the Scottish system, particularly in a small area such as ours.²⁹³

While it is a shame that Lord MacDermott did not live to see his vision of a UK Supreme Court come to fruition in 2009, the fact that he had the imagination to envisage one and the audacity to propose its creation is another interesting indicator of his horizon-scanning mind.

By February 1966, the Law Commission of England and Wales had settled on terms of reference for a committee on the Supreme Court

of Judicature in Northern Ireland and on its proposed membership. Interestingly, it seems that despite resisting efforts to place the responsibility for this project in his hands, Lord MacDermott was convinced that he should be Chairman of the committee after it was agreed that there would be a Deputy Chairman appointed from among his judicial peers, namely Lowry J.²⁹⁴ Lord MacDermott described his reluctance to assume the Chair in these terms:

I have only a limited amount of time and no desire to add any very heavy burden to my existing commitments. If I act on this Committee it will mean less time for other things, and that just when the demands of the courts seem to be increasing. However, I promised to help and if you and the Lord Chancellor think that I can best do so by acting as Chairman, I am prepared to try. The nature of the Committee and the ease with which it can be divided to fulfil different functions should be a considerable help.²⁹⁵

This correspondence suggests MacDermott was a man aware of his responsibilities, eager to avoid taking on more than he was capable of handling well, just as it shows a man who understood the value of trust and delegation.

MacDermott was formally appointed along with seven other committee members and a secretary in March 1966, with their terms of reference being:

to examine the law applicable to the Supreme Court of Judicature of Northern Ireland, taking into consideration (inter alia) the Report on the Supreme Court of Northern Ireland (1957; Cmnd. 227) and the extent to which the recommendations made in that Report have been implemented, and to make recommendations.

Interestingly, MacDermott and his committee were warned not to treat the Supreme Court of Judicature (Consolidation) Act 1925 which was then in force for England and Wales as 'a sort of model' to be aspired towards given that it was itself viewed as outmoded in several respects.²⁹⁶

294 'Note of a Meeting at the Law Commission at 2.30 p.m. on Monday, 14th February 1966', dated 15 February 1966, National Archives, LCO 65/333/1.

295 Letter dated 1 March 1966, MacDermott to Scarman, National Archives, LCO 65/333/1.

296 Letter dated 5 April 1966, National Archives, LCO 65/333/1. A list of 'scrappy suggestions' as to how the 1925 Act could be usefully amended is set out in a letter dated 18 May 1966 in the same file. They include a proposal to confer power on the High Court to make an 'Instalment Order', a proposal to change the requirement for a Divisional Court to hear appeals in the High Court, and a proposal to confer power to order discovery against a person who is not a party to proceedings, among other things.

Consistent with that advice, and building on the recommendations of ‘the Sheil Committee’ Report (Cmnd 227) consistently with its terms of reference, the report that MacDermott and his committee eventually produced was clearly tailored to the specific needs of Northern Ireland. It was delivered to the Lord Chancellor in December 1969,²⁹⁷ before being printed and laid before Parliament in March 1970 as a Command Paper.²⁹⁸ In due course, most of the report’s 97 recommendations would be reflected in the Judicature (NI) Act 1978, which fundamentally reorganised and reconstituted Northern Ireland’s court structures and which, to a large extent, continues to govern those structures today. The details of these reforms are too extensive to recount here, but a good example is the abolition of the Court of Criminal Appeal which had existed since 1930²⁹⁹ and the transfer of all its jurisdiction to a ‘new’ Court of Appeal with jurisdiction over both civil and criminal matters.³⁰⁰ These provisions stemmed directly from the MacDermott Report and have streamlined the workload of his successors as President of the Court of Appeal from 1978 onwards. They are just one illustration of the enduring impact of his role in leading this extensive law reform project, even if that role was assumed with some initial hesitation.

Report on measures to deal with terrorism

In 1974 the newly elected Labour Government decided to appoint a Commission ‘to consider what provisions and powers, consistent to the maximum extent practicable in the circumstances with the preservation of civil liberties and human rights, are required to deal with terrorism and subversion in Northern Ireland, including provisions for the administration of justice’. The Commission was chaired by Lord Gardiner, a former Lord Chancellor, and had six other members, one of whom was Lord MacDermott. It had its first meeting in June 1974 and published its report in January 1975.³⁰¹ During that short period it held 10 hearings, each lasting one, two or three days, one half of them in Belfast and the other half in London. In all it met for a total of 29 days, hearing from 97 witnesses and considering 157 written submissions. This was all no mean task for a man in his late seventies.

297 Letter dated 18 December 1969, MacDermott to Gardiner, National Archives, LCO 65/333/1.

298 *Report of the Committee on the Supreme Court of Judicature of Northern Ireland* (Cmnd 4292).

299 Judicature (NI) Act 1978, s 34(3).

300 *Ibid* ss 3, 34(2).

301 *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd 5847).

The Committee made 47 conclusions and recommendations, the stand-out ones being that the UK Government had acted consistently with the European Convention on Human Rights in restricting certain fundamental liberties in Northern Ireland but that consideration should be given to the enactment of a Bill of Rights; that trials of scheduled (ie terrorist-related) offences should continue to be conducted by courts without juries; that the Northern Ireland (Emergency Provisions) Act 1973 should be amended so as to declare that the courts have a discretion to exclude admissions by persons charged; that a new offence of being concerned in terrorism should be created; that there should be a new summary offence of being disguised in a public place or in the vicinity of a dwelling house; that an independent means of investigating complaints against the police should be introduced and its extension to the army considered; that the introduction of special category status for convicted prisoners was a serious mistake; that detention without trial should remain in place for the time being but not as a long-term policy; and that a Detention Advisory Board and a Release Advisory Committee should be established to help govern the detention system.

The Committee was unanimous on all points, some of which Lord MacDermott had already advocated for in his lectures. But he alone entered some reservations relating to the report. The four main ones were: (1) he could not agree with the conclusion that a political framework in a plural society such as Northern Ireland could not endure unless 'recognition is given to the different national inheritances of the two communities' (he claimed that he did not know what that phrase meant); (2) he could not agree that it was doubtful if emergency measures could produce lasting solutions on account of the social damage they may bring about:

the object of what the security forces are doing is to stop the campaign of violence and so pave the way for peace. Most of the long-term damage, of the scarring and the misery, is due first and last to the terrorist, and I would find this part of the Report more acceptable and a truer picture of events if it recognised this stark fact more fully ...

And (3) he did not think that the suggestion for a Bill of Rights should have been made: 'This is a difficult subject which does not always live up to its expectations'; and (4) though he agreed with the Committee's proposed changes to the detention regime, he thought that the wording used in relation to the policy of detention made 'an uncertain sound'.³⁰²

Lord MacDermott's own view on detention without trial at this point was expressed as follows:

302 Ibid 57–58.

Despite the repugnance which in common with most I feel for a system of detention, the evidence seemed to me conclusive that, with all its many failings and mistakes, detention still helps to protect the public safety and should therefore stand until such time as the Secretary of State may reach a different conclusion. The main protection it renders is to keep a substantial body of hard-core terrorists out of circulation. If those were released there was ample evidence to support the view that terrorism would be intensified and intimidation increased. These are both grave consequences. Most of the gains from detention would be lost, risks to life and limb and property would mount, and more intimidation would mean that the increasing success of the RUC in bringing terrorists to trial before the ordinary criminal courts would be set back'.³⁰³

When he wrote these words Lord MacDermott was already well into his retirement. He had ceased to be the Lord Chief Justice more than three years earlier, though he was still occasionally sitting as an *ad hoc* judge in the High Court. His views were undoubtedly informed by his personal experiences of living and working in Northern Ireland for very many years. To some they may seem surprising. They are based, it seems, on public safety grounds rather than on political grounds. It should be remembered that his views were endorsed, implicitly, three years later by the judgment of the European Court of Human Rights in *Ireland v UK*:

Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for. When the Irish Republic was faced with a serious crisis in 1957, it adopted the same approach and the Court did not conclude that the 'extent strictly required' [in Article 15 of the European Convention on Human Rights] had been exceeded.³⁰⁴

CONCLUSION

The legal life that John Clarke MacDermott led was actually fairly typical of his contemporaries, up to a point. His skill as a barrister and his willingness to enter the political fray saw him appointed as the Attorney General for Northern Ireland. From that point onwards he was essentially guaranteed to secure a judicial role by virtue of the constitutional customs then applicable in Northern Ireland. On the

303 Ibid 58.

304 (1978–80) 2 EHRR 25, para 212; in support of this statement the Court cited what it had said in *Lawless v Ireland (No 3)* (Merits) (1979–80) 1 EHRR 1, 27 and 33.

other hand, nobody could have predicted that, after an impressive but relatively short stint in the High Court of Northern Ireland, MacDermott would proceed to the House of Lords as a Lord of Appeal in Ordinary. Having been given that opportunity it then became conceivable that he might later transition from there to the office of Lord Chief Justice and President of the Court of Appeal in Northern Ireland.

Viewed from this perspective, unpredictability is possibly the most notable feature of Lord MacDermott's legal life. His intelligence and industry obviously played a significant part in shaping the career that he forged but, as with most legal careers in the twentieth century, the role of his inherited privileges and circumstantial good fortune should not be overlooked.

A pattern of unpredictability can also be discerned from our analysis of how Lord MacDermott would decide cases tried before him as a judge and as regards the extent to which his judicial views would accord with those of his peers. Like every other judge he was not 'right' 100 per cent of the time, in the sense that plenty of other judges disagreed with him just as he disagreed with them, but the law he administered and developed in his judgments is notable for the clarity of its delivery and the transparency of its reasoning. The same is true of his extra-judicial speeches and reports. He never concealed his thinking behind opaque writing, so his contemporaries could be left in absolutely no doubt about the rationale for his decisions and views. We hope that the foregoing pages have succeeded in showing that, thanks to that written perspicuity, there remains much to be learned by engaging with the fruits of Lord MacDermott's labours.

APPENDIX

Lord MacDermott's Reported Cases

Abbreviations: CA = Court of Appeal; CMAC = Courts-Martial Appeal Court; HC = High Court; HL = House of Lords; JCPC = Judicial Committee of the Privy Council

Part 1: Cases heard as a High Court judge, 1944–1947

	Date and law report	Court	Title of case	Primary area of law at issue	Contribution
1	17.1.45 [1945] NI 99	CA	<i>Baptist Union of Ireland (Northern) Corp Ltd v Inland Revenue Commissioners</i>	Charity law	Judgment
2	17.1.45 [1945] NI 155	HC	<i>Pigs Marketing Board (NI) Ltd v Inland Revenue Commissioners</i>	Taxation law	Judgment
3	9.3.45 [1946] NI 38	HC	<i>Robinson v Chambers</i>	Civil procedure law	Judgment
4	28.3.45 [1946] NI 1	HC	<i>In re B, An Infant</i>	Family law	Judgment
5	30.10.45 [1946] NI 63	HC	<i>Ministry of Agriculture v Turtle</i>	Criminal law	Judgment
6	7.12.45 [1946] NI 40	HC	<i>Goodwin v Leckey</i>	Insurance law	Judgment
7	6.3.46 [1946] NI 148	HC	<i>Robinson v Chambers (No 2)</i>	Defamation law	Judgment
8	15.11.46 [1947] NI 1	HC	<i>Fitzgerald v Great Northern Railway</i>	Tort law	Judgment
9	15.1.47 [1947] NI 50	CA	<i>Re Dunville</i>	Succession law	Judgment
10	2.2.47 [1947] NI 110	CA	<i>R v Stephenson</i>	Evidence law	Judgment
11	14.2.47 [1947] NI 8	HC	<i>Ross v McQueen</i>	Tort law	Judgment
12	18.4.47 [1947] NI 102	HC	<i>Shearer v Harland and Wolff Ltd</i>	Tort law	Judgment

Part 2: Cases heard as a Lord of Appeal, 1947–1951

	Date and law report	Court	Title of case	Primary area of law at issue	Contribution
1	25.7.47 [1947] AC 503	JCPC	<i>Attorney General for Alberta v Attorney General for Canada</i>	Constitutional law	Concurrence
2	28.7.47 [1948] AC 173	HL	<i>Winter Garden Theatre (London) Ltd v Millennium Productions Ltd</i>	Land law	Judgment
3	28.7.47 [1948] AC 140	HL	<i>Boy Andrew v St Rognvald</i>	Maritime law	Dissent
4	28.7.47 [1948] AC 79	HL	<i>Glasgow Corporation v Bruce or Nelson</i>	Tort law	Judgment
5	29.7.47 [1947] AC 565	JCPC	<i>Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands</i>	Land law	Judgment
6	30.7.47 [1948] AC 12	JCPC	<i>Sterios Thomopoulos v John Mandila</i>	Partnership law	Concurrence
7	31.7.47 [1948] AC 1	JCPC	<i>Arieh Zvi Lipshitz v Hain Aron Valero</i>	Civil procedure law	Concurrence
8	14.10.47 [1948] AC 18	JCPC	<i>Desain v Viani</i>	Succession law	Concurrence
9	5.12.47 [1948] AC 234	HL	<i>Railway Assessment Authority v Great Western Railway</i>	Rating law	Concurrence
10	17.12.47 [1947] 1 All ER 871	HL	<i>Horton v Horton</i>	Family law	Concurrence
11	18.12.47 [1948] AC 210	JCPC	<i>Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation</i>	Taxation law	Concurrence
12	19.12.47 [1948] AC 291	HL	<i>Palser v Grinling</i>	Land law	Concurrence
13	13.2.48 [1948] 1 All ER 308	HL	<i>Raleigh Cycle Co Ltd v H Miller & Co Ltd</i>	Patent law	Judgment
14	12.3.48 [1948] 1 All ER 616	HL	<i>Inland Revenue Commissioners v Ross and Coulter (Bladnoch Distillery Co Ltd)</i>	Taxation law	Dissent
15	12.3.48 [1948] 1 All ER 654	HL	<i>Inland Revenue Commissioners v Lord Saltoun</i>	Taxation law	Dissent
16	12.3.48 [1948] 1 All ER 660	HL	<i>Inland Revenue Commissioners v Barclay (Glasgow Binding Co Ltd)</i>	Taxation law	Concurrence
17	12.3.48 [1948] 1 All ER 663	HL	<i>Inland Revenue Commissioners v Barclay (Alexander McGavin & Co (Glasgow) Ltd)</i>	Taxation law	Concurrence
18	12.3.48 [1948] 1 All ER 665	HL	<i>Inland Revenue Commissioners v DP McDonald & Sons Ltd</i>	Taxation law	Concurrence
19	12.3.48 [1948] 1 All ER 669	HL	<i>Inland Revenue Commissioners v Russell (Peter Douglas & Co Ltd)</i>	Taxation law	Concurrence

20	12.3.48 [1948] 1 All ER 672	HL	<i>Inland Revenue Commissioners v Lannon</i>	Taxation law	Concurrence
21	12.3.48 [1948] 1 All ER 676	HL	<i>Henry Simpson & Co v Inland Revenue Commissioners</i>	Taxation law	Concurrence
22	12.3.48 [1948] 1 All ER 677	HL	<i>James McVey Ltd v Inland Revenue Commissioners</i>	Taxation law	Concurrence
23	12.3.48 [1948] 1 All ER 682	HL	<i>Inland Revenue Commissioners v Barr</i>	Taxation law	Dissent
24	12.3.48 [1948] 1 All ER 688	HL	<i>Holt v Inland Revenue Commissioners</i>	Taxation law	Judgment
25	12.3.48 [1948] 1 All ER 689	HL	<i>William Longmore & Co Ltd v Inland Revenue Commissioners</i>	Taxation law	Concurrence
26	27.4.48 [1948] AC 405	JCPC	<i>English and Scottish Joint Co-operative Wholesale Society Ltd v Commissioner of Agricultural Income Tax, Assam</i>	Taxation law	Concurrence
27	23.7.48 [1948] AC 495	JCPC	<i>Union Trustees Company of Australia Ltd v Bartlam</i>	Taxation law	Concurrence
28	13.10.48 [1949] AC 24	JCPC	<i>DR Fraser & Co Ltd v Minister of National Revenue</i>	Taxation law	Concurrence
29	13.10.48 [1949] AC 134	JCPC	<i>Labour Relations Board of Saskatchewan v John East Iron Works Ltd</i>	Administrative law	Concurrence
30	13.10.48 [1949] AC 1	JCPC	<i>Perera (MG) v Peiris</i>	Defamation law	Concurrence
31	19.10.48 [1949] AC 36	JCPC	<i>International Harvester Company of Canada Ltd v Provincial Tax Commission</i>	Taxation law	Concurrence
32	22.11.48 [1949] AC 110	JCPC	<i>Attorney General for Saskatchewan v Attorney General for Canada</i>	Constitutional law	Concurrence
33	14.1.49 [1949] AC 253	JCPC	<i>Tumahole Bereng v The King</i>	Criminal law	Judgment
34	19.1.49 [1949] AC 293	HL	<i>Comptoir d'achat et de vente du Boerenbond Belge s/A v Luis de Ridder Limitada (The Julia)</i>	Contract law	Judgment
35	19.1.49 [1949] AC 326	HL	<i>Tyne Improvement Commissioners v Armement Anversoils s/A (The Brado)</i>	Private international law	Dissent
36	20.1.49 [1949] AC 275	HL	<i>Galashiels Gas Co Ltd v O'Donnell or Millar</i>	Tort law	Judgment
37	20.1.49 153 EG 80	HL	<i>Mackintosh v Westwood</i>	Land law	Concurrence
38	20.1.49 [1949] AC 361	HL	<i>Inland Revenue Commissioners v Reid's Trustees</i>	Taxation law	Judgment

39	20.1.49 [1949] 1 All ER 261	HL	<i>Tootal Broadhurst Lee Co Ltd v Inland Revenue Commissioners</i>	Taxation law	Judgment
40	28.2.49 [1949] 1 All ER 588	HL	<i>Hogan v Bentinck West Hartley Collieries (Owners) Ltd</i>	Tort law	Dissent
41	11.4.49 [1949] AC 386	JCPC	<i>Yachuk v Oliver Blais Co Ltd</i>	Tort law	Concurrence
42	29.7.49 [1949] AC 530	HL	<i>Hill v William Hill (Park Lane) Ltd</i>	Contract law	Judgment
43	12.10.49 [1950] AC 1	JCPC	<i>Provincial Treasurer of Manitoba v William Wrigley Jr Co Ltd</i>	Taxation law	Concurrence
44	20.10.49 [1950] AC 24	HL	<i>Kahler v Midland Bank Ltd</i>	Contract law	Dissent
45	20.10.49 [1950] AC 57	HL	<i>Zivnostenska Banka National Corporation v Frankman</i>	Private international law	Judgment
46	26.10.49 [1950] AC 235	JCPC	<i>Commonwealth of Australia v Bank of New South Wales</i>	Constitutional law	Concurrence
47	1.12.49 [1949] 2 All ER 1044	HL	<i>Moodie v W & J Shepherd (Bookbinders) Ltd</i>	Company law	Judgment
48	14.12.49 [1950] AC 149	HL	<i>Inland Revenue Commissioners v John Dow Stuart Ltd</i>	Taxation law	Dissent
49	1.1.50 [1950] 2 All ER 261	HL	<i>EMI Ltd v Inland Revenue Commissioners</i>	Taxation law	Judgment
50	1.1.50 67 RPC 23	HL	<i>May & Baker Ltd v Boots Pure Drug Co Ltd</i>	Patent law	Judgment
51	1.1.50 [1950] 2 All ER 637	HL	<i>Railway Executive v Culkin</i>	Tort law	Dissent
52	1.1.50 [1950] 1 All ER 819	HL	<i>Winter v Cardiff Rural District Council</i>	Tort law	Judgment
53	21.3.50 [1950] AC 327	HL	<i>Boissevain v Weil</i>	Private international law	Judgment
54	21.3.50 [1950] AC 361	HL	<i>Jacobs v London County Council (No 2)</i>	Tort law	Concurrence
55	29.3.50 [1950] AC 401	HL	<i>Baker v Turner</i>	Land law	Judgment
56	18.4.50 [1950] AC 561	JCPC	<i>Piyaratana Unnanse v Wahareke Sonuttra Unnanse</i>	Civil procedure law	Concurrence
57	26.4.50 [1950] AC 493	JCPC	<i>HE Wijesuriya v Attorney General of Ceylon</i>	Land law	Concurrence
58	27.4.50 [1950] AC 508	HL	<i>Asher v Seaford Court Estates Ltd</i>	Land law	Dissent
59	3.5.50 [1950] AC 441	JCPC	<i>Basma v Weekes</i>	Land law	Concurrence

60	8.5.50 [1950] AC 536	JCPC	<i>Lever Bros and Unilever NV v HM Procurator General (The Unitas)</i>	Maritime law	Concurrence
61	10.5.50 [1950] AC 458	JCPC	<i>Sambasivam v Public Prosecutor, Federation of Malaya</i>	Criminal law	Judgment
62	23.6.50 [1950] 2 All ER 314	HL	<i>Goodlass Wall and Lead Industries Ltd v Atkinson</i>	Taxation law	Judgment
63	10.7.50 [1951] AC 13	JCPC	<i>Slazengers (Australia) Pty Ltd v Burnett</i>	Tort law	Concurrence
64	27.7.50 [1951] AC 53	JCPC	<i>Grace Bros Pty Ltd v Commonwealth of Australia</i>	Constitutional law	Concurrence
65	27.7.50 [1951] AC 34	JCPC	<i>Nelungaloo Pty Ltd v Commonwealth of Australia</i>	Constitutional law	Concurrence
66	16.10.50 [1951] AC 179	JCPC	<i>Canadian Federation of Agriculture v Attorney General for Quebec</i>	Constitutional law	Concurrence
67	30.10.50 [1951] AC 201	JCPC	<i>Bonython v Commonwealth of Australia</i>	Private international law	Concurrence
68	23.11.50 [1951] AC 251	HL	<i>Ministry of Health v Simpson</i>	Succession law	Concurrence
69	30.11.50 [1951] AC 278	HL	<i>Raleigh Cycle Co Ltd v H Miller & Co Ltd</i>	Patent law	Dissent
70	13.12.50 [1951] AC 297	HL	<i>Oppenheim v Tobacco Securities Trust Co Ltd</i>	Charity law	Dissent
71	13.12.50 [1951] AC 367	HL	<i>Paris v Stepney Borough Council</i>	Tort law	Judgment
72	14.12.50 [1951] AC 421	HL	<i>Inland Revenue Commissioners v Latilla-Campbell</i>	Taxation law	Judgment
73	14.12.50 [1951] AC 443	HL	<i>Potts' Executors v Inland Revenue Commissioners</i>	Taxation law	Judgment
74	14.12.50 [1951] AC 391	HL	<i>Preston-Jones v Preston-Jones</i>	Family law	Judgment
75	7.2.51 [1951] 1 All ER 457	HL	<i>Demetriades v Glasgow Corporation</i>	Administrative law	Judgment
76	7.2.51 [1951] AC 467	HL	<i>Hunter v Blackwood</i>	Land law	Concurrence
77	7.2.51 1951 SC (HL) 21	HL	<i>Nicol's Trustees v Sutherland</i>	Contract law	Dissent
78	1.3.51 [1951] AC 531	HL	<i>Hales v Bolton Leathers Ltd</i>	Tort law	Judgment
79	1.3.51 [1951] AC 555	HL	<i>Smith v London Transport Executive</i>	Administrative law	Judgment
80	6.3.51 [1951] AC 342	JCPC	<i>McDonnel v Neil</i>	Succession law	Judgment
81	8.5.51 [1951] AC 639	HL	<i>Harrison v National Coal Board</i>	Tort law	Judgment
82	9.5.51 [1951] AC 737	HL	<i>London Graving Dock Co Ltd v Horton</i>	Tort law	Judgment
83	9.5.51 [1951] AC 723	HL	<i>Crowther v Crowther</i>	Family law	Concurrence

Part 3: Cases heard as the Lord Chief Justice of Northern Ireland, 1951–1971 (and as a retired judge in Northern Ireland, 1971–1975)

	Date and law report	Court	Title of case	Primary area of law at issue	Contribution
1	26.4.51 [1951] NI 79	HC	<i>Petty v Lavelle</i>	Customs law	Judgment
2	1.5.51 [1951] NI 115	CA	<i>Harry Ferguson (Motors) Ltd v Commissioners of Inland Revenue</i>	Taxation law	Judgment
3	8.5.51 [1952] NI 24	CA	<i>Dixon v Forster and McMahon</i>	Customs law	Judgment
4	31.5.51 [1951] NI 97	CA	<i>Minister of Food v O'Rourke</i>	Criminal law	Judgment
5	30.10.51 [1952] NI 1	HC	<i>R (Buck) v Justices of the City of Londonderry</i>	Criminal law	Judgment
6	16.11.51 [1952] NI 33	HC	<i>McSteen v McCarthy</i>	Tort law	Judgment
7	29.2.52 [1952] NI 21	HC	<i>Connolly v Huddleston</i>	Tort law	Judgment
8	7.3.52 [1952] NI 16	HC	<i>R (Mooney) v County Court Judge of Down</i>	Licensing law	Judgment
9	9.5.52 [1952] NI 49	HC	<i>McCann v Belfast Corporation</i>	Civil procedure law	Judgment
10	9.5.52 [1952] NI 54	CA	<i>Robinson v Tyrone County Council</i>	Tort law	Judgment
11	12.6.52 [1952] NI 41	CA	<i>Antrim City Council v Harkness</i>	Administrative law	Judgment
12	18.7.52 [1954] NI 96	HC	<i>Patterson v Donnell</i>	Tort law	Judgment
13	31.7.52 [1952] NI 118	CA	<i>McCormick v Harland and Wolff Ltd</i>	Tort law	Reversed by CA
14	24.10.52 [1952] NI 91	HC	<i>R (Bowden) v Justices of the City of Belfast</i>	Criminal law	Judgment
15	1.12.52 [1953] NI 51	CA	<i>Russell v Thompson</i>	Criminal law	Judgment
16	12.12.52 [1952] NI 167	HC	<i>Diamond v Mullan</i>	Tort law	Judgment
17	12.1.53 [1953] NI 70	CA	<i>Fitzharris v Strain</i>	Customs law	Concurrence
18	15.1.53 [1952] NI 161	HC	<i>Minister of Agriculture v Mackle</i>	Customs law	Judgment
19	31.3.53 [1953] NI 32	CA	<i>Re Blackwood</i>	Succession law	Judgment
20	5.5.53 [1954] NI 170	CA	<i>Petty v Biggerstaff</i>	Customs law	Judgment
21	15.5.53 [1953] NI 160	CA	<i>Belfast Corporation v Kelso</i>	Administrative law	Concurrence
22	18.5.53 [1954] NI 41	CA	<i>Kelly v Farrow Ltd</i>	Tort law	Judgment
23	18.5.53 [1953] NI 151	CA	<i>Minister of Agriculture v Kelly</i>	Administrative law	Judgment
24	18.5.53 [1953] NI 131	CA	<i>Smith v Howdens</i>	Tort law	Judgment
25	29.6.53 [1953] NI 179	CA	<i>Ulster Transport Authority v James Brown & Sons Ltd</i>	Constitutional law	Judgment

26	28.7.53 [1954] NI 112	HC	<i>Artt v WG & T Greer</i>	Tort law	Judgment
27	23.9.53 [1954] NI 131	HC	<i>Quinn v Ministry of Commerce</i>	Tort law	Judgment
28	24.9.53 [1954] NI 144	HC	<i>R v McGoogan</i>	Criminal procedure	Judgment
29	26.11.53 [1954] NI 172	HC	<i>The Princess Victoria</i>	Administrative law	Judgment
30	21.12.53 [1954] NI 54	CA	<i>Commissioner of Valuation v McAllister</i>	Rating law	Judgment
31	21.12.53 [1954] NI 183	CA	<i>Newtownards Rural District Council v McCullough</i>	Administrative law	Judgment
32	22.2.54 [1954] NI 146	CA	<i>Atkinson v Stewart Partners Ltd</i>	Tort law	Judgment
33	31.3.54 [1955] NI 74	CA	<i>McGuigan v Pollock</i>	Tort law	Judgment
34	17.5.54 [1955] NI 58	HC	<i>Minister of Agriculture v Nugent</i>	Customs law	Judgment
35	9.11.54 [1955] NI 208	HC	<i>McAllister v Wilson</i>	Tort law	Judgment
36	12.11.54 [1955] NI 213	HC	<i>Brown v Belfast Corporation</i>	Tort law	Judgment
37	14.1.55 [1955] NI 1	HC	<i>Addison v Addison</i>	Family law	Judgment
38	18.1.55 [1955] NI 139	HC	<i>Minister of Agriculture v McGeough</i>	Civil procedure law	Judgment
39	25.1.55 [1955] NI 168	CA	<i>Drayson v Galbraith</i>	Administrative law	Judgment
40	27.1.55 [1955] NI 184	HC	<i>In re Kathleen McKee</i>	Succession law	Judgment
41	28.1.55 [1955] NI 112	CA	<i>Walsh v Curry</i>	Tort law	Judgment
42	18.2.55 [1956] NI 53	CA	<i>In re Townsend Street Belfast Presbyterian Endowment Trusts</i>	Charity law	Judgment
43	7.3.55 [1955] NI 224	HC	<i>Minister of Agriculture v Marmion</i>	Criminal law	Judgment
44	7.3.55 [1963] NI 29	CA	<i>Luke v Coulter (Note)</i>	Criminal law	Concurrence
45	22.4.55 [1956] NI 36	CA	<i>McCausland v Ministry of Commerce</i>	Administrative Law	Judgment
46	26.4.55 [1956] NI 31	CA	<i>Williamson v Honeyford</i>	Tort law	Judgment
47	15.5.55 [1956] NI 73	HC	<i>McLaughlin v McLaughlin</i>	Family law	Judgment
48	29.7.55 [1956] NI 84	CA	<i>Armstrong v Northern Ireland Hospitals Authority</i>	Employment law	Judgment
49	2.12.55 [1956] NI 171	HC	<i>Fox v Armagh Education Authority</i>	Tort law	Judgment
50	21.1.56 [1956] NI 15	CA	<i>R v Bailey</i>	Criminal law	Judgment
51	27.1.56 [1956] NI 119	HC	<i>Glass v Glass</i>	Family law	Judgment

52	8.2.56 [1957] NI 96	HC	<i>In re Frampton</i>	Succession law	Judgment
53	5.3.56 [1957] NI 70	CA	<i>McConnell v Lynch Robinson</i>	Tort law	Judgment
54	29.3.56 [1956] NI 127	CA	<i>McClelland v Northern Ireland General Health Services Board</i>	Employment law	Reversed by HL
55	31.7.56 [1956] NI 151	CA	<i>In re McConnell</i>	Succession law	Judgment
56	23.11.56 [1957] NI 64	CA	<i>Edgar v Wallace</i>	Family law	Judgment
57	23.11.56 [1956] NI 163	CA	<i>Minister of Agriculture v Healey</i>	Administrative law	Judgment
58	20.12.56 [1957] NI 130	CA	<i>In re Local Registration of Title (Ireland) Act 1891</i>	Land law	Judgment
59	14.1.57 [1957] NI 1	CA	<i>R v Hodgett</i>	Criminal law	Concurrence
60	2.2.57 [1957] NI 25	CA	<i>Trustees of St MacNissi's College v Commissioner of Valuation</i>	Taxation law	Judgment
61	5.3.57 [1957] NI 10	CA	<i>McNeill v McNeill</i>	Succession law	Judgment
62	28.3.57 [1957] NI 74	HC	<i>In re McWhinney</i>	Succession law	Judgment
63	29.3.57 [1958] NI 17	CA	<i>Conlon v Murray</i>	Land law	Judgment
64	17.4.57 [1957] NI 145	CA	<i>Minister of Agriculture v Carragher</i>	Customs law	Judgment
65	19.5.57 [1957] NI 122	CA	<i>Porter v Boomer</i>	Taxation law	Judgment
66	14.6.57 [1957] NI 77	CA	<i>HM Postmaster General v Londonderry Rural District Council</i>	Tort law	Judgment
67	26.7.57 [1957] NI 156	HC	<i>In re Murphy</i>	Land law	Judgment
68	5.11.57 [1957] NI 150	CA	<i>Minister of Agriculture v Carragher (No 2)</i>	Customs law	Judgment
69	18.12.57 [1960] NI 1	HC	<i>R (Antrim County Council) v Ministry of Health and Local Government</i>	Administrative law	Upheld by CA
70	3.3.58 [1958] NI 44	CA	<i>City Brick and Terra Cotta Co Ltd v Belfast Corporation</i>	Administrative law	Judgment
71	3.3.58 [1958] NI 13	CA	<i>Sherrard v Woods</i>	Criminal law	Judgment
72	10.3.58 [1958] NI 28	CA	<i>In re Scarlett</i>	Succession law	Judgment
73	25.4.58 [1958] NI 135	CA	<i>R v Taylor</i>	Criminal law	Judgment
74	15.5.58 [1958] NI 78	CA	<i>Ulster Farmers' Mart Co Ltd v Scottish Cooperative Society</i>	Tort law	Reversed in part by HL
75	16.6.58 [1959] NI 109	CA	<i>Cavanagh v Ulster Weaving Co Ltd</i>	Employers' liability	Dissent; HL upheld dissent

76	11.12.58 [1959] NI 37	CA	<i>Mahon v Clingen</i>	Criminal law	Judgment
77	18.3.59 [1959] NI 98	CA	<i>McGimpsey v O'Hare</i>	Licensing law	Judgment
78	26.3.59 [1959] NI 62	CA	<i>OD Cars Ltd v Belfast Corporation</i>	Administrative law	Reversed by HL
79	1.5.59 [1959] NI 161	HC	<i>Rainey v North Down Rural District Council</i>	Land law	Judgment
80	19.5.59 [1960] NI 198	CA	<i>Belfast Collar Co Ltd v Commissioner of Valuation</i>	Taxation law	Judgment
81	25.5.59 [1959] NI 171	CA	<i>Montgomery v Loney</i>	Criminal law	Judgment
82	28.5.59 [1959] NI 1	CA	<i>Simpson v McKenna</i>	Criminal law	Judgment
83	9.6.59 [1959] NI 147	CA	<i>White v Trainor</i>	Criminal law	Dissent
84	16.9.59 [1960] NI 54	CA	<i>Newry Urban District Council v Collins</i>	Administrative law	Judgment
85	16.11.59 [1960] NI 45	CA	<i>Irvine v McNulty</i>	Criminal law	Judgment
86	11.12.59 [1960] NI 181	HC	<i>Andrews v Dunn & Co Ltd</i>	Tort law	Judgment
87	11.12.59 [1960] NI 181	HC	<i>Andrews v Dunn & Co Ltd: Belfast Ropework Co Ltd (Third Party)</i>	Civil procedure law	Judgment
88	18.12.59 [1960] NI 163	CA	<i>Minister of Agriculture v Ulster Transport Authority</i>	Customs law	Judgment
89	12.2.60 [1960] NI 141	CA	<i>Mageean v Valuation Commissioner</i>	Taxation law	Judgment
90	14.2.60 [1962] NI 24	CA	<i>Great Northern Railway Board v Minister of Home Affairs</i>	Civil procedure law	Judgment
91	19.2.60 [1960] NI 185	CA	<i>Portadown Borough Council v Moore</i>	Administrative law	Judgment
92	3.3.60 [1960] NI 122	HC	<i>Wells v Wells</i>	Family law	Judgment
93	16.3.60 [1961] NI 102	CA	<i>McCann v Attorney General for Northern Ireland</i>	Constitutional law	Upheld by HL
94	22.4.60 [1960] NI 177	HC	<i>Noble v Noble</i>	Family law	Judgment
95	30.6.60 [1961] NI 1	CA	<i>Fulton v Kee</i>	Succession law	Judgment
96	7.10.60 [1961] NI 65	CA	<i>Minister of Agriculture for Northern Ireland v McGeough</i>	Customs Law	Judgment
97	28.11.60 [1961] NI 176	CA	<i>National Assistance Board v McEaney</i>	Welfare law	Judgment
98	2.12.60 [1961] NI 26	CA	<i>Gallagher v N McDowell Ltd</i>	Tort law	Judgment
99	2.12.60 [1962] NI 32	CA	<i>Walker v Commissioner of Valuation</i>	Rating law	Judgment
100	8.12.60 [1961] NI 167	HC	<i>R (Burns) v Tyrone County Court Judge</i>	Evidence law	Judgment

101	19.1.61 [1961] NI 192	CA	<i>Lombank Ltd v Kennedy and Whitelaw</i>	Contract law	Judgment
102	30.1.61 [1961] NI 135	CA	<i>Mulholland v McCrea</i>	Tort law	Judgment
103	16.2.61 [1961] NI 184	CA	<i>Magherafelt Rural District Council v Nelson</i>	Housing law	Judgment
104	16.2.61 [1962] NI 6	CA	<i>Duffy v Ministry of Labour and National Insurance</i>	Constitutional law	Judgment
105	24.4.61 [1962] NI 3	CA	<i>Ross v Tower Upholstery Ltd</i>	Civil procedure law	Judgment
106	18.5.61 [1962] NI 54	HC	<i>In re C (An Infant)</i>	Family law	Judgment
107	29.5.61 [1962] NI 50	HC	<i>In re Loughconnolly Primary School</i>	Administrative law	Judgment
108	5.6.61 [1963] NI 1	CA	<i>Bill v Short Brothers & Harland Ltd</i>	Tort law	Dissent; HL upheld dissent
109	28.6.61 [1962] NI 152	HC	<i>Fitzpatrick v Moore</i>	Tort law	Judgment
110	18.7.61 [1962] NI 78	CA	<i>R v Bratty</i>	Criminal law	Upheld by HL
111	19.3.62 [1962] NI 190	CA	<i>Holland & Ors v Lynn</i>	Rating law	Judgment
112	19.3.62 [1963] NI 23	CA	<i>Walker v Rountree</i>	Criminal law	Judgment
113	19.3.62 [1963] NI 41	CA	<i>McIlwrath v Harland & Wolff Ltd</i>	Tort law	Judgment
114	12.6.62 [1963] NI 11	CA	<i>Bradley v McGivern</i>	Criminal law	Judgment
115	29.6.62 [1963] NI 49	CA	<i>Boyd v Lee Guinness Ltd</i>	Company law	Dissent
116	30.11.62 [1963] NI 65	CA	<i>Devine v Cementation Co Ltd</i>	Civil procedure law	Judgment
117	30.11.62 [1963] NI 78	CA	<i>Belfast Corporation v Daly</i>	Administrative law	Judgment
118	25.1.63 [1964] NI 22	CA	<i>Irwin v White, Tomkins & Courage Ltd</i>	Tort law	Dissent; HL upheld dissent
119	15.3.63 [1963] NI 64	HC	<i>In re the Estate of Jane McDowell, Deceased (Note)</i>	Succession law	Judgment
120	28.3.63 [1965] NI 7	HC	<i>R (Nicholl) v Recorder of Belfast</i>	Administrative law	Judgment
121	17.4.63 [1963] NI 194	CA	<i>Buchanan v Moore</i>	Criminal law	Judgment
122	30.4.63 [1964] NI 17	CA	<i>Lavelle v A Robinson & Co Ltd</i>	Costs	Judgment
123	10.6.63 [1964] NI 72	CA	<i>Hedley v Sparrow</i>	Criminal law	Judgment
124	18.2.64 [1965] NI 1	CA	<i>Spears v Wilson</i>	Criminal law	Judgment
125	24.2.64 [1964] NI 90	HC	<i>R (Londonderry Corporation) v The Industrial Court (Northern Ireland)</i>	Employment law	Upheld by CA
126	3.3.64 [1965] NI 73	HC	<i>J & WF Burrows Ltd v Belfast Corporation</i>	Criminal law	Judgment

127	26.3.64 [1964] NI 77	CA	<i>Spears v Barrett</i>	Gaming law	Judgment
128	1.5.64 [1965] NI 113	CA	<i>Buchanan v McKinney</i>	Criminal law	Judgment
129	12.6.64 [1966] NI 1	CA	<i>Toome Eel Fishery (Northern Ireland) Ltd v Cardwell</i>	Fishing rights	Judgment
130	25.6.64 [1965] NI 187	CA	<i>McCallum v G Madill & Sons Ltd</i>	Tort law	Judgment
131	25.9.64 [1965] NI 52	CA	<i>R v Williams and Wilson</i>	Criminal law	Judgment
132	2.12.64 [1965] NI 67	HC	<i>In re an application by HM Attorney General for Northern Ireland for a writ of certiorari</i>	Criminal procedure law	Judgment
133	27.1.65 [1965] NI 138	CMAC	<i>R v Murphy</i>	Criminal law	Judgment
134	8.3.65 [1966] NI 31	CA	<i>Cowan v Hale</i>	Taxation law	Judgment
135	26.3.65 [1966] NI 85	HC	<i>Waddell & Anr v Norton & Anr</i>	Civil procedure law	Judgment
136	30.3.65 [1965] NI 151	CA	<i>Sherrard v Jacob</i>	Criminal law	Judgment
137	16.6.65 [1966] NI 93	CA	<i>Elwood (Inspector of Taxes) v Utiitz</i>	Taxation law	Judgment
137	26.10.65 [1966] NI 128	CA	<i>In re Alexander, a bankrupt</i>	Bankruptcy law	Judgment
139	4.11.65 [1966] NI 171	CA	<i>Platt v Kerr</i>	Criminal procedure law	Judgment
140	17.12.65 [1967] NI 1	CA	<i>Cavendish Furniture Co Ltd & Anr v Chalfant & Or</i>	Land law	Judgment
141	31.1.66 [1966] NI 178	CA	<i>Cyril Lord Carpets Ltd v Commissioners of Inland Revenue</i>	Taxation law	Judgment
142	14.2.66 [1968] NI 193	CA	<i>R v Corr</i>	Criminal law	Judgment
143	7.3.66 [1967] NI 40	CA	<i>Commissioner of Valuation for Northern Ireland v Thomas McMullan & Co Ltd</i>	Valuation law	Judgment
144	15.4.66 [1967] NI 54	CA	<i>F B McKee & Co Ltd v Allen</i>	Rating law	Judgment
145	25.4.66 [1967] NI 62	CA	<i>James P Corry & Co Ltd v Clarke</i>	Tort law	Judgment
146	29.6.66 [1967] NI 137	CA	<i>Begley v Jeffrey</i>	Customs law	Judgment
147	23.11.66 [1967] NI 101	HC	<i>R (HM Attorney General for Northern Ireland) v Recorder of Belfast</i>	Licensing law	Judgment
148	27.1.67 [1968] NI 96	HC	<i>In re the Estate of Bulloch, Deceased</i>	Succession law	Judgment
149	15.3.67 [1968] NI 1	HC	<i>Hope v Hope</i>	Family law	Judgment
150	19.4.67 [1968] NI 74	CA	<i>Herdman v Commissioners of Inland Revenue</i>	Taxation law	Judgment

151	25.4.67 [1968] NI 21	CA	<i>Belfast Association for Employment of Industrious Blind v Commissioner of Valuation for Northern Ireland</i>	Charity law	Dissent
152	9.6.67 [1969] NI 139	HC	<i>British Egg Marketing Board v Gillespie</i>	Civil procedure law	Judgment
153	9.6.67 [1968] NI 7	HC	<i>Holden v Holden</i>	Family law	Judgment
154	29.6.67 [1968] NI 104	CA	<i>Commissioner of Valuation for Northern Ireland v Lurgan Borough Council</i>	Charity law	Judgment
155	15.9.67 [1969] NI 78	HC	<i>Stewart v Murdoch</i>	Succession law	Judgment
156	12.1.68 [1969] NI 91	CA	<i>Mallett v McMonagle</i>	Tort law	Upheld by HL
157	12.1.68 [1969] NI 54	CA	<i>Mullan v Lamrock and Ministry of Agriculture</i>	Tort law	Judgment
158	18.1.68 [1968] NI 163	CA	<i>Monarch Electric Ltd v McIntyre</i>	Employment law	Judgment
159	30.1.68 [1968] NI 58	CA	<i>Hill v Cunningham</i>	Tort law	Judgment
160	29.3.68 [1969] NI 116	CA	<i>McGimpsey v Carlin</i>	Criminal law	Judgment
161	23.4.68 [1969] NI 3	CA	<i>Trustees of the City of Belfast Young Men's Christian Association v Commissioner of Valuation for Northern Ireland</i>	Charity law	Judgment
162	6.5.68 [1971] NI 174	CA	<i>Trustees of the Congregation of Poor Clares of the Immaculate Conception v Commissioner of Valuation (Note)</i>	Rating law	Judgment
163	31.5.68 [1970] NI 89	CA	<i>Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education</i>	Charity law	Upheld by HL in part
164	28.6.68 [1970] NI 68	CA	<i>J M Reilly Ltd v Belfast Corporation</i>	Contract law	Judgment
165	28.6.68 [1969] NI 189	CA	<i>Shute v Hunt</i>	Criminal law	Judgment
166	13.11.68 [1970] NI 8	CA	<i>R v Patterson</i>	Criminal law	Judgment
167	29.11.68 [1970] NI 11	CA	<i>Forde v McEldowney</i>	Administrative law	Dissent; not upheld by HL
168	4.12.68 [1969] NI 169	CA	<i>Smith v Harland & Wolff Ltd</i>	Employment law	Judgment
169	24.2.69 [1969] NI 204	CA	<i>Northern Ireland Carriers Ltd v Thompson</i>	Employment law	Judgment
170	21.3.69 [1970] NI 173	CA	<i>R (Shields) v Down Justices</i>	Civil procedure law	Judgment
171	27.3.69 [1970] NI 1	CA	<i>Hunter v Gray</i>	Criminal law	Judgment

172	6.10.69 [1971] NI 238	CA	<i>McCullough v Glass</i>	Criminal law	Judgment
173	12.12.69 [1971] NI 73	CA	<i>Neill v Short Bros & Harland Ltd</i>	Tort law	Judgment
174	18.12.69 [1970] NI 236	CA	<i>Marks & Ors v Wellman Machines Ltd</i>	Employment law	Judgment
175	26.1.70 [1971] NI 40	CA	<i>Arthurs v Attorney General for Northern Ireland</i>	Criminal law	Upheld by HL
176	6.2.70 [1970] NI 257	CA	<i>Bairnswear Ltd v Armagh County Council</i>	Criminal injury law	Judgment
177	1.5.70 [1970] 5 NIJB 1	CA	<i>Gracey v Weaver</i>	Criminal law	Judgment
178	1.5.70 [1970] NI 231	CA	<i>Ministry of Home Affairs v Guiney</i>	Criminal injury law	Judgment
179	22.6.70 [1971] NI 13	CA	<i>Devlin v Armstrong</i>	Criminal law	Judgment
180	24.9.70 [1971] NI 68	HC	<i>In re the Goods of Patrick Black</i>	Succession law	Judgment
181	2.10.70 [1971] NI 211	CA	<i>Charles Donnelly & Sons Ltd v Belfast Corporation</i>	Criminal law	Judgment
182	7.10.70 [1970] 10 NIJB 2	CA	<i>Kennedy v Spratt</i>	Sentencing law	Upheld by HL
183	20.10.70 [1970] 10 NIJB 4	HC	<i>Hart v Cresswell</i>	Land law	Judgment
184	20.11.70 [1971] NI 250	CA	<i>McCarroll v Hicking Pentecost & Co (NI) Ltd</i>	Employment law	Judgment
185	27.10.70 [1979] NI 172	CA	<i>Martin v Ministry of Home Affairs</i>	Criminal injury law	Judgment
186	12.2.71 [1971] NI 114	CA	<i>Commissioner of Valuation v Trustees of the Redemptorist Order</i>	Charity law	Judgment
187	19.3.71 [1971] NI 224	CA	<i>R v Downey</i>	Criminal law	Judgment
188	26.3.71 [1971] NI 193	CA	<i>R v Murphy, Lillis and Burns</i>	Criminal law	Judgment
189	26.5.71 [1972] NI 59	CA	<i>McFarlane v McFarlane</i>	Family law	Judgment
190	4.6.71 [1972] NI 80	CA	<i>R v Fegan</i>	Criminal law	Judgment
191	30.6.72 [1974] NI 44	HC	<i>Heron v Ulster Bank Ltd</i>	Succession law	Judgment
192	19.3.74 [1974] NI 83	HC	<i>In re Hughes</i>	Land law	Judgment
193	14.10.74 [1974] NI 226	HC	<i>In re McKeown</i>	Bankruptcy law	Judgment
194	23.6.75 [1975] NI 139	HC	<i>McKeown v McKeown</i>	Family law	Judgment

Part 4: Cases heard as an *ad hoc* Law Lord, 1951–1973

	Date and law report	Court	Title of case	Primary area of law at issue	Contribution
1	25.2.52 [1952] AC 362	HL	<i>Earl Fitzwilliam's Wentworth Estates Co Ltd v Minister of Housing and Local Government</i>	Land law	Judgment
2	24.11.52 [1953] AC 164	JCPC	<i>Kwasi v Larbi</i>	Arbitration law	Concurrence
3	25.1.54 1954 SC (HL) 43	HL	<i>Anderson v Lambie</i>	Land law	Concurrence
4	25.1.54 [1954] 1 WLR 282	HL	<i>Inland Revenue Commissioners v Williams (Dunblane) Ltd</i>	Taxation law	Judgment
5	25.1.54 [1954] AC 257	HL	<i>Sneddon v Lord Advocate</i>	Taxation law	Judgment
6	27.7.54 [1955] AC 93	JCPC	<i>Wong Pooh Yin v Public Prosecutor</i>	Criminal law	Judgment
7	11.3.55 [1955] AC 667	HL	<i>Madras Electric Supply Corp Ltd v Boarland (Inspector of Taxes)</i>	Taxation law	Judgment
8	7.11.55 [1956] AC 104	HL	<i>Bonsor v Musicians' Union</i>	Employment law	Judgment
9	8.12.55 [1955] 1 WLR 1329	HL	<i>Bambridge v Inland Revenue Commissioners</i>	Taxation law	Concurrence
10	19.12.55 [1956] AC 421	HL	<i>Attorney General v Parsons</i>	Land law	Judgment
11	21.6.56 [1957] AC 334	HL	<i>Southern Railway of Peru Ltd v Owen (Inspector of Taxes)</i>	Taxation law	Dissent
12	19.7.56 [1956] 1 WLR 1002	HL	<i>Walsh v Lord Advocate</i>	Administrative law	Judgment
13	25.7.56 [1957] AC 403	HL	<i>West Suffolk County Council v W Rought Ltd</i>	Taxation law	Concurrence
14	14.1.57 [1957] AC 176	JCPC	<i>Abeyawardene v West</i>	Succession law	Concurrence
15	25.6.58 [1959] AC 293	HL	<i>National Deposit Friendly Society Trustees v Skegness Urban District Council</i>	Charity law	Judgment
16	13.2.61 [1962] 1 WLR 241	HL	<i>Amp Inc v Hellermann Ltd</i>	Patent law	Judgment
17	19.12.61 [1962] AC 496	HL	<i>Rye v Rye</i>	Land law	Judgment
18	18.10.62 [1964] AC 1019	HL	<i>Sparrow v Fairey Aviation Co Ltd</i>	Tort law	Dissent
19	20.12.62 [1963] 1 WLR 69	HL	<i>British Commonwealth International Newsfilm Agency Ltd v Mahany (Inspector of Taxes)</i>	Taxation law	Judgment
20	13.3.63 [1964] AC 173	HL	<i>Inland Revenue Commissioners v Lord Rennell</i>	Taxation law	Dissent
21	21.12.65 [1967] 1 AC 259	JCPC	<i>Liyanage v The Queen</i>	Constitutional law	Concurrence

22	18.5.66 [1966] 1 WLR 1015	HL	<i>Central and District Properties Ltd v Inland Revenue Commissioners</i>	Taxation law	Judgment
23	18.5.66 [1967] 2 AC 1	HL	<i>Toohey v Woolwich Justices</i>	Criminal procedure law	Judgment
24	1.2.67 [1967] 2 AC 224	HL	<i>Churchill v Walton</i>	Criminal law	Concurrence
25	15.3.67 [1971] AC 282	HL	<i>Athanassiadis v Government of Greece</i>	Criminal law	Concurrence
26	15.3.68 [1968] AC 1097	HL	<i>Davies Jenkins & Co Ltd v Davies (Inspector of Taxes)</i>	Taxation law	Judgment
27	27.5.68 [1969] 1 AC 320	JCPC	<i>Thompson v Stamp Duties Commissioner</i>	Taxation law	Concurrence
28	27.6.58 [1968] 1 WLR 1718	JCPC	<i>Ishak v Thowfeek</i>	Trust law	Concurrence
29	19.12.67 [1968] 1 WLR 53	HL	<i>Crickitt v Kursaal Casino Ltd (No 2)</i>	Contract law	Concurrence
30	19.12.67 [1968] 1 WLR 205	HL	<i>Lord Advocate v Reliant Tool Co</i>	Taxation law	Judgment
31	25.7.68 [1970] AC 379	JCPC	<i>Ningkan v Government of Malaysia</i>	Constitutional law	Judgment
32	19.2.69 [1970] AC 668	HL	<i>J v C</i>	Family law	Judgment
33	21.10.69 [1971] AC 481	HL	<i>S (Infant) v Manchester City Recorder</i>	Criminal law	Judgment
34	6.11.69 [1971] AC 198	HL	<i>Atkinson v US Government</i>	Criminal law	Concurrence
35	23.7.70 [1972] AC 24	HL	<i>S v S; W v Official Solicitor</i>	Family law	Judgment
36	2.11.70 [1971] 1 WLR 191	JCPC	<i>McClelland v Taxation Commissioner of the Commonwealth of Australia</i>	Taxation law	Dissent
37	24.3.71 [1971] AC 682	HL	<i>Re W (An Infant)</i>	Family law	Judgment
38	16.2.72 [1972] AC 601	HL	<i>Dingle v Turner</i>	Charity law	Judgment
39	25.7.73 [1974] AC 370	HL	<i>DPP v Ray</i>	Criminal law	Judgment
40	25.7.73 [1974] AC 357	HL	<i>DPP v Turner</i>	Criminal law	Judgment
41	25.7.73 [1973] 1 WLR 1295	HL	<i>Williams v Beasley</i>	Tort law	Concurrence



Towards introducing a new criminal offence covering politicians making egregious deceptive representations to the public[†]

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ABSTRACT

In recent years politicians have been increasingly accused of making deceptive representations to the public. The false or misleading information imparted in these representations has the potential to influence how the public forms political preferences, leading to broader democratic implications when the public engages in democratic procedures. While these representations have existed throughout British politics, recent scandals such as Partygate and the Brexit campaign have exposed their regular use. This shift has highlighted the need to reflect on what is being and should be done to deter politicians from making these representations. The purpose of this article is twofold. It explores why these representations are problematic and sets out to make a case for legal reform. In doing so it argues for a novel legal solution. Specifically, it advocates for a new criminal offence to address the most egregious deceptive political representations made to the public.

Keywords: political deception; false information; public law; criminal law.

INTRODUCTION

Deceptive representations (material statements of fact which are knowingly or recklessly false or misleading) have always been pervasive in the political domain.¹ Unlike other types of deceptive statements (like opinions or vague comments), deceptive representations carry greater credibility and influence. They are

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¹ Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press 2018) 229, 234–239, 241.

made with an apparent sincerity and certainty which offer the public something to rely on, inducing people to have false beliefs.

These representations are a staple in British politics. In the 1990s John Major lied to the public about not engaging in peace talks with the Irish Republican Army (IRA),² and just over a decade later, Tony Blair misrepresented the strength of the intelligence³ as to Iraq having weapons of mass destruction.⁴ While these representations have existed throughout British politics, recent scandals such as Partygate and the Brexit campaign have exposed the regularity of their usage.

Just a few years ago, Boris Johnson's claim that the United Kingdom (UK) would make a gain of £350 million a week if it left the European Union (EU) became a notorious example of deception in politics.⁵ The implication was that the £350 million was a net gain, when in fact it 'did not take into account the rebate or other flows from the EU to the UK public sector'.⁶ Another prominent instance was Boris Johnson's claim that he did not participate in breaches of Covid-19 social-distancing rules, saying 'anybody who thinks I was knowingly going to parties that were breaking lockdown rules ... [is] out of their mind'. This is despite having been previously reported as saying 'this is the most un-socially distanced party in the UK right now'.⁷ This particular revelation invites questions about what the UK's approach to addressing deceptive representations is and whether it is fully fit for purpose.

Now, the UK has a framework in place to discourage, recognise, and sanction deceptive representations, as discussed below. The problem is that these mechanisms are deficient, either being unenforceable and ineffective at creating changes in behaviour, or they are enforceable but underutilised or overly niche. The result is that politicians are not discouraged from making these representations. In the meantime, the false or misleading information being imparted has the potential to influence how the public forms political preferences. This can have

- 2 Anthony Bevens, Eamonn Mallie and Mary Holland, 'Major's secret links with IRA leadership revealed' (*The Guardian* 28 November 1993).
- 3 BBC, 'Breakfast with Frost' 26 January 2003.
- 4 Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (HC 2016, 264) paras 540, 796. See also Gordon Corera, 'How the search for Iraq's secret weapons fell apart' (*BBC News* 13 March 2023).
- 5 Anushka Asthana, 'Boris Johnson: we will still claw back £350m a week after Brexit' (*The Guardian* 16 September 2017). Note: there is an argument to be made that he perhaps did not know that the figure would be misleading (at least at first). However, what is particularly telling is that he continued to make the claim after the UK Statistics Authority concluded that it was misleading.
- 6 Office for National Statistics 'Leave campaign claims during Brexit Debate' (*Office for National Statistics* 7 February 2017).
- 7 Sachin Ravikumar, Kylie MacLellan and William James, 'UK's Boris Johnson and the "partygate" scandal' (*Reuters* 15 June 2023).

broader democratic implications when the public engages in democratic procedures.

This article is arguing for a new criminal offence which would complement the existing framework. Such criminalisation has been attempted before, as with the Elected Representative (Prohibition of Deception) Bills of 2006 and 2023. However, these attempts have been unsuccessful and never came close to being enacted into law. The suggestion being made is that we should still use the criminal law but take a different tack and impose a more effective deterrent. What this article advocates for is a new and more narrowly drafted criminal offence (compared to those that have previously been suggested). Specifically, it would be one which is targeted at the most egregious deceptive representations which are made to the public. Importantly, this strikes the balance between intervening to provide some protection from democratic harms whilst not overextending the criminal law or giving substance to objections, such as concerns over free speech or the politicisation of the judiciary.⁸

To substantiate this argument, this article adopts a tripartite structure. It begins by using political theory to explain why making deceptive representations to the public is problematic. It then critically assesses the efficacy of the mechanisms forming the UK's current approach, finding them to be deficient. Finally, it proposes a way that this deficiency can be addressed and advocates for a new offence. It is beyond what can be achieved here to outline a complete draft offence, but this article puts forward a provisional idea of what it could involve. In particular, it highlights certain elements which should form the foundation of the offence, with the aim of capturing the most egregious deceptive representations.

THE PROBLEM OF DECEPTIVE POLITICAL REPRESENTATIONS

Why are deceptive representations to the public problematic?

Understanding why deceptive representations are a problem returns to the broader question of how the public forms political preferences. Elite influence as a whole is widely appreciated as being a significant factor in shaping political opinions. 'Citizens have clear incentives to take

8 Eg Kent Greenawalt, 'Free speech justifications' (1989) 89 *Columbia Law Review* 119–155, 119; Eric Barendt, *Freedom of Speech* (2nd edn Oxford University Press 2007) ch 3; Jeremy Horder, 'Criminal law at the limit: countering false claims in elections and referendums' (2021) 84(3) *Modern Law Review* 429–455, 433.

political cues from those more knowledgeable, typically experts or elites whose views are conveyed by the media.’⁹ The elites which carry this influence are a ‘wide range of individuals and organizations, including politicians and political officials, policy experts, interest groups, religious leaders, and journalists’.¹⁰ Politicians in particular (by this I mean those who are in Parliament, Government or local councillors) are fundamental to forming and shaping public opinion. They have the unique position of not only being professionals in the political field but also being informed of and party to the inner workings of policy. This is something which the majority of the public is not well versed in, so the ideal is that the public defers to politicians and draws on their expertise. The issue is that when politicians deceive this arrangement is threatened because the information being imparted is corrupted. It is then possible that the public is forming political opinions from a knowledge base which is comprised of false or misleading information.¹¹

With that being said, how the public forms political opinions is a multifaceted issue. In particular, heuristic factors (cognitive shortcuts which enable the public to ‘be knowledgeable in their reasoning about political choices without necessarily possessing a large body of knowledge about politics’)¹² are increasingly recognised as important. Lepoutre, for instance, puts great emphasis on these factors. He argues that there is an:

assum[ption in democratic theory] that ... [the public is] trying to form accurate or reliable political judgments. But there is ample evidence suggesting that, when it comes to politics, people simply accept whatever their social group tells them to believe.¹³

People often draw upon their social group, partisanship¹⁴ or even emotive intuitions (eg the likeability of a party or inferences about a

9 Martin Gilens and Naomi Murakawa, ‘Elite cues and political decision making’ (2002) 6 *Political Decision Making, Deliberation and Participation* 15–49, 15.

10 Ibid 16.

11 For a discussion on rational choice theory in politics, see Joe Oppenheimer, *Principles of Politics: A Rational Choice Theory Guide to Politics and Social Justice* (Cambridge University Press 2012) 15.

12 Paul M Sniderman, Richard A Brody and Phillip E Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge University Press 1991) 19.

13 Maxime Lepoutre, ‘Democratic group cognition’ (2020) 48(1) *Philosophy & Public Affairs* 40–78, 41.

14 Jeffrey Mondak, ‘Public opinion and heuristic processing of source cues’ (1993) 15(2) *Political Behaviour* 167–192, 182–184.

candidate's character).¹⁵ Seen in this light, political opinion formation needs to be recognised as a complex and multifaceted theory.

While it is important to stress that this is not a straightforward issue and that a politician's influence may not be determinative in how opinions are formed, it still has a role.¹⁶ Even new empirically based studies note its significance. Take, for instance, Clarke and colleagues' mass observation project into voting in the Brexit referendum.¹⁷ The results indicated that, when developing opinions, panellists often fell back on feelings.¹⁸ The findings showed that '[m]any panellists looked to the campaign for help, at least initially. They read leaflets and newspapers, watched television and listened to the radio.'¹⁹ The problem was that the misleading, unverified and contradicting claims left them feeling uninformed, and members of the public were forced to use their instinct to fill that deficit.²⁰ These findings are consistent with Mitchell's analysis of the Scottish independence referendum. He too noted that the diversity of opinions on independence led to division within parties, 'and opinions on each side of the debate limited the extent to which clear differences could emerge on position issues'.²¹ The contradiction did not provide voters with clear information which they could use to develop their preferences.

Another example is Arceneaux's cross-national analysis of the impact of election campaigns as informational tools and their use by voters.²² Survey data from nine European countries across 12 years indicated that voter learning actually improved when parties campaigned. Although Arceneaux did observe that 'voters' pre-existing attitudes and assessment of things beyond the control of political campaigns, like the

15 Samuel L Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* 2nd edn (University of Chicago Press 2020) 7, 44, 65. See also, James H Kuklinski and Paul J Quirk, 'Reconsidering the rational public: cognition, heuristics, and mass opinion' in Arthur Lupia, Mathew D McCubbins and Samuel L Popkin (eds), *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* (Cambridge University Press 2012) 153–159.

16 Eg Gregory B Markus, 'The impact of personal and national economic conditions on the presidential vote: a pooled cross-sectional analysis' (1988) 32 *American Journal of Political Science* 137–154, 137.

17 Nick Clarke et al, 'Voter decision-making in a context of low political trust: the 2016 UK EU membership referendum' (2023) 71(1) *Political Studies* 106–124, 110–118.

18 Ibid 107.

19 Ibid 113.

20 Ibid 115–116.

21 James Mitchell, 'The Referendum Campaign' in Aileen McHarg et al (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 93.

22 Kevin Arceneaux, 'Do campaigns help voters learn? A cross-national analysis' (2006) 36 *British Journal of Political Science* 159–173, 160, 164–169.

economy, have the strongest impact on voting decisions', he also noted that 'campaigns play a major role in producing these effects'.²³ In other words, whilst heuristic factors were present, their existence did not invalidate the fact that information being imparted by politicians also had influence.

It thus follows that deceptive representations which are made by politicians are problematic. They give the public a flawed knowledge base on which to make decisions, something which has broader democratic implications when the public then engages in democratic procedures whether it be institutional, for example voting in referendums or elections, or alternative and ongoing signalling procedures, for instance protesting, petitioning or the critiquing of policy decisions.²⁴ Having explored the problematic nature of deceptive representations, the next section of this article will critically assess the UK's current approach, asking whether it is fit for purpose.

THE FAILURE OF THE CURRENT APPROACH

The current approach to tackling these representations can be broadly distinguished into two themes: an approach based on a lack of intervention and unenforceable mechanisms (ie the self-correcting public debate) and regulation which is mandatory and/or enforceable.

The self-correcting public debate

The first part of the approach is based on non-intervention, essentially relying on the idea that public discussion has the ability to self-correct. Such a theory is advocated by free speech scholars including Mill,²⁵ Justices Brandeis and Holmes,²⁶ and Meiklejohn,²⁷ who have all suggested that the public debate has the capacity to identify problematic speech (eg false or dangerous rhetoric) and remove it from circulation. The theory is that unconstrained public discussion provides an open platform for ideas, so initially all ideas have equal status. However, as time and the discussion develop the public is able

23 Ibid 160.

24 See Sofie Marien and Henrik Serup Christensen, 'Trust and openness: prerequisites for democratic engagement?' in Kyriakos N Demetriou (ed), *Democracy in Transition: Political Participation in the European Union* (Springer 2012) 109, for discussion on alternative forms of activism.

25 John Stuart Mill, *On Liberty* 4th edn (Longmans, Green, Reader & Dyer 1869) 94–95.

26 *Abrams et al v United States* (1919) 250 US 616 Supreme Court, at 630–631 per Justices Holmes and Brandeis.

27 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (HarperCollins 2001) 26–27. See also Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper 1960) 27.

to scrutinise and challenge different ideas.²⁸ As ideas are tested some are able to withstand the scrutiny, while others have their weaknesses exposed and are defeated. The argument is that the best and most rational idea emerges victorious. Under this interpretation a deceptive representation can be introduced into public discussion but it will eventually be exposed.²⁹ The logic is that ‘the good will over time drive out the bad and the true prevail over the false’.³⁰ Rather than restraining or deterring a type of speech, the public debate should be enriched with more speech and counter speech (‘communication that seeks to counteract potential harm that is brought about by other speech’)³¹ to help identify problematic types of expression.³²

While the self-correcting speech model has appeal, it is not the answer to addressing this problem. As argued by other scholars (eg Coe³³ and Rowbottom)³⁴ this model is fraught with difficulties and is an idealistic representation of how public debate works. The core issue is that our cognitive processes are not framed in a way which makes us easily susceptible to changing our beliefs. Individuals are not only biased towards evidence which is familiar³⁵ but that which fosters confirmation of their previous beliefs.³⁶ Political studies – such as those conducted by Nyhan and Reifler, Taber and Lodge, and Lord and colleagues³⁷ – share the finding that the public is resistant

28 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, (2008) 1 AC 1312, para 28 per Lord Bingham.

29 *Abrams* (n 26 above) 630–631.

30 *R (Animal Defenders International)* (n 28 above) para 28 per Lord Bingham.

31 Bianca Cepollaro, Maxime Lepoutre and Robert Mark Simpson, ‘Counterspeech’ (2023) 18(1) *Philosophy Compass* 1–11, 2.

32 *Whitney v California No 3* 274 US 357 (1927), 377 per Justices Brandeis and Holmes.

33 Peter Coe, ‘Tackling online false information in the United Kingdom: the Online Safety Act 2023 and its disconnection from free speech law and theory’ (2023) 15(2) *Journal of Media Law* 213–242, 223–227.

34 Jacob Rowbottom, ‘Lies, manipulation and elections – controlling false campaign statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507–535, 522–524. See also, Irini Katsirea, ‘“Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty’ (2018) 10(2) *Journal of Media Law* 159–188, 184–185.

35 Ullrich K H Ecker et al, ‘The psychological drivers of misinformation belief and its resistance to correction’ (2022) 1 *Nature Reviews Psychology* 13–19, 15–16.

36 *Ibid* 13. See Rowbottom, (n 34 above) 522–523.

37 Brendan Nyhan and Jason Reifler, ‘When corrections fail: the persistence of political misperceptions’ (2010) 32(3) *Political Behavior* 303–330; Charles S Taber and Milton Lodge, ‘Motivated skepticism in the evaluation of political beliefs’ (2006) 50(3) *American Journal of Political Science* 755–769; Charles G Lord, Lee Ross and Mark R Lepper, ‘Biased assimilation and attitude polarization: the effects of prior theories on subsequently considered evidence’ (1979) 37(11) *Journal of Personality and Social Psychology* 2098–2109.

to information which contradicts their beliefs. In these studies, individuals were presented with information which challenged their initial assumptions on controversial political issues, for example capital punishment,³⁸ weapons of mass destruction, or tax cuts.³⁹ Even when confronted with contradicting evidence, individuals were unconvinced⁴⁰ and in some cases their commitment to the false belief was affirmed. This demonstrates the general issue with the self-correcting model. If the public is not able to be open to identifying and correcting their misperception, then the deceit will not be defeated and removed from discussion.

Of course, one may counter this assessment of the model with the admission that, yes, the theory in its original form is flawed, but a modified version could be effective. To a degree this can be accepted. Studies by those such as Kuklinski and colleagues have demonstrated that the public can be induced to correct their belief⁴¹ when the counter speech is more sophisticated than the mere counteraction of a particular view by ordinary citizens.⁴² Instead, there needs to be an authoritative statement, provided by a recognised source such as a state actor.⁴³ While fact-checking news and current affairs is becoming more commonplace,⁴⁴ in the UK we do not have a single authoritative, unbiased and independent body to consistently check political statements. On the odd occasion, we have tried to use the UK Statistics Authority to correct misperceptions. In the midst of the Brexit campaigning, for example, the UK Statistics Authority (an impartial body) intervened and highlighted the limitations of the claim that £350 million would be invested in the National Health Service (NHS) if the UK were to leave the EU.⁴⁵

However, this example is a good illustration of the way that even with this intervention the narrative can remain uncorrected. In Clarke and colleagues' study, for instance, panellists found that it was 'increasingly hard to decipher and believe' the different claims put forward.⁴⁶ Part of the issue was that the UK Statistics Authority was not established as the leading authority on correction, so when public figures endorsed a

38 Lord et al (n 37 above) 2105–2107.

39 Nyhan and Reifler (n 37 above) 314–320.

40 Ibid 314–320. See also Lord et al (n 37 above) 2099–2100.

41 James H Kuklinski et al, 'Misinformation and the currency of democratic citizenship' (2000) 62(3) *The Journal of Politics* 790–816, 792.

42 Rowbottom (n 34 above) 523.

43 Cepollaro et al (n 31 above) 3.

44 [Full Fact](#).

45 UK Statistics Authority, '[Statement on the use of official statistics on contributions to the European Union](#)' (UK Statistics Authority 27 May 2016).

46 Clarke et al (n 17 above) 114.

47 Ibid 114.

wide range of claims, it was still difficult for the public to identify the deception. Nevertheless, even if such a body was able to establish itself as being *the* leading authority on exposing deceitful representations, it would likely encounter a number of logistical issues if it was used with greater frequency and on a wider scale.

First, effective countering would be financially and practically difficult. It would require a burdensome amount of time and resources to interrogate and investigate the claims being made and then spread the exposure of the deceit to the public. The message would need to be conveyed with sufficient accessibility,⁴⁷ reach, and frequency,⁴⁸ likely needing to be communicated in a number of ways so as to reflect how different generations consume news.⁴⁹ These logistical demands would deplete the UK Statistics Authority's limited funds and resources. In all likelihood, opening it up to criticism, as has been the case with other authorities or regulators who are underfunded, under-resourced and increasingly asked to do more.⁵⁰

Second, there may be particular difficulty in correcting the discussion when the deceit is circulated right before a fixed democratic procedure (eg days before a referendum or election). In such circumstances, there simply would not be time to investigate and then attempt to correct the narrative: the damage would already be done.⁵¹ It is also worth noting that even if the UK Statistics Authority had the funds and resources to effectively identify and counter deceptive political representations, some members of the public still may not be convinced. After all, as said above, humans are predisposed to cling to their false beliefs. All this considered, neither the original nor the modified theory of self-correction is the answer to addressing deceptive political representations. With this analysis undertaken, this brings this article to its next section: examining the regulatory mechanisms.

The regulatory mechanisms

The starting point for an analysis of the regulatory part of the framework are the Principles of Public Life, which, unlike measures such as ministerial responsibility, apply to all public officials. Following the recommendations of the 1995 Nolan Report, seven principles were introduced (selflessness, integrity, objectivity, accountability,

48 Brian G Southwell, Emily A Thorson and Laura Sheble, *Misinformation and Mass Audiences* (University of Texas Press 2018) 5.

49 *News Consumption in the UK: 2024* (Ofcom 10 September 2024).

50 Tom Gerken, 'Ofcom needs more powers to remove misleading posts, says watchdog' (*BBC News* 7 May 2025).

51 See broadly, Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (The Constitution Unit 2019) 39.

openness, honesty, and leadership),⁵² becoming the quintessential basis for what political behaviour should be. A select few have particular applicability to addressing political deceit. The most obvious one is honesty – that public office holders ‘should be truthful’⁵³ in the statements they make or promote.⁵⁴ There are also associated values of accountability and openness, which encourage transparency (‘unless there are clear and lawful reasons for [not] doing so’)⁵⁵ and the scrutiny of behaviour more broadly. These principles form part of many codes of conduct, including the Ministerial Code and the codes for the House of Commons, House of Lords, and local councillors which all hold an overarching duty to observe them.⁵⁶

For the most part, non-compliance with these principles does not result in punitive action. The principles tend to be used as part of an integrity-based model,⁵⁷ relying on individual consciences, rather than an overseeing body to regulate behaviour. The premise is that ethical principles are not enforced but embedded into political culture,⁵⁸ over time becoming internalised norms of what is acceptable.⁵⁹ However, political practice still seems to be fraught with scandals and poor behaviour,⁶⁰ suggesting that relying on individual consciences to uphold these principles is not effective.⁶¹ As Member of Parliament (MP) Liz Saville puts it, ‘we are no longer in [a] ... world ... [where]

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- 52 Committee on Standards in Public Life, chaired by Lord Nolan, *Standards in Public Life: Volume 1* (Nolan Report) (Committee on Standards in Public Life 1995) 14, para 55.
 - 53 Committee on Standards in Public Life, ‘*The Seven Principles of Public Life*’ (Gov.UK 31 May 1995).
 - 54 Richard Thomas, ‘*Fake news and the Nolan Principles*’ (Committee on Standards in Public Life 6 March 2017).
 - 55 Committee on Standards in Public Life (n 53 above).
 - 56 Cabinet Office, *The Ministerial Code* (Cabinet Office October 2025) para 1.4. See also House of Lords, *Code of Conduct for Members of the House of Lords and Guide to the Code of Conduct* (HL Paper 109–I 2025) 2–3, paras 6–8; House of Commons, *The Code of Conduct Together with the Guide to the Rules Relating to the Conduct of Members* (HC 1083 2023) 2–3; Local Government Association, ‘*Code of Conduct and Standards*’ (Local Government Association nd).
 - 57 Franklin M Lartey, ‘Integrity-based and compliance-based ethics programs: a critical analysis of key differences’ (2021) 5(5) *International Journal of Business Economics and Management* 43–53, 44.
 - 58 Committee on Standards in Public Life (n 52 above) 3, para 6.
 - 59 Paul Spicker, ‘Seven Principles of Public Life: time to rethink’ (2014) 34(1) *Public Money & Management* 11–18, 11–12.
 - 60 Martin Bull, ‘*Whatever happened to the Nolan Principles? Sleaze in the government of Boris Johnson*’ (*LSE British Politics and Policy* 17 May 2021).
 - 61 Robert Roberts, ‘The rise of compliance-based ethics management’ (2009) 11(3) *Public Integrity* 261–278, 261–273.

chivalry and words as bonds ...'⁶² are enough to regulate most political behaviour.

Of course, there are tweaks which could be made to improve the normative force of these principles. For example, a 2023–2024 report from the Committee on Standards in Public Life proposed that MPs undertake an oath to follow the Principles of Public Life.⁶³ It would be similar to the affirmation of allegiance which is made to the King before parliamentarians take their seats,⁶⁴ involving 'a declaration of commitment to the Nolan principles at the start of a Member's parliamentary career, renewed every time they are re-elected to the House'.⁶⁵ An oath goes beyond a promise, in the sense that it is not just promising to do or not to do something, it is more comprehensive and changes who one is. As put by Sulmasy:

[i]t is a self-performative utterance. It is not merely a commitment to do something or not to do something [in private, as is the case with a promise]. It is a [public] commitment to be a particular sort of someone. And this is why a violation of an oath seems so serious. A promise does put the promisor at risk of losing his or her reputation. But an oath [compounds this and] risks the hono[u]r and person of the one who swears[,] in a much deeper way.⁶⁶

In this sense, an oath is a very serious commitment and is a strong moral obligation.

This article accepts this line of reasoning and argues that an oath to uphold the Principles of Public Life should be introduced. While the substantive content would be the same as the codes of conduct, empirical evidence demonstrates that oaths are successful at guiding behaviour. For example, studies into virginity pledges,⁶⁷ healthy eating⁶⁸ and

62 'Elected Representatives (Prohibition of Deception)', HC Deb 28 June 2022, cols 183–185 (Liz Saville).

63 Committee on Standards in Public Life, *The House of Commons Standards Landscape: How MPs' Standards and Conduct Are Regulated* (HC 247 2023–2024) 26–27, paras 108–113.

64 Ibid 26, fn 89. 'The Parliamentary Oaths Act 1866 sets out the requirement to take the oath, the place in which it is to be administered and the penalties applicable to any MP who takes part in parliamentary proceedings without having taken the oath; the Promissory Oaths Act 1868 sets out the wording of the oath; and the Oaths Act 1978 prescribes the form and manner of administering and taking it.'

65 Committee on Standards in Public Life (n 63 above) 27, para 113.

66 Daniel P Sulmasy, 'What is an oath and why should a physician swear one?' (1999) 20 *Theoretical Medicine and Bioethics* 329–346, 332.

67 Peter S Bearman and Hannah Brückner, 'Promising the future: virginity pledges and first intercourse' (2001) 106(4) *American Journal of Sociology* 859–912, 859.

68 Sekar Raju, Priyali Rajagopal and Timothy J Gilbride, 'Marketing healthful eating to children: the effectiveness of incentives, pledges, and competitions' (2010) 74(3) *Journal of Marketing* 93–106, 93.

non-smoking⁶⁹ all point to it being an effective tool for changing behaviour. An oath would invoke a stronger level of commitment to the principles than what is already in place. Essentially, ‘prick[ing] the conscience of those who have sworn the oath and are tempted to violate one of its precepts’.⁷⁰ Additionally, reaffirming commitment to the principles every time they are elected should remind Members of the Westminster Parliament what they should be striving for and put it at the forefront of their minds.

Nonetheless, the efficacy of an oath is always going to be contingent on those partaking, particularly them having the intention and desire to uphold it.⁷¹ If oath-takers lack this intention they will see the oath as a performance as opposed to something meaningful,⁷² undermining the normative force of the commitment. General observations about political practice⁷³ and recent events such as Partygate, the Brexit campaign and the election betting scandal, suggest that a significant number of politicians may not be committed to these principles and, thus, the oath may not have a transformative effect. Although its impact would likely be modest, it is still worthwhile introducing an oath to *enhance* compliance with the Principles of Public Life amongst those who already uphold them. It is an opportunity to bolster commitment to the Principles and encourage truth and honesty in the political sphere.

Although the Principles of Public Life mainly operate as guidance for political behaviour, they do have some capacity to trigger sanctions. For instance, in Northern Ireland the Ministerial Code (which incorporates these Principles) is legally enforceable. Similarly, local councillor Codes of Conduct use the Principles of Public Life to create rules, which if breached can result in the councillor being removed from their role by the local authority.⁷⁴

Another notable example is the Westminster Ministerial Code where the principles are enforceable as standards of behaviour. There is not only an overarching duty placed on ministers ‘to adhere to the Seven Principles of Public Life’,⁷⁵ but a specific stipulation that ministers should be as open as possible with Parliament and the public. Refusal

69 John H Hallaq, ‘The pledge as an instrument of behavioral change’ (1976) 98(1) *The Journal of Social Psychology* 147, 147–148.

70 Sulmasy (n 66 above) 339.

71 See, Herbert J Schlesinger, *Promises, Oaths, and Vows: On the Psychology of Promising* (Taylor & Francis 2008) 44.

72 Committee on Standards in Public Life (n 63 above) 27 para, 111, fn 97 Q198.

73 Rory Stewart, *Politics on the Edge* (Random House 2023).

74 Local Government Association, ‘[Guidance on Local Government Association Model Councillor Code of Conduct](#)’ (*Local Government Association* 8 July 2021).

75 Cabinet Office (n 56 above) para 1.4.

to provide information is only permissible when disclosure would not be in the public's interest.⁷⁶ Breaching these ministerial standards can result in an investigation and sanctions (eg a public apology, remedial action, removal of ministerial salary, or removal from office). Although the Prime Minister can ask the Independent Advisor to investigate a matter and the Independent Advisor can make recommendations, the ultimate judge of whether there has been a breach and what the consequence should be is the Prime Minister.⁷⁷

While this seems acceptable in principle, its use gives rise to multiple flaws in practice. One problem is that this mechanism is underutilised. The Prime Minister does not refer allegations of deceptive representations for investigation,⁷⁸ even when notified about potential breaches.⁷⁹ Another problem is that the Prime Minister has the ability to ignore the finding that a breach has occurred. Although the Prime Minister usually follows the advice of the Independent Advisor, there are instances where the findings of their investigation have not been accepted. One notorious example concerns Boris Johnson, who ignored his then-advisor's findings that Priti Patel was bullying members of staff, allowing her to breach the code without repercussion (aside from an apology).⁸⁰

Some aspects of the problem may be ameliorated due to the requirements of the recently updated Ministerial Code. Now, the Independent Adviser has greater autonomy because they have the power to launch investigations into potential breaches without the Prime Minister's approval.⁸¹ This means that instances of deception which had previously not been investigated may now gain attention and be looked into. However, decisions as to whether a breach has occurred, whether to impose a sanction, and the form it should take, all still lie with the Prime Minister.⁸² The point at issue is that, largely for the reasons given, the Ministerial Code and the Principles of Public Life are not appropriate for addressing deceptive representations which are made to the public. The insufficiency of the existing regulatory mechanisms is one that extends beyond the Ministerial

76 Ibid para 1.4(e).

77 Ibid para 2.7.

78 Based on the *Annual Reports of the Independent Advisor of Ministers' Interests* (Gov.UK nd).

79 Eg Full Fact notified the Home Office about the misuse of immigration statistics. In doing so, they referred to Suella Braverman. Hannah Smith, 'Who are the 100 million displaced people Suella Braverman said could qualify for UK protection?' (*Full Fact* 9 March 2023).

80 Simon Murphy 'Alex Allan: the veteran windsurfing mandarin who quit over Patel row' (*The Guardian* 20 November 2020).

81 Cabinet Office (n 56) para 2.6(b).

82 Ibid paras 2.6–2.7.

Code and continues to affect the legal remedy (namely, section 106 of the Representation of the People Act (RPA) 1983).

Section 106 is integral for any analysis of regulating deceitful representations made to the public because it is the only legal mechanism which specifically targets this problem. It is supposed to create a deterrent against electoral defamation. Section 106 makes it an illegal practice for a person to make or publish 'any false statement of fact in relation to [a] ... candidate's personal character or conduct',⁸³ 'before or during an election',⁸⁴ 'for the purpose of affecting the return of any candidate at the election',⁸⁵ unless the individual can show that they 'had reasonable grounds for believing, and did believe, the statement to be true'.⁸⁶ It draws together civil remedies and criminal sanctions. For instance, a candidate could apply for an interim injunction by which to restrain the distribution of the deceit.⁸⁷ Once the election has finished, a candidate may then put forward an electoral petition, requesting that the election be declared void.⁸⁸ It is also possible for criminal proceedings to be brought 'without there previously having been an election petition'⁸⁹ and upon a summary conviction a defendant will receive a maximum of a level 5 fine.⁹⁰ If the illegal practice is proved, the guilty person would then be disqualified from being elected to or taking their seat in the House of Commons for three years.⁹¹

Section 106 already has limited applicability because it only targets electoral defamation. However, the legislative drafting imposes additional requirements, reducing its coverage further. One requirement is that it only applies to the personal conduct of a candidate.⁹² The courts have repeatedly emphasised that there is a distinction between 'whether the statement is one as to the personal character or conduct[,] or a statement as to the political position or character of the candidate'.⁹³ The former is actionable and the latter is not. Another requirement is that section 106 is only applicable in cases

83 RPA 1983, s 106(1)(b).

84 Ibid s 106(1)(a).

85 Ibid s 106(1)(b).

86 Ibid s 106(1)(b).

87 Ibid s 106(3).

88 Ibid ss 127, 135, 159.

89 *Erskine May* (UK Parliament) pt 1, ch 3, para 3.9.

90 RPA 1983, s 169. On the point of criminal proceedings, see generally *DPP v Edwards* [2002] EWHC 636, [2002] 3 WLUK 551, paras 4–13.

91 RPA 1983 ss 106(2), 160(4), 160(5)(b), 173(1)–(3). See also *Erskine May* (n 89 above) para 3.9.

92 Ibid s 106(1)(b). See also *Cumberland Cockermonth Division case* (1901) 5 O'M&H 155, 160.

93 *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169, (2011) 2 WLR 1362, para 111. See also paras 107–111, 114.

where there has been a lie. As argued by Horder, the notion of ‘a false statement of fact in relation to the candidate’s personal character or conduct’⁹⁴ notably excludes deception which is misleading. ‘[S]omeone might disseminate a perfectly correct claim that a candidate has been convicted of murder, whilst failing to mention that the conviction was later overturned and the candidate completely exonerated’.⁹⁵ The narrowness of the legislative drafting contributes towards ensuring that section 106 has limited use and a weakened deterrent effect.

Data from both the Electoral Commission and the law reports prove that section 106 has rarely been relied on as a legal remedy. For instance, over 900 allegations were made to the police between 2010 and 2024,⁹⁶ with 552 of the total allegations documented as not being within the scope of section 106.⁹⁷ Similarly, only a handful of electoral petitions have been brought in this time period.⁹⁸ What should be an effective mechanism which deters politicians from making such representations is not having the desired effect.

This inefficacy could be addressed if the scope of the illegal practice was widened, for instance to include other types of representations (like misleading statements) and accommodate political defamation (ie not just personal matters). On this point, what is being suggested is similar to the approach in some parts of the United States where the making of any false statement about a candidate is prohibited (eg in Colorado and Louisiana).⁹⁹ While these reforms would make section 106 more effective in addressing electoral defamation, it would not go far enough. This would only be addressing part of the problem and representations which are made to the public outside the context of

94 RPA 1983 s 106 (1)(b).

95 Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) 146.

96 Electoral Commission, ‘Electoral Fraud Data 2010–2016’ (Electoral Commission nd). The data is public information and available upon request to the Electoral Commission. Electoral Commission, ‘[Electoral Fraud Data 2017–2024](#)’ (Electoral Commission 2024).

97 Based on filtering the Electoral Commission data with the categories: ‘No further action - no offence’, ‘No further action - not an RPA offence’, ‘No further action - not RPA offence’, ‘No further action - No offence’, ‘No Further Action - No offence under RPA’. Moreover, between 2010–2024 there have only been two convictions under s 106, per *ibid*.

98 Only eight civil actions have been brought on s 106 grounds between 2010–2024 (electoral petitions or applications for interim injunctions/interim interdicts) and few have been successful. This is based on a search of the Law Reports through the online database of Westlaw last conducted in November 2025. Note that appeals were excluded.

99 Staci Lieffring, ‘First amendment and the right to lie: regulating knowingly false campaign speech after *United States v Alvarez*’ (2013) 97(3) *Minnesota Law Review* 1047–1078, 1056. See fn 74 of Lieffring’s article for a detailed list.

elections would be excluded. What is needed is a new mechanism to address representations which are made to the public more broadly. Specifically, this article advocates for a new specific criminal offence to complement the existing framework.

TOWARDS A NEW CRIMINAL OFFENCE

The section below begins by setting out a rough conceptualisation of what the offence should be covering. It then moves on to setting out a case in favour of it, responding to key objections such as those concerning free speech or politicisation of the judiciary.

A new specific offence for the most egregious representations

While it is beyond what can be achieved to offer a draft offence, it is necessary to offer a rough indication of what the offence should be covering. The section below provides an overview, highlighting certain features which should form the foundation of the offence.

It is argued that the remit of the criminal offence should be limited to the most egregious representations, similar to instances such as Johnson's misleading claims on post-Brexit NHS investment¹⁰⁰ or Blair's claim in relation to Iraq's weapons of mass destruction.¹⁰¹ These are labelled as the most egregious because they embody a number of features which are indicative of greater culpability and potential for significant harm.

First and foremost, egregious instances are forms of true deceit; in other words, the politician is aware that what they are saying was false or misleading or knew that there was risk of it being so (recklessness). With these types of intention duplicity is present; the politician has made a conscious decision to engage in deception, making them worthy of blame. A politician who makes a false or misleading representation but lacks this intention (ie they have made a mistake or simply failed to do their due diligence) does not qualify as being deceptive.¹⁰² What is significant for deceptive intent is the fact that there is a disparity between what the individual knows and what they present.

Second, the representation needs to be made by a certain type of politician. The political sphere vests the majority of its power through a chain of delegation,¹⁰³ in that power is delegated first from

100 Asthana (n 5 above).

101 BBC (n 3 above).

102 On this point, I align with the interpretations of deception in the Fraud Act 2006, sch 1, s 31, and the National Security Act 2023, sch 2, s 11.

103 Kaare Strøm, 'Delegation and accountability in parliamentary democracies' (2000) 37 *European Journal of Political Research* 261–289, 262.

the public (ie voters) to its elected representatives, then from some of these representatives to the Government, and finally from the Government to bureaucrats.¹⁰⁴ Whilst the chain of delegation is not unique to the political sphere, it is unique in the sense that the public has a much more significant role. Importantly, it is the public that first delegates political power and starts the chain reaction by participating in elections. This imposes a moral duty on politicians to behave with integrity and to refrain from making deceptive representations. While it is recognised that this moral duty exists throughout the chain, those who have a stronger nexus to that initial delegation of power, for example local councillors, Members of the House of Commons, and those who are in Government, are under the strongest obligation not to deceive. Thus, what they do should attract greater culpability compared to ordinary Members of the House of Lords (who are not in Government), civil servants or political advisors. Additionally, such roles tend to carry greater political influence and are consequently more likely to be given greater credibility by the public when they form their political preferences.

Third, the representation needs to have the potential for collectivised harm. Thus, it needs to be made to the public more broadly, or the politician needs to be aware that it will be likely to be disseminated to the public more broadly in the near future. So, this could include speeches, social media or press releases, but also radio or television interviews. The obvious exclusion to the behaviour would be speech which is covered by parliamentary privilege (on account of the need for free parliamentary debate).

Fourth, the representation needs to be a material matter of public interest – as in relevant to the public and with the potential to be influential on people's decision-making. Aside from basing the offence around features which capture a greater propensity for culpability and harm, it is suggested that it should also include an excuse for justifiable deceit to reflect some situations where the deceptive representation was required or necessitated. The classic example of this would arise in instances of national security or when secret negotiations are taking place, as was the case with Major and the IRA negotiations.¹⁰⁵

104 Ibid 262. See also, Torbjörn Bergman, Wolfgang C Müller and Kaare Strøm, 'Introduction: parliamentary democracy and the chain of delegation' (2003) 37 *European Journal of Political Research* 255–260, 257–259.

105 Bevins et al (n 2 above).

A case for this new offence

It is appropriate to turn towards using the criminal law to address this issue, as opposed to other regulatory mechanisms, for instance parliamentary committees or ordinary regulators like the Electoral Commission. In comparison to the other options, criminalisation is more expressive and symbolic – it is, after all, the most severe expression of societal disapproval. The criminal law achieves this through a systematic and holistic reflection on the behaviour, beginning with the stigmatisation associated with criminalising. The act of criminalisation is a declaration that the state sees it as wrongful and society recognises the severity of being labelled a criminal (ie having a criminal record). Being labelled a criminal is something which needs to be disclosed in certain formal contexts (eg employment and visa applications).¹⁰⁶ The punishment itself then also acts as a severe form of censure.¹⁰⁷ Although other political and legal mechanisms do have sanctions attached (typically, political sanctions involve being sacked or forced resignation, and civil remedies involve damages, as well as the potential for reputational harm), the criminal law has a social significance and resonance¹⁰⁸ which other sanctions do not carry. It sends a powerful message that the conduct will not be tolerated and that if someone engages in this behaviour then they will be labelled a criminal.¹⁰⁹

This expressive quality should mean that the criminal law is effective as a deterrent against more general forms of deceptive representations which are made to the public. The combination of being labelled a criminal and the sanctions imposed should mean that a significant cost is attached, thereby creating greater deterrence as regards the behaviour in question. The deterrence model is based on rational cost–benefit analysis: that is, if you increase the cost of something, less of it will be consumed. So, if you make a behaviour more costly to engage in then less of it will occur¹¹⁰ because the benefit of engaging in the behaviour is outweighed by the burdens of potentially being caught and punished.¹¹¹ Of course, we also need to impose consequences which reflect the gravity of one's political deceit (retribution),¹¹² but the

106 A P Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) 4.

107 Ibid 5.

108 Ibid 4, 212.

109 Ibid 4–5, 11.

110 Gordon Tullock, 'Does punishment deter crime?' (1974) 36 *The Public Interest* 103–111, 105.

111 Thom Brooks, *Punishment: A Critical Introduction* (2nd edn Taylor & Francis 2019) 45.

112 Ibid 48–49.

strategy of the regulation should centre around deterrence, as opposed to gearing itself towards a backward-looking response, particularly in light of the idea of protecting the public's ability to form political preferences and engage in democratic procedures.

Now, one may counter this with the argument that deterrence theory is not that successful, drawing on empirical studies to do so. For example, Anderson's survey into male prisoners and the factors influencing their offending suggests that most criminals do not contemplate the potential effect of the criminal behaviour before engaging in it. He notes that '76% of active criminals and 89% of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes'.¹¹³ With that being said, there is evidence to suggest that the success of deterrence theory varies by context, with a propensity for it to be more effective in cases of minor or administrative crime when individuals undertake rational choice theory before the act, namely, weighing the risks up against the benefits. Dölling and colleagues' meta-analysis of 700 studies¹¹⁴ notes that the effect of the deterrence model varies by type of crime. They comment that 'statistically significant estimations [are] ... to be found [in minor crimes like] ... traffic offences, whereas the deterrence hypothesis is rarely confirmed in the case of more serious offences'. They attribute this to the role of rational choice, which is more prevalent in minor offences, whereas major crimes are often characterised by expression, for example emotion and spontaneity which often do not give the opportunity for rational thinking and a risk assessment.¹¹⁵ Similar findings can be seen in Abramovaite and colleagues'¹¹⁶ analysis of police forces and the reduction of theft, burglary and violence in England and Wales. Yes, increasing the certainty of punishment (measured by increased police detections) was associated with a reduction in non-expressive crimes like theft and burglary, but it did not have the same effect on violent crime.

Now, deceptive representations are not crimes characterised by emotion or spontaneity so they are an act which would naturally lend themselves towards a risk assessment. Further, once the politician engages in the risk assessment there are a number of factors that

113 David A Anderson, 'The deterrence hypothesis and picking pockets at the pickpocket's hanging' (2002) 4(2) *American Law and Economics Review* 295–313, 295.

114 Dieter Dölling et al, 'Is deterrence effective? Results of a meta-analysis of punishment' (2009) 15 *European Journal on Criminal Policy Research* 201–224, 214–215.

115 Ibid 215. See also Anderson (n 113 above) 295, 298, 301–304.

116 Juste Abramovaite et al, 'Classical deterrence theory revisited: an empirical analysis of police force areas in England and Wales' (2023) 20(5) *European Journal of Criminology* 1663–1680, 1663.

would colour their perception. First, a politician is likely aware of the risks and penalties attached to the offence, so will be well informed of the potential costs and fully understand the implications of getting caught.¹¹⁷ Second, politicians have a high social and economic status which should mean that they have more to lose if they engage in criminal acts.¹¹⁸ Those ‘persons who receive relatively few rewards from the society, whether economic or social, would tend to place a greater value on the potential rewards for criminal activity’. Conversely, those who receive more rewards will perceive greater informal costs¹¹⁹ from engaging in the behaviour such as loss of status and prestige. In particular, the publicity that is associated with the role and the long-term effect on career and livelihood that being caught may have¹²⁰ are notable costs and should help to act as significant deterrents. Furthermore, a conviction of this nature would be career-ending, so there should be no potential of the costs becoming less significant or repeated offending.¹²¹

Of course, prosecution comes with a risk of unintended political consequences, for example, the offence could be weaponised. In the past, there have been instances where the prosecution of a politician has done little to dampen the support they receive (as can be seen in the case of John Wilkes¹²² and with Alternative für Deutschland politicians in Germany).¹²³ In fact, it may actually result in them gaining an influx of supporters, and it is thus feasible that some politicians may misuse the law by intentionally making deceptive representations, with the aim of being prosecuted, becoming a so-called martyr, and generating publicity for their political cause. With that said, this is not a very likely possibility because doing so would require a great deal of self-sacrifice. As said above, the ramifications for career and livelihood from being

117 Paul H Robinson and John M Darley, ‘Does criminal law deter? A behavioural science investigation’ (2004) 24(2) *Oxford Journal of Legal Studies* 173–205, 176.

118 Michael R Geerken and Walter R Gove, ‘Deterrence: some theoretical considerations’ (1975) 9(3) *Law Society Review* 497–513, 498, 507.

119 *Ibid* 508.

120 *Ibid* 497, 503–508.

121 David Weisburd, Elin Waring and Ellen Chayet, ‘Specific deterrence in a sample of offenders convicted of white collar crimes’ (1995) 33(4) *Criminology* 587–607, 587, 593–597.

122 ‘John Wilkes – Liberty & Parliament’ (*UK Parliament* 2025).

123 Deborah Cole, ‘German spy agency labels AfD as “confirmed rightwing extremist” force’ (*The Guardian* 2 May 2025). Per Cole: ‘The AfD has faced growing calls from opponents for it to be outlawed on the grounds that it seeks to undermine democratic values, including protection of minority rights. ... But Olaf Scholz, the outgoing Social Democrat chancellor, warned against rushing to outlaw the AfD. Some opponents of a ban say it could backfire and help promote a victim narrative within the party.’

found guilty of a criminal offence should be sufficiently significant so as to outweigh the potential benefits – publicity, for example. Again, this should deter politicians from making deceptive representations, regardless of their motivations.

The overarching point here is that the criminal law would be effective in reducing the number of politicians who make deceptive representations. It has a resonance and deterrence effect which is unique. With that being said, there are a number of objections which could be raised in response to my suggestion of using the criminal law. The rest of this article will involve examining and addressing the most frequently raised objections, seeking to highlight the appeal of a new specific offence.

The first objection which could be levied at criminalisation is one that may be termed the legislative objection. What is meant by this is that it would require the very people who the Act would be restricting to support its passage. Admittedly, Parliament has traditionally been unwilling to support the passage of similar legislation. For instance, there have been attempts to pass Bills making it illegal for politicians to make deceptive statements – the Elected Representative (Prohibition of Deception) Bill was introduced in 2006 and then again with minor changes in 2023. Both times the Bills failed to get a second reading. Whilst the validity of the self-interest objection can be readily appreciated, there is reason to believe that Parliament could support a new and different offence. The offence set out in this article is significantly narrower compared to the one in either of the Elected Representative Bills. Even in the rough outline provided, there are extra conditions of materiality and a broader justifiability defence. As the offence will have less general applicability, it should be more appealing to those in Parliament.

With that being said, there is evidence to suggest that Parliament can set aside its self-interest. What is particularly indicative is the recent move by the Welsh Government committing to making lying in politics illegal.¹²⁴ Although what this would entail is unknown (the legislation has not been drafted), the fact that politicians are willing to commit to it and support its passage suggests that the prospect that Parliament could introduce an Act to criminalise this behaviour is a realistic one. Setting aside these more specific reasons, it is important to stress that most British politicians are answerable to the public. If the public feels that their current representatives are not serving their interests and supporting legislation that the public wants, then politicians could lose political power at the next election. Therefore, if enough public pressure is exerted and expressed in favour of a Bill to address this

¹²⁴ Steven Morris, 'Welsh Government commits to making lying in politics illegal' (*The Guardian* 2 July 2024).

issue, then politicians would be forced to support it because a failure to do so would risk their political power.

Another possible objection is what this article terms the politicisation objection: as in the argument that creating a criminal offence to address political deceit would encourage the judiciary to become overly involved in political matters when these institutions should be kept separate. Whilst the validity of this objection can be appreciated, this piece is advocating for a narrow offence. It would only involve expanding the judiciary's role in addressing political behaviour to a small degree. Indeed, the UK already has a number of criminal provisions which regulate certain behaviours from our political representatives and public figures. But these offences are all narrow in scope. Again, it is important to acknowledge section 106 of the RPA 1983 as well as other offences, such as bribery¹²⁵ and various provisions which relate to election expenses.¹²⁶ On a related note, we already have criminal offences for promulgating false information (as with section 179 of the Online Safety Act 2023) which is also narrowly drafted. The key point is that the law already addresses other deceptive and political issues and has not been brought into disrepute. If we consider this in light of the fact that the offence would be narrow and not something which the courts would encounter every day then the judicial role would not be extended very much and would not be likely to influence public perceptions as to judicial independence.

One may respond to this and ask whether the offence would have much of an impact. This article completely acknowledges that the offence is quite narrow and would have limited applicability. The purpose of the offence is not to address deceptive representations more broadly or to be used frequently. Rather, it is more narrowly drafted so as to only address the most egregious representations and the most clear-cut cases. This is actually beneficial and would aid in avoiding encouragement of a culture of secrecy and lack of transparency.¹²⁷ Nonetheless, it is important not to overstate the narrowness of the offence. This article is not advocating for the introduction of something which is as narrowly drafted as section 106 currently is (eg dependent on the demonstration of a number of very specific contingencies, such as a certain time period or type of representation). Such an approach to drafting would be problematic because it would offer little coverage. As such, prosecutions would be unlikely, and the deterrence-effect would be diminished.

125 Bribery Act 2010, ss 1–2, 6. See also RPA 1983, s 113, for bribery in the context of voting.

126 RPA 1983, ss 72–90D.

127 Horder (n 95 above) ch 1.1.

Another potential objection is that using the criminal justice system comes with certain enforceability challenges. For instance, the Crown Prosecution Service (CPS) requires there to be a realistic possibility of conviction and it to be in the public interest before proceeding with prosecution. Then, if prosecution is pursued, court proceedings can take a long time by which point the damage is done. Again, it is recognised that this is a valid point. However, this seems to be a natural limitation of using the criminal justice system to address any type of behaviour. While these are issues with its operation, these are widespread issues with the criminal justice system as a whole. It does not mean is that we should not introduce new criminal offences simply because the threshold is high and the system is slow. It is also worth emphasising that the suggestion is not to introduce a new offence that would produce a disproportionate strain on the system. The whole point of the offence would be to introduce something which would not lead to a deluge of cases, overly burdening an already burdened system.

A further objection is that this offence may be subject to exploitation. There is potential for politicians and politically minded members of the public to make false allegations with the aim of discrediting politicians. The fact that this is a possibility can be accepted. However, people would be deterred from making false allegations because they could be prosecuted for wasting police time, an offence which carries a potential prison sentence.¹²⁸ Setting this reason aside, it is also important to bear in mind that the unfoundedness of the allegation would be exposed through investigation. The unfortunate by-product is that the reputations of the investigating body and CPS could be damaged. Even if the decisions to close the investigation or the lack of prosecution are 'bona fide', the decision may still appear to be politically motivated, opening the body up to criticism.¹²⁹ However, similar to the point made immediately above, these are widespread issues with using the criminal justice system. All decisions are open to critique and public backlash, but what that does not mean is that we should not introduce new criminal offences simply because there is potential for criticism of the state bodies involved. Instead, there should be focus on reducing this criticism by informing the public of the rationale behind the decision.

In a similar vein, another objection which could be posed is that this offence may be subject to abuse, stifling genuine political debate or opposition to government policies.¹³⁰ By analogy, we can refer to other countries such as Vietnam and Thailand where fake news laws have been

128 Criminal Law Act 1967, s 5(2).

129 Jeremy Horder, 'Online free speech and the suppression of false political claims' (2021) 8(1) *Journal of International and Comparative Law* 15–52, 29.

130 *Ibid* 34–35.

exploited, and increasingly repressive legislation has been introduced so as to curtail the broader public debate.¹³¹ While it is recognised that this is a possibility, it is important to stress that this article is proposing one relatively narrow offence. It is not intended to be part of a regulatory spree against political speech, nor is it supposed to be the start of an escalation in repressive laws. Although there is nothing preventing the Government from proposing such legislation, existing scrutinisation and checking mechanisms would hopefully prevent these from being enacted. The House of Commons, for example, could vote against passing the Bill through to the next stage. In the unlikely event that further laws were passed, they would need to be compatible with our freedom of speech obligations. As discussed in further detail below, repressive laws on speech would likely be inconsistent with these obligations, resulting in a judgment of incompatibility from the European Court of Human Rights (ECtHR) and potential repeal. Thus, not only is it not the aim of this article to argue for legislation beyond this offence but there are also multiple safeguards and actors in place which make the possibility of more substantial curtailment of the political debate unlikely.

The final objection which could be levied at criminalising certain types of political deceit is the free speech critique. One could argue that criminalising a type of political speech would be at odds with our international obligations under the European Convention on Human Rights (ECHR) and ECtHR jurisprudence. While it is important to recognise the value of free speech, this article does not agree with the sentiment that criminalising this type of political speech would be a violation.

Under article 10 of the ECHR¹³² there is a general guarantee afforded to free expression. Political expression is guarded even more fervently with states having less capacity for interference. This is reflected in the ECtHR case law in which the court has traditionally been very reluctant to accept interferences. It has offered protection to an entire spectrum of political speech from information or ideas which are favourably received to those which are indifferent and even to

131 On this point parallels can be drawn with Thailand and Vietnam where fake news laws have become increasingly oppressive and used to inhibit genuine political debate or peaceful protests. See Amnesty International, '[Thailand: authorities using repressive laws to intensify crackdown on online critics](#)' (Amnesty International 23 April 2020); Gov.UK, '[Country policy and information note: opposition to the state, Vietnam](#)' (Gov.UK updated 22 September 2025).

132 European Convention on Human Rights 1950, art 10.

those which offend, shock or disturb.¹³³ Thus, not only have relatively straightforward types of political speech been protected (such as ideas which challenge the current institutional order),¹³⁴ but also more controversial and offensive types such as where a political applicant has engaged in hateful, hostile or offensive rhetoric.¹³⁵

More importantly for the purposes of this article, ECtHR jurisprudence seems to support the fact that article 10 protection extends to making false political claims. The pertinence of this is clearly illustrated by *Salov v Ukraine*.¹³⁶ In this case Mr Salov (the applicant) disseminated incorrect information about the alleged death of a presidential candidate, thereby breaching article 127 of Ukraine's Criminal Code by interfering with 'electoral rights, or ... with the activity of an electoral commission, for the purpose of influencing election results'.¹³⁷ He was convicted of the offence and received criminal penalties.¹³⁸

Although the Court determined that there was an illegitimate interference with article 10, it is important to appreciate the application of the test under article 10(2). Identifying where the measure failed to meet the test highlights the appeal and likely compatibility of the offence proposed in this article. The Court found that the state managed to satisfy the first two limbs of the test. The legislation under article 127 was sufficiently foreseeable and clear so as to allow an individual to see the consequences of their behaviour.¹³⁹ Furthermore, safeguarding against false or misleading political information falls under the legitimate aim¹⁴⁰ of protecting the public's engagement with the democratic processes (such as choosing a presidential candidate).¹⁴¹

While the first two limbs were met with ease, the interference failed on the latter part of the test: being necessary in a democratic society

133 *Eğitim ve Bilim Emekçileri Sendikası v Turkey* App no 20641/05 (ECtHR 25 September 2012) para 67, citing *Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976) para 49, and *Jersild v Denmark* App no 15890/89 (ECtHR 23 September 1994) para 37.

134 *Eğitim ve Bilim Emekçileri Sendikası* (n 133 above) paras 70–74.

135 See, for instance, *Jersild v Denmark*, *Gündüz v Turkey* App no 35071/97 (ECtHR 4 December 2003); *Erbakan v Turkey* App no 59405/00 (ECtHR 6 July 2006).

136 *Salov v Ukraine* App no 65518/01 (ECtHR 6 September 2005).

137 Criminal Code of Ukraine, art 127.

138 *Salov* (n 136 above) paras 10–32.

139 *Ibid* paras 108–110.

140 *Ibid* para 110. See also *Ahmed and Others v the United Kingdom* App no 65/1997/849/1056 (ECtHR 2 September 1998) para 52 where the Court stressed the importance of ensuring the free will of the people during elections and the need to protect democratic society from interferences.

141 *Ibid* para 101.

and proportionate to the aim pursued.¹⁴² In relation to necessity, the Court drew particular attention to the nature of the speech in question, noting the fact that the information was not produced or published by the defendant. Instead, it was a personalised assessment, had limited impact, and lacked evidence of being made with deceitful intention¹⁴³ (characteristics which are indicative of lower culpability and less potential for harm). Taking these characteristics into account, the Court judged that there was no need for the interference.¹⁴⁴ Another issue was that the measure was disproportionate to the aim pursued. In particular, the nature and severity of the penalties imposed far outweighed the aim of ensuring the democratic process.¹⁴⁵ In this case, Mr Salov was given a sentence of five years (which was suspended for two), a fine, and annulment by the Bar Association of the applicant's licence to practise law.

Now, it is important to stress that this article agrees with the Court's approach in *Salov*: for that particular speech the measure was unnecessary and the sanctions imposed disproportionate.¹⁴⁶ However, this case can be interpreted as suggesting that there *may* be circumstances in which political deceit may in fact be criminalised in a way which is compatible with article 10(2).¹⁴⁷ The issue of proportionality may be resolved by being more cautious with sanctions, for example imposing fines or community orders as opposed to imprisonment. One may counter that using lesser sanctions may undermine the deterrent effect which this article seeks to create. After all, if you attach sanctions which are less severe, then the risk assessment will be influenced. Nevertheless, the deterrence effect should remain intact. Irrespective of sanctions attached to the offence, a conviction carries a significance and resonance. Thus, the potential of being charged and convicted of a criminal offence should act as a significant disincentive and maintain the strong deterrent effect.

The problem of necessity requires more work. This article fully admits that not all low-value speech (such as false or deceitful political rhetoric) poses such a significant threat to the democratic process as to necessitate criminalisation. However, the Court's approach may be different if there was a change in the nature of the deceit. Say, for example, the individual was more culpable, or the deception had more potential for harm. While this is something which was not met by the facts in *Salov*, the reasoning underpinning the judgment suggests that

142 Ibid para 116.

143 Ibid paras 113–116.

144 Ibid para 113.

145 Ibid para 115.

146 Ibid paras 110–113.

147 See Coe's different interpretation of the case in Coe (n 33 above) 222–223.

the presence of these factors may sway the assessment of interference with article 10.¹⁴⁸ The point to be taken is that the offence would need to be more discerning with what it addresses compared to *Salov*. This is something which the offence proposed in this article achieves. It is narrowly drafted and only seeks to address the instances of deceit which are indicative of higher levels of culpability and potential for harm (the most egregious). In turn, it is more likely to satisfy the requirement of necessity and so an offence which is drafted in this way would be unlikely to compromise article 10.

CONCLUSION

Recent political scandals such as statements made regarding Brexit and Partygate have exposed the regular use of deceptive representations by our politicians. This revelation invites questions about the suitability of the current state of affairs, both in terms of what the UK's approach is to addressing deceptive representations and whether it is fully fit for purpose. An assessment of the UK's position highlights how the framework is not sufficient. The argument put forward here is that a new response is needed to help ensure that the public's formation of political preferences and democratic participation is based on truthful information. Specifically, this article advocates for a new measure to complement what is already in place, suggesting that the most effective way to do this would be to introduce a new criminal offence. Even though prior attempts have been unsuccessful, there is great value in employing the criminal law to deter politicians from making deceptive representations. A careful exploration of the objections which criminalisation often encounters demonstrates that a new approach would be more appropriate. This article advocates for a narrower criminal offence compared to what has previously been attempted, specifically arguing for one which targets the most egregious representations. It emphasises its potential as an effective deterrent as well as a feasible course of action. With legislative reform of deceptive political speech now being seriously considered (at least in Wales),¹⁴⁹ it is worthwhile reflecting on the untapped potential of a criminal offence.

148 See similar points being made about a more discerning threshold in the US context in Lieftring (n 99 above) 1061–1076.

149 Eg Morris (n 124 above).



The narrow(ing) scope of duty: clinical negligence and secondary victims after *Paul and others v Royal Wolverhampton NHS Trust*[†]

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ABSTRACT

In *Paul and others v Royal Wolverhampton NHS Trust* the United Kingdom Supreme Court (UKSC) held that a doctor who negligently misdiagnoses a patient does not owe a duty to family members who witness their death or injury. Such claimant witnesses – or ‘secondary victims’ – have hitherto been able to claim for psychiatric injury under an exception to the rule that there is no compensable interest arising from the death or injury of another. The majority of the UKSC curtailed this exception which, to quote the dissenting Lord Burrows, ‘will mean that recovery for negligently caused psychiatric illness by secondary victims will be closed off in medical negligence cases’.¹ This commentary explores the pragmatism adopted by the court and its application of the ‘scope of duty’ principle. Placing this principle in a critical context, I argue that the scope of duty in clinical settings risks becoming unduly narrow and will limit access to justice for families. The decision will further amplify debate about wide-scale reform of National Health Service litigation, including a move towards a no-fault system focused on learning and accident-prevention.

INTRODUCTION

Under the common law of torts there is no compensable interest in the death or well-being of another. However, over the last century an exception emerged: a ‘secondary victim’ who suffered psychiatric injury after witnessing a loved one (the ‘primary victim’) die, be injured, or be placed at risk of injury could recover compensation. The exception emerged in the factual context of witnessing road traffic accidents. Underpinning this exception were concerns about imposing disproportionate liability on defendants relative to the negligent conduct and the risk of a high volume of claims from a substantial

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1 *Paul v Wolverhampton NHS Trust* [2024] UKSC 1, para 250.

class of claimants.² In the early 1990s the rules that would limit such claims were clarified against the backdrop of the Hillsborough Stadium disaster.

Comprised of three conjoined appeals and heard before a seven-member bench of the United Kingdom Supreme Court (UKSC), the central issue in *Paul and others v Royal Wolverhampton NHS Trust* was whether this exception should include cases of clinical negligence where the claimant's injury arose not by witnessing an accident but witnessing the primary victim's death (or medical crisis) which the defendant had failed to diagnose. In the cases of *Paul* and *Polmear*, the deaths were witnessed in the presence of the primary victims and, in *Purchase*, the secondary victim came upon the primary victim shortly after death.³

The starting point is to examine the relationship between the defendant and the secondary victim. Applying first principles under *Donoghue v Stevenson*, mere foreseeability of harm is not enough to mount a successful claim.⁴ One needs to establish legal proximity without which there would be no duty. In *Alcock v Chief Constable of the South Yorkshire Police*,⁵ Lord Oliver identified five elements from which proximity was to be deduced:

[F]irst, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim.⁶

These elements – often termed ‘control mechanisms’ – became the touchstone for secondary victim claims but were difficult to apply in non-accident cases: that is, where the event was ‘silent’ or ‘invisible’,

2 Lord Wilberforce in *McLoughlin v O'Brian* [1980] 1 AC 410; see also Lord Oliver in *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310, para 410H, who questioned the underlying rationale of the exception but accepted that it was now firmly embedded in the common law.

3 *Paul* (n 1 above).

4 *Donoghue v Stevenson* [1932] AC 562.

5 *Alcock* (n 2 above). The claims in *Alcock* arose from the deaths of 96 people who were crushed in the Hillsborough disaster in 1989.

6 *Ibid* paras 411F–411H.

such as in the case of a clinical failure to diagnose. In such cases, and with no event to witness, another area of uncertainty was whether liability should be governed by the time lag between the negligent act itself and the primary victim's death or injuries which caused the psychiatric injury.⁷ Perhaps to circumvent such difficulties the courts had grappled with the interpretation and/or construction of 'event' to determine whether the claimant was sufficiently proximate.⁸

The question for the Supreme Court was: what constitutes the 'event' for the purpose of establishing proximity and thus liability? Was the event exclusively an accident external to the primary victim or would the event of death or injury to the primary victim suffice?⁹ The UKSC preferred the former answer and dismissed the claims. In doing so, it confirmed that such claimants were outside the scope of a doctor's duty of care.

This commentary argues that the scope of duty in clinical settings risks becoming unduly narrow, thus limiting access to justice. By narrowly ring-fencing the doctor's duty of care, the Supreme Court's approach is incongruous with the relationship between clinicians and family (eg in the provision of maternity services) and with wider developments in the National Health Service (NHS). The decision continues a recent appellate trend in defining the scope of duty by close reference to clinical expertise rather than patient (and non-patient) expectations. The decision masks a more fundamental socio-economic enquiry about the duty of an (underfunded) NHS towards injured families. Such an enquiry requires a wider civic conversation about society's relationship with the NHS amid debate about reform of clinical negligence litigation.

7 *Paul* (n 1 above) para 94.

8 Five cases of alleged clinical negligence were considered by the UKSC and, albeit some were decided on an alternate basis, there had only been one previous case where the claimant had been successful. See *Taylor v Somerset Health Authority* [1993] PIWR P262; *Sion v Hampstead Health Authority* [1994] 5 Med LR 170; *North Glamorgan NHS Trust v Walters* [2003] PIQR P16; *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] PIWR P20; *Liverpool Women's Hospital NHS Foundation v Ronayne* [2015] PIQR P20. The claimant succeeded in *Walters*.

9 I omit for present purposes the approach taken by counsel for *Paul*. Counsel's submission was that the relevant event was the first manifestation of the injury to the primary victim. Underhill LJ in the Court of Appeal rejected the submission as unprincipled and unworkable. The majority in the UKSC agreed (see *Paul* (n 1 above) paras 97–104) and concluded that this position was highly uncertain and illogical. This view was echoed by the dissenting Lord Burrows, see *ibid* para 178.

FACTS

Mr Harminder Singh Paul collapsed and died from a heart attack whilst shopping with his daughters, aged 12 and 9. It was subsequently alleged that his death had occurred as a result of a negligent failure to diagnose and treat coronary artery disease some 14-and-a-half months earlier. Both daughters brought claims having suffered psychiatric injury as a result of witnessing their father's collapse and eventual death.

Esmee Polmear, aged 7, collapsed and died after a school trip to the beach. Esmee's collapse, the unsuccessful attempts in resuscitating her and her subsequent death were witnessed by her mother and father, both of whom subsequently suffered post-traumatic stress and depression. Despite Esmee displaying symptoms, a paediatrician had failed to diagnose cardiac disease five-and-a-half months before her death. The parents brought claims as secondary victims.

Evelyn Purchase was discovered by her mother at home motionless in bed with a phone in her hand. She looked alive and her skin was still warm. Her mother attempted to resuscitate her, but it was too late. It was later determined that she had died of pneumonia complications five minutes earlier with her final breaths recorded in a voicemail on her mother's mobile phone. Evelyn's mother suffered psychiatric injuries upon discovering her daughter. She brought a claim against the general practitioner (GP) who allegedly failed to assess Evelyn three days before her death.

THE LOWER COURTS

In *Paul*, Master Cook applied *Taylor v Somerset Health Authority*.¹⁰ In *Taylor*, a failure to diagnose and treat the claimant's husband led to his heart condition getting worse and months later resulted in a heart attack at work. The claimant attended the hospital within the hour and after 20 minutes was told of her husband's death before she visited the body in the mortuary. Auld J held that there was no external, traumatic event in the nature of accident or violent happening; the death was the culmination of the process of heart disease and there was no proximity

10 *Taylor v Somerset Health Authority* [1993] 4 Med LR 34.

to the event or its immediate aftermath.¹¹ Accordingly, Master Cook concluded the claim brought by both daughters in *Paul* was bound to fail; a time lag of over 14 months between the negligence and death defeated the requirement of proximity. Master Cook declared that there needed to be a proximate connection between the initial negligence and the shocking event, which was a necessary, albeit not a sufficient, condition in establishing legal proximity.¹²

The decision in *Paul* was reversed on the central question of whether the death was the relevant event.¹³ Chamberlain J concluded there was no authority that suggested a time lag between the negligence and the death would prevent the latter being the relevant event (eg an event where a primary victim is killed by electrocution would be the relevant event irrespective of when the earlier negligent wiring took place). Further, Chamberlain J considered that Auld J's decision in *Taylor* was inconsistent with *NHS Glamorgan Trust v Walters*¹⁴ in which the claimant's son died following two days of illness. The mother in *Walters* was asleep in the same room when her son suffered a seizure, which led to a coma accompanied by brain damage. The appropriate clinical intervention was delayed by a misdiagnosis. Her son died in her arms approximately 36 hours after the seizure. The Court of Appeal held that the entire 36-hour period could be regarded as one drawn-out, horrifying event as there was:

[an] inexorable progression from the moment when the fit occurred as a result of the failure to diagnose [leading to] the dreadful climax when the child died in her arms. It [was] a seamless tale with an obvious beginning and an equally obvious end.¹⁵

Chamberlain J also distinguished *Taylor v A Novo*.¹⁶ Albeit a non-clinical case, *Novo* concerned the claimant's mother who sustained injuries in an accident at work. During her recovery and as a result of her injuries she collapsed and died at home three weeks later. The

11 The immediate aftermath extension was developed in *McLoughlin* (n 2 above). Mrs McLoughlin was at home when the car in which her husband and children were travelling was involved in a negligently caused collision due to the defendant's negligence. On learning of the accident from a neighbour an hour or so after it happened, she went immediately to the hospital where she was told that her daughter was dead. She saw her husband and other children injured and in distress and grimy with dirt and oil. Noting the arbitrariness of allowing recovery if the mother had attended the accident scene, but denying recovery on her arrival at the hospital, the House of Lords permitted recovery on the basis of her coming upon the immediate aftermath of the accident.

12 *Paul v Royal Wolverhampton NHS Trust* [2019] EWHC 289.

13 *Paul v Royal Wolverhampton NHS Trust* [2020] EWHC 1415 (QB).

14 *NHS Glamorgan Trust v Walters* [2002] EWCA Civ 1792; [2003] PIQR 232.

15 *Ibid* para 35 (Ward LJ).

16 *Taylor v A Novo* [2013] EWCA Civ 194.

claimant did not witness the workplace accident but witnessed the collapse at home and suffered psychological trauma. In *Novo* there had been one accident at work which had two consequences: the initial injuries and the death three weeks later (the latter consequence causing the psychiatric injury). The claimant was not physically proximate to the original accident and to permit recovery would be to go too far, potentially including cases where the death was months or years after the accident.¹⁷ Chamberlain J considered *Novo* was distinguishable on the simple basis that in *Paul* there was only ever one witnessable event (the first occasion where the harm caused by the negligence was manifest).

Master Cook decided *Polmear* after the appeal in *Paul* had overturned his decision in that case. Now bound, Master Cook concluded that there was a qualifying event and the fact of earlier presenting symptoms (the first actionable damage) did not negate the ability of Esmee's parents to recover for witnessing their daughter's collapse and death.¹⁸

Purchase was decided by District Judge Lumb a month before the appeal decision in *Paul*. Without the benefit of Chamberlain J's judgment, the judge held that he was bound by *Novo* and thus the claim was bound to fail.¹⁹

COURT OF APPEAL

The Court of Appeal found for the defendants in each case.²⁰ Noting that *Taylor* and then *Novo* had adapted the proximity requirements for clinical settings, the court was bound to follow *Novo* which it took as authority for the proposition that no claim can be brought where psychiatric injury was caused by a separate horrific event removed in time from the original negligence, accident, or first horrific event.²¹ Sir

17 If the claimant's mother had died at work and the claimant had arrived upon the immediate aftermath of the accident, she would have been denied compensation. Therefore, to permit recovery in the present case would not be comprehensible to an ordinary reasonable person. Note the Court of Appeal distinguished *Walters* on the basis that *Novo* involved two separate events rather than the single drawn-out and seamless event in *Walters*. *Novo* (n 16 above) para 35.

18 *Polmear* [2021] EWHC 196 (QB) para(s) 36–43.

19 *Purchase v Ahmed County Court* (2020) C86YX712, para(s) 32–33.

20 *Paul and others v Royal Wolverhampton NHS Trust* [2022] EWCA Civ 12.

21 *Ibid* para 12 (Sir Geoffrey Vos MR). Underhill LJ made similar comments stating: '[a] decisive feature was simply that there had been an interval of time between breach of duty, whether or not it occasioned any injury at the time, and the shocking event. In *Novo* itself the interval was three weeks, but the principle must be the same whatever the interval, provided it is not part of the same sequence of events as in cases of the *Walters* kind' (para 102).

Geoffrey Vos MR questioned whether *Novo* had correctly interpreted the proximity requirement, noting that original references to ‘physical and temporal propinquity’ in *Alcock* were not directed to the relationship between the breach of duty and the shocking event but rather the need for the claimant to be close in space and time to the shocking event. Underhill LJ highlighted that in earlier cases such as *McLoughlin* and *Alcock*, the death of the primary victim and the shocking events were generally contemporaneous with the breach of duty. He went on to state that there was no principled reason for distinguishing proximity on the basis of whether the primary victim’s death was immediate or a few days or weeks later.²² Similarly, the Master of the Rolls concluded that were he to have a ‘clean sheet’ he would have held the claimants sufficiently proximate and permit recovery.²³ On that basis, the Court of Appeal, on its own volition, granted permission to appeal.

THE SUPREME COURT

Majority

By a majority of 6:1 the UKSC dismissed each of the appeals.²⁴ The Supreme Court confirmed that those bringing a secondary victim claim must witness an *accident* or its immediate aftermath caused by the defendant’s negligence. The underlying event in the trilogy of *McLoughlin*, *Alcock* and *Frost* was an accident and no analogy could be drawn between cases involving accidents and cases where the secondary victim witnesses a death or medical crisis brought about by an untreated condition.²⁵ Accidents were discrete events that happened at a particular time, at a particular place, in a particular way, enabling one to offer a clear answer to the question of whether someone was present at the scene and/or directly perceived the accident.²⁶ In the ordinary sense of the word, an accident was an ‘unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims’.²⁷ In adopting ‘rough and ready logic’, the majority made clear that those who are injured

22 Ibid para 102.

23 Ibid para 12.

24 Lord Leggatt and Lady Rose gave the leading judgment. Lord Carloway gave a short five-paragraph judgment agreeing with the leading judgment, noting its potential persuasive influence on Scots law. See *Paul* (n 1 above) paras 252–256.

25 Ibid paras 140–143; *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455.

26 *Paul* (n 1 above) para 108.

27 Ibid para 52. The occurrence or first manifestation of any injury was not constitutive of an accident but a potential result of an accident. Ibid para 105.

having witnessed an accident are not more worthy of compensation than those who do not witness an accident. However, a line had to be drawn to keep liability within reasonable bounds and adopt restrictions that were reasonably straightforward and comprehensible to the ordinary person.²⁸

In the Supreme Court's view, witnessing an accident in which a family member was injured or put in peril (even if they escaped unharmed) was independently capable of being disturbing and could lead to psychological trauma, for example those who see their child hit by a car.²⁹ By contrast, in non-accident cases where the claimant witnesses the primary victim's injury or illness, there is insufficient certainty. A medical crisis might lead to an event such as a collapse as in *Paul*, but, in other cases, there will be considerable uncertainty about the duration of symptoms: minutes, hours, days, or weeks.³⁰ Similarly, the degree of psychological trauma triggered by the experience of witnessing would also be variable. In the Supreme Court's view, a defensible and intelligible line could be drawn between claimants who witness the accident in which a close relative was killed or injured and those claimants who do not.

The Supreme Court stated that it would be impossible to explain to an ordinary reasonable person why a daughter could recover compensation as a result of seeing her parent die from a heart attack, but compensation be denied to someone who identified the body at a mortuary or remained with their dying family member in hospital after the accident's aftermath. For the Court, such differential treatment would lead to unfair disparities between claimants in materially similar situations. And it had a further policy argument in mind: pending any later finding of negligence, it would be undesirable to expose hospitals to civil liability and risk interfering with decisions about the presence of close family with injured patients at the end of life.³¹

The Supreme Court took the opportunity to clarify the status of several authorities. First, it confirmed that the case of *Novo* had been correctly decided: the claimant was not present at the scene of the accident or its immediate aftermath and witnessing death was not an accident. Second, the cases of *Sion*, *Shorter* and *Ronayne* were correctly decided but on the erroneous basis that there was no sudden shock and/or the events were not 'horrificing' judged against a person

28 Ibid para 141.

29 Ibid para 109.

30 See, for instance, the cases discussed in the judgment where the duration of symptoms ranged from 24 hours, as in *Shorter* (n 8 above), to 36 hours as in *Walters* (n 14 above), and finally to 14 days as in *Sion* (n 8 above).

31 *Paul* (n 1 above) para 116.

of ordinary susceptibility.³² Third, the Court concluded that the case of *Walters* in the Court of Appeal was wrongly decided because the claimant did not witness an accident.³³ The Court also removed and/or clarified other requirements that, it was assumed, secondary victim claims needed to satisfy. Notably these included:

- 1 The event did *not* need to be close in time to the negligent act or omissions. The Supreme Court concluded that there was no authority that suggested liability would depend on the interval between the negligence and the events which caused psychiatric injury.³⁴ Highlighting an example raised by the Master of the Rolls in the Court of Appeal – that of an architect whose negligent design caused masonry to fall on a primary victim's head years later – the Supreme Court confirmed that the gap in time between the negligence and the accident would not prevent a claim by the secondary victim. A mother who saw masonry fall on her child could not rationally be prevented from a successful claim on the basis of the length of time between the negligence and the accident.
- 2 No claimant would need to prove injuries were as a result of sudden and unexpected shock to the nervous system³⁵ or involved the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind.³⁶ The Supreme Court concluded it was no longer necessary to demonstrate the neurological or psychological mechanism by which the psychiatric illness was induced. The claimant need only demonstrate a causal connection, under ordinary principles, between the act of witnessing and the psychiatric illness suffered.³⁷
- 3 The event did not need to be sufficiently 'horrifying' which, relying on the language of Lord Ackner in *Alcock*, had been mistakenly extrapolated by the courts as a separate requirement. Noting 'there is no available Richter scale of horror', the attempt to evaluate whether an event was objectively horrifying was an

32 In *Walters* (n 14 above), *Shorter* (n 8 above) and *Ronayne* (n 8 above), the issue of whether the rules developed in accident cases should even apply was not expressly raised. It was simply assumed the rules so applied.

33 *Galli-Atkinson v Seghal* [2003] EWCA Civ 697. The case of *Seghal* should also not be followed because it had transposed the analysis of *Walters* to the aftermath of an accident case and problematically accepted that the claimant's visit to the mortuary was to 'complete the story rather than the purpose of identifying the body'. See *Paul* (n 1 above) para 122.

34 *Paul* (n 1 above) paras 90–96.

35 Lord Oliver in *Alcock* (n 2 above) para 411F.

36 Lord Ackner in *ibid* para 401F

37 *Paul* (n 1 above) para 74.

invidious task, inherently subjective and not susceptible to proper analysis.³⁸

- 4 There is only one event – the accident and its immediate aftermath. *Walters* had opened the door to an unhelpful and artificial assessment of whether there had been an inexorable or seamless progression of events with an obvious beginning and end. The Supreme Court stated: ‘we find it hard to see why the defendant’s legal liability should turn on the court’s impression of whether or not the facts of the case fit the dramatic pattern of a Greek tragedy’.³⁹

Revisiting fundamental principles, the Supreme Court went on to address the existence and scope of the duty owed directly to the claimant – an approach buttressed by Lord Oliver’s statement in *Alcock* that nothing should obscure ‘the absolute essentiality’ of doing so.⁴⁰ The Court concluded that family members do not fall within a doctor–patient relationship and did not accept that the doctor’s role and purposes for which care is provided would extend to assuming responsibility to protect the patient’s family from the risk of illness arising from witnessing death or injury to the primary victim. In a telling passage the Court stated the following:

To impose such a responsibility on hospitals and doctors would go beyond what, in the current state of our society, is reasonably regarded as the nature and scope of their role ... Although social attitudes and expectations may be changing, we would not accept that our society has yet reached a point where the experience of witnessing the death of a close family member from disease is something from which a person can reasonably expect to be shielded by the medical profession. That is so whether the death is slow or sudden, occurs in a hospital, at home or somewhere else, and whether it be peaceful or painful for the dying person. We do not mean in any way to minimise the psychological effects which such an experience may have on the person’s parent, child or partner when we express our view that, in the perception of the ordinary reasonable person, such an experience is not an insult to health from which we expect doctors to take care to protect us but a vicissitude of life which is part of the human condition.⁴¹

38 Ibid para 77.

39 Ibid paras 80–81. The Court stated that *Walters* also had the effect of blurring the distinction between the event and its immediate aftermath, essentially extending the period of aftermath beyond what was contemplated in *McLoughlin* (n 2 above).

40 Lord Oliver in *Alcock* (n 2 above) paras 411A–411B.

41 *Paul* (n 1 above) paras 138–139.

Minority

Lord Burrows would have allowed the appeals. He viewed the relevant event as the death of the primary victim (and thus would have overruled *Novo*). For Lord Burrows, this was an incremental step justified in the tradition of updating the common law whereas the insistence on an accident (as an event external to the primary victim) was an ‘unwarranted backward step’ that would close off recovery for secondary victims in medical negligence cases.⁴² He highlighted that medical negligence usually involves failure to prevent injury, and it would be rare for events capable of being termed an accident (eg the injection of an incorrect drug) to occur. Lord Burrows adopted the opposing position to that of the majority: the ordinary reasonable person would find it incomprehensible for a daughter who witnessed the initial event (accident) to the primary victim to succeed and a daughter who witnessed the final death a few weeks later to be denied.⁴³

PRAGMATISM AND THE NARROW(ING) SCOPE OF DUTY IN CLINICAL NEGLIGENCE

Pragmatism in common law reasoning is nothing novel.⁴⁴ Lady Hale pithily equated pragmatism with policy which requires reasoning from a given conclusion and practical solutions that work best in the case and in others like it.⁴⁵ Pragmatism in tort law is also equated with considerations of distributive justice.⁴⁶ In *Paul*, the majority’s discussion of principle thinly veiled the pragmatic question – what Plunkett describes as the normative ‘notional duty’ enquiry – *should* the law of negligence apply to the particular situation?⁴⁷ Before placing the scope of duty in context, I consider the pragmatism adopted by the Supreme Court which I argue replaced one type of arbitrariness with another kind.

42 Ibid paras 207–208 and 250.

43 Ibid paras 238.

44 I interpret pragmatism as an approach to law that is practical, sensible, not necessarily anchored to precedent and rather is ‘forward-looking’ to maximise benefits for the future needs of society. On pragmatism, see Patrick Atiyah, *Pragmatism and Theory in English Law* (39th Hamlyn Lectures, Stevens & Sons 1987). The distinction between principle and pragmatism is complex: see James Plunkett, ‘Principle and policy in private law reasoning’ (2016) 75(2) *Cambridge Law Journal* 366.

45 Lady Hale, ‘[Principle and pragmatism in developing private law](#)’ (Cambridge Freshfields Lecture 7 March 2019).

46 P Cane, *Key Ideas in Tort Law* (Hart 2017).

47 J Plunkett, *The Duty of Care in Negligence* (Bloomsbury 2018) 151–152.

Arbitrary policy-based reasoning

As a preliminary observation, the majority relied on the legal fiction of ‘ordinary reasonable people’.⁴⁸ The use of the term ‘reasonable person’ is prevalent in common law adjudication but focus on their *views* – writ large and abstracted – is often more tenuous. Most striking was the majority’s conclusion that an ordinary reasonable person would view witnessing death not as ‘an insult to health from which we expect doctors to take care to protect us, but a vicissitude of life which is part of the human condition’.⁴⁹ This claim, even on the face of it, might startle the member of the public: witnessing death in circumstances where death is allegedly caused by clinical negligence is not a vicissitude which individuals can, or should, expect to experience over their life-time.

Second, the majority relied on broad policy arguments, including the risk of encouraging defensive practices. The Supreme Court noted that exposing hospitals to the risk of liability would interfere with decisions about the presence of families with patients at the end of life.⁵⁰ Beever and Weinrib argue *any* recourse to policy undermines the coherence of tort because it requires balancing incommensurables and/or otherwise invites unpredictability and inconsistency: namely when and why are policy factors relied on in some cases and not in others?⁵¹ However, more specifically, assertions about undesirable consequences for public bodies and professionals has been strongly discouraged in earlier cases.⁵²

In any event, there was a considerable imprecision in the Supreme Court’s analysis; it is unclear whether the concern was the risk of undesirable regulation by the NHS Trust (eg unnecessary ‘paper trails’) or, more narrowly, a risk of interfering with the exercise of judgment by clinicians acting in the best interests of the patient. Wilberg considers that the proper approach to arguments about defensive practices is to focus on the precise ‘conflict of duties’ which can trigger disproportionate and/or burdensome practices.⁵³ Either way, the

48 Lord Reed in *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49, [2014] 4 All ER 210, paras 1–4.

49 *Paul* (n 1 above) para 139.

50 *Ibid* para 117.

51 A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 29; E J Weinrib, ‘The disintegration of duty’ in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge University Press 2005).

52 See the discussion in H Wilberg, ‘Defensive practice or conflict of duties? Policy concerns in public authority negligence claims’ (2010) 126 *Law Quarterly Review* 420. See, more generally, the criticism of unanchored policy-based reasoning in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.

53 *Ibid*.

Supreme Court's speculation about defensive practices is vulnerable to critique: for example, the absence of empirical evidence to explain why such defensive practices would materialise and/or an assessment of why more defensive care is undesirable.

Pragmatism also led the Supreme Court to mount the law of secondary victims on the occurrence of an 'accident' – a conclusion that is likely to present an insurmountable barrier to claimants in clinical negligence cases. Errors in diagnosis, treatment or administration of medication would not ordinarily involve an 'accident' in the terminological sense articulated by the Court, and families would often not be physically present when such errors did occur. However, by magnifying the focus on an accident the law remains arbitrary. The accident must be external to the primary victim, but for secondary victims the death or injury to their loved one is an accident because it is 'external' to them. Adopting everyday language, families would consider an avoidable and careless death of a loved one as self-evidently *accidental*. Lord Burrows questioned the majority's arbitrary interpretation of accident: 'what is the justification for adopting that definition of an accident and not another; or, put another way, why do some accidents count and others do not?'⁵⁴

For the majority, an accident now requires a degree of 'violence' which is a term that is highly subjective.⁵⁵ On the one hand, the Supreme Court removed the need for sudden shock and/or a horrifying event, but 'sudden' and 'horrific' are descriptors now re-assimilated into the task of identifying a 'violent' accident. Certainly, these descriptors are still 'in-play' given the fact-patterns against which the law has developed.⁵⁶ Whilst the Court was clear that adopting a Richter scale of objective 'horror' was not appropriate, one might consider it now replaced by a *de facto* scale of violence in what will require a fact-specific assessment, rather than a binary one.⁵⁷

54 Paul (n 1 above) para 211.

55 Ibid para 24: 'using that term in its ordinary sense to refer to an unexpected and unintended event which causes injury (or a risk of injury) to a victim by violent external means'. By contrast, the dictionary definition of accident does not suggest 'violence' but an unexpected and unintentional incident, typically resulting in damage or injury.

56 Much of the law refers to 'shocking events', and it is clear that in some contexts the term has been used in two senses: a) reference to the nature of the event itself; and b) reference to the event causing or leading to 'nervous shock' on the part of the claimant.

57 It is a fact-specific question whether clinical *incidents* which put primary victims at risk of injury could amount to *accidents* (despite recovery being permissible on the basis of placing the primary victim in peril rather than injuring). Without drawing semantic distinctions, the notion of 'incident' is common in health and safety settings and is taken to mean either a 'near-miss' that was unintended or unexpected, and which otherwise could have caused avoidable death or injury.

Thus, there is likely to be a grey band of potential qualifying events yet to be tested in the courts. To illustrate: would the injection of a patient with the wrong drug, or leaving a surgical implement within the patient's body, or errors in the physical handling or movement of the primary victim resulting in falls and impact injuries, or repeated erroneous attempts at invasive procedures (for example intubations, use of forceps), or careless attempts at stemming extreme blood loss now qualify as accidents?⁵⁸

Delineating the scope of duty

Paul concerned a special duty regime on pure psychiatric injury in which the determinative question was the existence of a duty to the secondary victim. Nonetheless, the majority drew upon analysis from *Khan v Meadows*,⁵⁹ a case involving the scope of an established duty between a doctor and patient arising from negligent advice (and *Khan* itself incorporated analysis from cases involving the liability of negligent professional advisors for pure economic loss).⁶⁰

Lord Leggatt has previously warned against extrapolating general principles beyond the factual matrix of an appeal and in the absence of oral argument.⁶¹ Universalising general principles of tort across factual categories of cases is fraught with risk given the relevance of specific facts is a matter of discretionary judgment.⁶² However, the majority's articulation of the general scope of a doctor's duty is an invitation to critically situate *Paul* against the backdrop of appellate jurisprudence, including those cases that did not concern secondary victims.

In *Khan*, attention fell on the scope of duty towards a patient for a precise risk leading to a particular set of losses. In *Khan*, the purpose for which a doctor was consulted concerned a particular risk in pregnancy (that of a baby born with haemophilia) and, despite their negligent advice, the doctor was not liable for the consequence of an unrelated risk (that of a baby born with autism). *Khan* led the majority in *Paul* to focus on the purpose of the doctor's duty and the risks they are expected to predict or protect against.⁶³ The scope of duty question

58 For more, see Alex Stutt, 'Secondary victim claims and medical negligence: what is the future after Paul? (Part 1)' (*AnthonyGold* 19 January 2024).

59 *Khan v Meadows* [2021] UKSC 21, [2022] AC 852.

60 *South Australia Asset Management Corporation v York Montague Limited* [1997] AC 191.

61 Lord Leggatt in *Khan* (n 59 above) UKSC para [96]. Lord Leggatt considered that the majority's discussion of the conceptual structure of the tort of negligence was undesirable, unnecessary and went far beyond the issues raised in *Khan* and its twinned case of *Manchester Building Society v Grant Thornton* [2021] UKSC 20, [2021] 3 WLR 81.

62 *Paul* (n 1 above) para 58.

63 *Khan* (n 59 above) UKSC para 28.

was cast in the following way: ‘whether a doctor who owes a duty of care to a patient also owes a duty to members of the patient’s close family to take care to protect them against the risk of illness from the experience of witnessing the medical crisis of their relative arising from the doctor’s negligence’.⁶⁴

The flaw in this approach is that it casts the duty to family members in opposition to that owed to the patient. The Supreme Court’s starting point was the narrow duty between doctor and patient and whether it ‘stretched’ to the patient’s family. It was already accepted that any duty to family members was not simply derivative of the duty to the primary victim.⁶⁵ In approaching the question in this way there was a lack of contextual and more nuanced analysis of ‘doctor–family’ relationships, namely the *a priori* independent relationship between clinician and family (or non-patient).⁶⁶

Each factual situation will differ, requiring a fact-sensitive approach. However, developing relationships with families is a daily experience for doctors (especially GPs), nurses and caregivers. Family members fulfil an important function: a therapeutic one for their loved one (particularly ‘vulnerable’ patients, eg elderly, children, or those with limited agency) and a clinical one for those providing care (eg monitoring symptoms and/or being advocates in articulating the patient’s best interests) and even assisting clinical judgment (eg questioning the risks and benefits of interventions). Thus, the scope of a doctor’s duty (which is not simply determined by the immediate request of a patient) may also encompass risks that a doctor recognises or ought to recognise, including those risks to the psychological welfare of family members who are in contemplation and proximate in a spatial-temporal sense.⁶⁷

A useful example is maternity services. Fathers are entirely expected witnesses and partake in a non-clinical collective experience of becoming

64 Ibid para 136.

65 Lord Burrows tentatively suggested that it could be so derived, albeit in the context of the ‘no liability for a pure omissions rule’: *Paul* (n 1 above) paras 217–218.

66 The majority confined their discussion to only two paragraphs, *ibid* paras 134–135. However, there were other useful analyses and authorities available including *ABC v St George’s University Hospital NHS Trust (ABC)* [2020] EWHC 455 (QB). See also R Mulheron, *Medical Negligence: Non-Patient and Third Party Claims* (Ashgate 2010) 265–296.

67 See Lord Leggatt in *Khan* (n 59 above) UKSC para 84. This is not to argue that family members are primary victims but that such categorisation poses significant difficulties. Mulheron argues that the dichotomy between primary and secondary victim status is opaque in cases of clinical negligence. In earlier cases families did not succeed in arguing they were a primary victim. See Mulheron (n 66 above) 282.

a parent alongside the patient mother. In May 2024, a report into birth trauma recognised that clinicians ought to demonstrate increased regard towards partners, not least given the psychological impact of traumatic birth injuries on partners who are helpless witnesses unable to avert the course of negligent events.⁶⁸ Before the decision in *Paul*, there had been successful claims and/or agreed settlements in the context of neonatal deaths and/or birth injuries (eg where a father raised repeated concerns about treatment and care which were dismissed by midwives and who later suffered psychiatric injury after witnessing his new-born baby daughter die).⁶⁹ Since the decision in *Paul*, similar cases brought by parents have now been abandoned.⁷⁰

On one view, the decision in *Paul* is incongruent with existing practice, codes of professional conduct and the momentum within the NHS to protect and elevate family members.⁷¹ In April 2024, this momentum led to the introduction of ‘Martha’s Rule’ which gives families the *right* to a second opinion from independent medics if they consider the patient to be deteriorating and/or feel their concerns are being dismissed by the treating team, which, in essence, is a right to invite an alternative diagnosis and treatment plan.⁷² As the NHS notes, parents know their child-patients best and clinical staff will be required to note changes in their condition when reported by family members.⁷³ Zooming out, the decision is also uncomfortably juxtaposed to the exposure of systemic failures in NHS care, such as those in maternity services and various statutory inquiries which have

68 All-Party Parliamentary Group, ‘Listen to Mums: Ending the Postcode Lottery on Perinatal Care’ (Birth Trauma Inquiry 13 May 2024).

69 Cited in S Lintern, ‘Doctors made errors over their daughter’s death. Should they be compensated?’ *The Times* (London 3 March 2024).

70 See the case of Robert Miller and Katie Fowler reported in ‘Royal Sussex: grieving father unlikely to get compensation for baby’s death’ (*BBC News* 2 February 2024), cited in Lintern (n 69 above).

71 See, indicatively, General Medical Council, *Good Medical Practice* (2024) paras 37–38; Nursing and Midwifery Council, *The Code: Professional Standards of Practice and Behaviour for Nurses, Midwives and Nursing Associates* (29 January 2015, updated 10 October 2018).

72 NHS England, ‘Martha’s Rule’. Martha Mills died in 2021 after developing sepsis in hospital; Martha’s family’s concerns about her deterioration were not responded to, and in 2023 a coroner ruled that Martha would probably have survived had she been moved to intensive care earlier. This rule is having a transformative and life-saving effect: ‘Martha’s Rule “already saving lives” in NHS hospitals’ (17 December 2024).

73 NHS England, ‘NHS to “roll-out” Martha’s Rule’ (*Healthwatch* 21 February 2024).

recommended enhanced recognition of the risk of harm to parents and families.⁷⁴

It is, of course, not the function of the common law to develop in lockstep with regulatory or statutory duties, or custom and practice. These developments serve different policy aims. Tort law (and the provision of corrective justice) is not on the same trajectory. Courts do not have the institutional competence to pursue policy goals but can only proceed by analogical reasoning based on precedent.⁷⁵ However, the majority in *Paul* went beyond mere analogical reasoning and took a view on policy when it was arguably not required.⁷⁶ The difficulty, as Lord Sales has acknowledged, is the absence of ‘a concrete guide’ as to when recourse to policy is permissible and when it is not.⁷⁷ When judges decide to incrementally update the common law they do so by acknowledging the social and practical context in which the law operates. It is not entirely clear why the majority in *Paul* divined inspiration from their interpretation of policy when, in other significant cases, policy has been entirely relegated.

The decision in *Paul* is on the appellate course set in *Khan*, namely, narrowing the scope of duty by examining the nexus between that scope and the harm. For defendant clinicians, the determination of scope of duty is shaped by the precise purpose which will be governed by the demarcation of professional specialisms. Such an approach is, of course, at odds with patient and family expectations of an overarching duty of doctors to prevent harm and/or that multiple duties of care across specialisms are ‘joined-up’. Running *contra* to any sense that family members are vulnerable subjects,⁷⁸ the majority’s conclusion on the scope of duty allocates (more) risk to claimants despite their reliance on a doctor’s expertise. In that respect the Supreme Court

74 See the Ockenden Report: *Findings, Conclusions and Essential Actions from the Independent Review of Maternity Service at the Shrewsbury and Telford Hospital NHS Trust* (Department of Health and Social Care 2022). More obliquely, concerns about culture and systems of safeguarding are likely to be considered by the [Thirwall Inquiry](#) which has been established to examine events at the Countess of Chester Hospital following the trial, and subsequent convictions, of former neonatal nurse Lucy Letby of murder and attempted murder of babies at the hospital. Generally, various authors in ‘Inquiries in the British Health Service’, Martin Powell (ed) (2019) 90(2) (Special Issue) *Political Quarterly*.

75 See the remarks of Lord Leggatt in *Phillips v Barclays Bank* [2023] UKSC 25, paras 23–24.

76 *Paul* (n 1 above) para 24.

77 Lord Sales, ‘[Exploring the interface between the common law of tort and statute law](#)’ (Annual Richard Davies Lecture for the Personal Injuries Bar Association 29 November 2023).

78 C F Stychin, ‘The vulnerable subject of negligence law’ (2012) *International Journal of Law in Context* 337–353; J Stapleton, ‘The golden thread at the heart of tort law: protection of the vulnerable’ (2003) 24 *Australian Bar Review* 135–149.

risks a deferential approach by permitting the medical profession to draw or confine the boundaries of duty, albeit that the Court retains its role in determining whether any such duty has been breached.

D v Grampian Health Board illustrates the problem; a case in which Lady Wise, *obiter*, considered that the scope of duty owed by midwives to a mother when in an antenatal ward did not extend to risks to the mother which later materialised during delivery when she was in the care of obstetricians, despite it being known that prompt induction of labour would decrease the risk of harm during labour.⁷⁹ Such an approach (where the scope of duty is divisible between specialisms as closely linked as antenatal care and obstetrics) is in conflict with tort's basic purpose of corrective justice.⁸⁰

The scope of whose duty: doctor or NHS Trust?

Questions of scope of duty and assumption of responsibility are dependent on the precise defendant. Doctors do not 'assume responsibility' for families equivalent to their patient (primary victim).⁸¹ That is uncontroversial. Lord Burrows in his dissent postulated that the duty owed by the doctor to the secondary victim could be derivative of the duty owed to the primary victim including the doctor's assumption of care for them.⁸² However neat a work-around, that approach risks undermining the primacy of the doctor–patient relationship. There would also be difficulties in the internal coherence of a 'single' duty: that is, where a doctor's duty to act in the patient's best interests conflicted with the duty to families to avoid psychiatric harm.

An alternative approach is to focus on the defendant NHS Trust and whether it directly assumes responsibility to family members

79 *D v Grampian Health Board* [2022] CSOH 63. In this case, the claimant had a traumatic birth and her son was born with severe disabilities. It was alleged midwives in the antenatal ward negligently delayed the induction of labour and, a day later, obstetricians had negligently delayed delivery of the baby on the labour ward. The cause of the injuries was umbilical cord compression triggered by the dramatic pace of labour and it was not disputed that, prior to this point, the baby was uninjured.

80 For a specific discussion of this case (and some of the evidential limitations before Lady Wise), see LawPod, 'Scope of duty since *Khan v Meadows*' (1 COR 25 January 2024); Julia Dias, 'Scope of duty in 2024: whither *Manchester Building Society v Grant Thornton LLP* and *Meadows v Khan*?' (Commercial Court Seminar 2024).

81 *Paul* (n 1 above) paras 217–218.

82 For instance, the standard of care and the resulting breach of the duty of care to the primary victim is the same breach upon which the secondary victim relies. Lord Burrows discussed this in the context of circumventing the rule on pure omissions because, as between the doctor and the secondary victim, there is a pure omission, ie a failure to benefit which would ordinarily rule out any duty at all: *Paul* (n 1 above) paras 218–220.

(unmediated by the at-fault doctor). Trusts are held liable vicariously due to the acts of the individual doctor, but one might consider that the NHS's wider purpose is consistent with a tortious duty owed to secondary victims who suffer psychiatric injury. The scope of the NHS Trust's duty – now encompassing wider obligations towards family members (as discussed above) – is of a different 'width' compared to that of a doctor.

The UKSC in *Darnley v Croydon Health Services NHS Trust*⁸³ focused squarely on the NHS Trust and held it was an established rule that a patient was owed a duty by the Trust when he presented himself to an A&E Department.⁸⁴ In allowing the appellant's appeal, Lord Lloyd-Jones considered the Court of Appeal's concentration on a non-medical member of staff on reception (the tortfeasor who gave misleading information regarding waiting times) to be flawed. The Court of Appeal had earlier concluded there was no general duty upon civilian receptionists (and thus the Trust) to keep patients informed about waiting times.⁸⁵ The UKSC clarified that distinguishing the scope of duty based on distinctions between medical and non-medical staff was inappropriate and upheld the established duty on the defendant NHS Trust; a conclusion that did not entirely escape criticism.⁸⁶

Fact-sensitivity is integral to the identification of a duty of care. In *Paul*, the court analysed that the precise facts did not fall under the secondary victim duty as established in the case law. However, there is no universal formula to determine whether a duty exists but only an analogical and incremental approach based on previous established categories.⁸⁷ It therefore remains unclear which set of facts determine, first, the scope of any suggested duty and, second, whether that suggested duty qualifies under an established category owed by the

83 *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50; [2018] 3 WLR 1153. This case involved an individual who had suffered a head injury. Seeking treatment, he attended his local A&E where a receptionist then gave him misleading information about the waiting time, indicating that it would take four or five hours (rather than informing him he would be seen within 30 minutes by a triage nurse). Feeling too unwell to wait for hours, the individual left and returned home. He later collapsed, and despite undergoing an emergency operation, he was left with permanent brain damage and paralysis on one side of his body. The evidence suggested that had he been seen in the normal routine way by a triage nurse, he would have been admitted for surgery earlier and would have gone on to make a complete recovery.

84 See C Purshouse, 'The impatient patient and the unreceptive receptionist: *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50' (2019) 27(2) Medical Law Review 318–332.

85 *Darnley* (n 83 above) UKSC paras 11–12.

86 O Thomas KC, in LawPod, '*Darnley v Croydon Health Services NHS Trust*' (1 COR 15 October 2018).

87 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, para 24.

NHS/hospital. Adapting the facts of *Darnley*, consider a young child admitted to hospital who suffers further injuries arising from not being seen timeously (or at all) by a negligent doctor. Presumably, after *Paul*, the child's mother who then witnesses her child collapse and suffers psychiatric injury would be unable to recover as a secondary victim: the scope of that doctor's duty was to the child alone and, coterminously, she would not be able to recover against the NHS Trust which does not owe a duty to family members directly to avoid psychiatric injury on witnessing the child's injuries.

Clinical negligence claims focus on individual error rather than the system and policies in which such an error occurred. In *Darnley*, attention was placed on the fault of the receptionist rather than the capacity, protocols and departmental arrangements in which patients were registered and triaged. This is not to argue that a direct claim against a Trust for systemic failures is impossible, but that, as Heywood considers in detail, such claims are difficult to mount and thus underutilised.⁸⁸ The pursuit of direct claims against the NHS Trust may be the only way that tort can maximise its aims of accountability, deterrence and accident-prevention (and incidentally remove the stigmatisation of individual clinicians).⁸⁹

At present, focus on the at-fault doctor renders the duty question one of interpersonal justice.⁹⁰ However, examining the relationship between the claimant and the defendant (ie the NHS Trust) renders the duty question one of distributive justice, namely the allocation of risk among members of a society,⁹¹ which invites a much wider enquiry about who should bear the (economic) loss. Lord Burrows rightly considered this is 'not the type of socio-economic policy argument that the courts are well equipped to assess'.⁹²

Debate about non-fault systems of compensation has long been exercising tort scholars, notably after Patrick Atiyah's *Accidents, Compensation and the Law*⁹³ and the establishment of New Zealand's

88 R Heywood, 'Systemic negligence and NHS hospitals: an underutilised argument' (2021) 32(3) *Kings Law Journal* 437–465.

89 *Ibid.*

90 D Campbell, 'Interpersonal justice and actual choice as ways of determining personal injury law and policy' (2015) 35(3) *Legal Studies* 430–422. Cf A Robertson 'Policy-based reasoning in duty of care cases' (2013) 33 *Legal Studies* 119–140.

91 A Tettenborn et al (eds), *Clerk and Lindsell on Torts* (Sweet & Maxwell 2023) 1–20.

92 *Paul* (n 1 above) para 249.

93 P Atiyah, *Accidents, Compensation and the Law* (Cambridge University Press 2018 [1970]).

Accident Compensation Commission in 1974.⁹⁴ In April 2022, the House of Commons Select Committee on Health revisited no-fault systems in the context of clinical negligence litigation and recommended a move away from an adversarial culture to a learning ‘no-blame’ culture focused on candour and risk prevention.⁹⁵ Economically, payments for clinical negligence in 2022–2023 were almost £2.7 billion with the sum predicted to reach £4.6 billion by the end of this decade.⁹⁶ Billions more are already committed in future liabilities. Drawing some inspiration from models in New Zealand and Sweden, the Select Committee suggested that compensation should be awarded where there was agreement as to the failure of procedures and the system, rather than individual negligence. Compensation would be determined by a dispute resolution body and independent investigations would focus on identifying and developing safety recommendations.

It is beyond the scope of this note to develop analysis of these proposals further. The dilemma is how to fairly balance access to justice with improving quality of care and accident prevention. Does an adversarial model complement these outcomes or is it a costly and inefficient means of doing so? Certainly, clinical negligence litigation is imperfect and not a panacea for redress or accident prevention. Expectations of litigation are often unrealistic and undeliverable. Tort has inherent limits; Lord Sumption, delivering a lecture in 2017, argued that tort:

is an extraordinarily clumsy and inefficient way of dealing with serious cases of personal injury. It often misses the target or hits the wrong target. It makes us no safer while producing undesirable side effects ... at disproportionate cost and with altogether excessive delay.⁹⁷

For legislators and policymakers the question posed is: what is the (financial) limit of corrective justice? These are questions that require a wider civic conversation about society’s relationship with the NHS

94 New Zealand’s Accident Compensation Commission provides universal and compulsory insurance coverage against work and non-work-related injuries on a no-fault basis for everyone in New Zealand with no or very limited rights to sue an ‘at-fault’ party. See ‘[Prevention. Care. Recovery: Improving New Zealand’s quality of life](#)’.

95 House of Commons Health and Social Care Committee, *NHS Litigation Reform* (April 2022).

96 Ibid.

97 Lord Sumption, ‘Abolishing personal injuries law: a project’ (Personal Injuries Bar Association Annual Lecture 16 November 2017).

which is currently apt at a time of sweeping reforms promised by the Government.⁹⁸

CONCLUSION

Is the scope of duty principle about the control of liability or, as it ought to be, about the principled assessment of whether care was required? The concept of ‘duty’ in tort has always been fungible and malleable – able to be cast in various ways – vulnerable to absorbing concerns about negligence at the expense of analysis of other components (eg causation) – or reduced entirely to policy-rooted considerations.⁹⁹ None more so was this evident than in the decision in *Paul* which reinforced the view that secondary victims’ claims are built on ‘a patchwork quilt of distinctions [with] no refined analytical tools which ... enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible’.¹⁰⁰ Lord Briggs later acknowledged that, as a line drawn by fallible human beings to bring some sense of justice and order, the decision is not too bad.¹⁰¹ By contrast, Esmee Polmear’s father, speaking to *The Times*, viewed the decision as an insult and went on to say, ‘the way this court ruling works is that the NHS doesn’t have to do anything for people like us, even where they are responsible we’re not suing them just to get money, we’re suing them to get the help we need’.¹⁰²

Rates of trust and satisfaction in the quality of NHS care are declining.¹⁰³ Decisions such as the one in *Paul* should amplify debate about reform of clinical negligence and how best to balance redress with public resources. Whether such reform can secure access to justice for claimants *and* improve public confidence in the NHS is a different question.

98 See, for instance, Lord Darzi, ‘[Independent investigation of the National Health Service in England](#)’ (September 2024) and Department for Health and Social Care, ‘[Zero tolerance for failure under package of tough NHS reforms](#)’ (Press Release 13 November 2024).

99 See D Nolan, ‘Varying the standard of care in negligence’ (2013) *Cambridge Law Journal* 651–688.

100 *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455, at 500.

101 A few weeks after the decision, Lord Briggs delivered a lecture addressing the judgment: see Lord Briggs, ‘[Liability for mental injury](#)’ (Chichester University Lecture 19 January 2024).

102 Lintern (n 69 above).

103 D Campbell, ‘Public satisfaction with the NHS at its lowest ever level, poll shows’ *The Guardian* (London 27 March 2024); L Buzelli, G Cameron and T Gardner, ‘Public perceptions of the NHS and social care: performance, policy and expectations’ (The Health Foundation 3 February 2022).



‘Matrimonialisation’ in *Standish v Standish*: new word, new battlegrounds?*

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ABSTRACT

This case note offers a critical analysis of the United Kingdom Supreme Court’s widely noted decision in *Standish v Standish*, exploring its implications for the conceptual boundaries between matrimonial and non-matrimonial assets. The judgment introduces and affirms the concept of ‘matrimonialisation’, offering clearer guidance on when or whether non-matrimonial property might fall within the pool of ‘divisible’ shared assets available for carving up following divorce or dissolution. While the decision brings greater definitional clarity, it perhaps does so at the expense of deeper engagement with equitable principles. We argue that *Standish* does at least reflect a turn towards greater, more formalised clarity in relation to familial assets protection. However, it leaves unresolved important questions about the status of such assets once they are earmarked by a common intention or transferred for shared or familial purposes. We consider the potential long-term effects of *Standish* on such practical matters as ancillary relief litigation and succession planning.

Keywords: ancillary relief; matrimonialisation; resulting trusts; promissory estoppel.

In *Standish*, the Supreme Court had to determine whether disputed assets were available to be divided by the court following the breakdown of a marriage. As short-hand, assets over which the court will exercise its powers to make orders as between the parties are referred to as ‘matrimonial’ and assets belonging to either party which are not subject to consideration for division are ‘non-matrimonial’. The Court also faced the question of whether a non-matrimonial asset had ‘matrimonialised’ to become a matrimonial asset.

This case note will consider the background to case, setting out the existing legal framework as well as the factual background to the case. It will then analyse the reasoning of the Supreme Court judgment which ultimately decided that a valuable pre-acquired asset which had

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been transferred from husband to wife had not become matrimonial by virtue of that transfer. It will then explore the implications of the reasoning.¹

BACKGROUND TO THE CASE

Following the breakdown of a marriage or civil partnership, the courts have the power to make a number of different orders to divide assets between the parting parties. In England and Wales, the Matrimonial Causes Act 1973, section 25, provides a broad but structured discretion to the courts as to which orders are made. This is mirrored in the Matrimonial Causes (Northern Ireland) Order 1979, Article 27. The case law has shaped this discretion, identifying principles the courts should apply. Many of the leading authorities in ancillary relief are what has come to be known as 'big money' cases and this one was no different, with the Court itself using the term.²

The husband had a successful career in financial services, earning considerable wealth. In terms of the relevant section 25 factors, the length of the marriage was 15 years with a two-year relationship before that. The husband was aged 72 and the wife 57. There were relevant children, two from the marriage with each party also having children from a previous marriage.³

There was a significant pool of assets in the case, not all of which it was contested should be available for division. Among these was the former matrimonial home which the lower court accepted as having an agreed value of £21.6 million.⁴ The husband brought significant pre-acquired wealth into the relationship. He claimed that, at the outset of the relationship in 2004, his assets were worth £57 million – equivalent to approximately £155 million at the time of the hearing.⁵ Although the wife also had pre-acquired wealth from a previous property and an inheritance, the scale of her assets was markedly less. The husband's holdings included a farm in Australia, the business operating that farm, a half share in the former matrimonial home, and an investment fund portfolio. The wife, by contrast, held a half share in the matrimonial home.⁶

1 All analysis, views and explanations are the authors' own.

2 *Standish v Standish* [2025] UKSC 26, para 6. For research on a broader range of cases see Hitchings et al, *Fair Shares? Sorting out Property and Money on Divorce* (University of Bristol/Nuffield Foundation/BPSR 2023).

3 *Standish* (n 2 above) paras 8–15.

4 *Ibid* para 14.

5 *Ibid* para 17.

6 *Ibid* para 20.

The litigation centred on two principal financial issues. The first concerned a portfolio of investment funds valued at £77.8 million ('the investment funds'), which the husband transferred into the wife's sole name after 12 years of marriage. The second related to the allocation of shares to the wife in the company responsible for managing farming operations at the husband's farm. It was the first financial issue – the investment funds – which was the focus of the litigation by the time it reached the Supreme Court.⁷

The transfer of the investment funds from husband to wife (referred to as 'the 2017 transfer') formed part of a broader estate-planning strategy. It was undertaken following the family's relocation to the United Kingdom (UK), which had implications for both parties' domicile status and consequent tax liabilities. The wife remained non-domiciled in the UK. The husband argued that the intention was for the investment funds to be transferred into the wife's sole name and subsequently settled into an offshore discretionary trust for the benefit of the couple's two children.⁸ This was accepted by the first instance judge, a finding later upheld by both the Court of Appeal and the Supreme Court.⁹ On the husband's evidence, he would be added as a beneficiary of the discretionary trust at a later date, although at first instance the judge found there to be no evidence that the husband could be a beneficiary of the trust.¹⁰

At first instance, the Court found that the investment funds in the 2017 transfer were mostly pre-marital wealth, with only a portion accrued during the marriage and therefore the majority of the funds were not matrimonial property. However, the first instance court found the transfer of those assets caused them to become matrimonial property, but the source of the assets impacted the application of the sharing principle. When added to the other assets the pot totalled over £112 million, and, as such, the court determined the appropriate division for the wife amounted to £45 million.¹¹ The husband was awarded the greater share to take into account that he was the source of the assets and that these were mostly acquired pre-marriage.

The Court of Appeal disagreed. It determined that the *source* of the assets should be the determinative factor in whether an asset was considered to be matrimonial, and thus available for sharing. The Court agreed that the title was not determinative of how the asset was categorised but did not see the transfer as changing the categorisation of the asset, again focusing on the source. In other words, the act of

7 Ibid para 19.

8 Ibid para 22.

9 Ibid paras 21–22.

10 *Standish v Standish* [2024] EWCA Civ 567, [29], [49].

11 *Standish* (n 2 above) para 24.

transfer had not 'matrimonialised' any of the investment funds to render them subject to the sharing principle: as such, they remained outside of the pot. This assessment significantly lowered the amount to which the court could apply the sharing principle. Determining it to be £50 million meant that a fair outcome (half of the relevant pot) allowed for the wife to be awarded £25 million. The Court of Appeal remitted to the lower court a needs assessment for the wife, to determine if £25 million could meet her needs.¹²

A needs assessment in the context of an award of £25 million seems paradoxical but where statutory discretion requires consideration of the standard of living enjoyed by the family before the breakdown of the marriage (as well as consideration of any financial obligations and responsibilities) this is a necessary assessment. Arguably, in 'big money' cases such as this, different terminology might be considered, given that the notion of 'need' – particularly within family law cases – is often more associated with deprivation, and at times remains acutely unmet, post-divorce or separation.¹³

The wife's appeal to the Supreme Court was on the question of the investment funds and challenged the Court of Appeal's assessment that these had not been matrimonialised by the 2017 transfer. She argued that the investment funds were a gift – as evidenced by the transfer – and the Court of Appeal had been wrong to focus on the source of the assets, rather than looking to the transfer.¹⁴

THE SUPREME COURT'S REASONING

The Supreme Court reiterated the three principles derived from the existing case law with which practitioners will be very familiar – the 'needs' principle, the 'compensation principle' and the 'sharing principle'.¹⁵ Straightforward to state and easy to understand though those principles may be, their operation in the individual case against the backdrop of the court's discretion keeps this area of practice alive with disputes. The Supreme Court added to these three principles the 'non-discrimination principle': the courts will not favour the wage-earner over the party who has been a 'home-maker'.¹⁶

The focus of the Court in this case was not on which principles should be applied (or even on how these should be applied) but rather what

12 Ibid para 25.

13 See Hinchings et al (n 2 above) 296: the survey finding that up to five years after their divorce, 'women – notably mothers with dependent children – were, on average, worse-off financially than men'.

14 *Standish* (n 2 above) para 27.

15 Ibid paras 5.

16 Ibid paras 5.

those principles can be applied to. As the Supreme Court summarised, in ancillary relief cases the court will consider matrimonial assets as being distinct from non-matrimonial assets. In some contexts, what might have been considered a non-matrimonial asset has, either through time or due to the actions of the parties to the marriage, become a matrimonial asset. The Supreme Court endorsed the term 'matrimonialisation' (of an asset) to capture this.¹⁷

Revisiting the stalwart cases of *White v White*, *Miller v Miller*, and *McFarlane v McFarlane*, the Court set out five principles to be referred to when considering matrimonial and non-matrimonial property alongside the sharing principle.¹⁸ On first reading, it does so with a simplicity which will likely be welcomed by law students everywhere. With regards to matrimonial and non-matrimonial property, some clarity is offered. Firstly, the case states that there is a conceptual difference between these two terms based on the source of the asset. Non-matrimonial property is either pre-acquired or related to an inheritance or gift, whereas matrimonial property has come from the parties' *joint* efforts, to reflect the relational, co-owning nature of marital partnerships. The Court made clear that legal title alone does not determine whether an asset is to be treated as matrimonial or non-matrimonial in character.¹⁹

Second, and putting to bed some previous consternation, the Court definitively states that non-matrimonial property will *not* be subject to the sharing principle, though it can be subject to the twin principles of need and compensation.²⁰ Defining such property as non-matrimonial might have impacted upon our understanding of what proportion of the shareable pot of assets might be awarded to each party under the sharing principle. Similarly, and thirdly, the Court opted not to depart from the equality principle. Instead, it favoured a bright-line rule that non-matrimonial property will not be automatically subject to the sharing principle.

As a fourth principle, the Court accepted that what might start out as a non-matrimonial asset can in time become matrimonial.²¹ On that subject, the *obiter dicta* of *Wilson LJ in K v L* were endorsed.²² In that case, he considered three circumstances where the source of the asset might become less important. In paraphrase, those are:

17 Ibid paras 7.

18 *White v White & Miller v Miller* [2001] 1 AC 596; *McFarlane v McFarlane* [2006] UKHL 24.

19 *Standish* (n 2 above) para 48.

20 Ibid paras 48–49.

21 Ibid paras 51.

22 *K v L* [2011] EWCA Civ 550.

- 1 That the matrimonial property has become so valuable that the initial contribution by one spouse of non-matrimonial property to it is no longer significant.
- 2 That the non-matrimonial and matrimonial properties have become so mixed together that it may be said the spouse who brought the non-matrimonial property has accepted this state of affairs: it was either, to their mind, becoming matrimonial or it was by now too difficult to unpick the mixing-up of assets, to correctly identify the value of the non-matrimonial property.
- 3 The non-matrimonial property has been used towards the matrimonial home.²³

Though endorsing this analysis, Lord Burrows and Lord Stephens expressly state that these are not exclusive categories. Matrimonialisation is 'neither narrow nor wide':

what is important (leaving aside matrimonial property resting on contributions from each party) is to consider how the parties have been dealing with the asset and whether this shows that, over time, they have been treating the asset as shared between them. That is, matrimonialisation rests on the parties, over time, treating the asset as shared.²⁴

The treatment of the asset by the parties is key in terms of conveying – and establishing evidence of – intention. Treatment of an asset can, however, be complicated and subject to myriad factors. It was not for the Supreme Court to consider the facts beyond those which were before it. However, in the context of cohabitation, *Jones v Kernott* introduced to the law a complex analysis for courts around intention – actual, implied or imputed.²⁵ Actual treatment of an asset may differ from treatment of an asset to perhaps include the parties' intentions. These intentions might be very different from each other and might also vary over time. Whether an asset has come to be treated as a shared asset may well be a straightforward question in many cases. However, sometimes the parties may not be treating an asset in the same way or share the same understanding of why an asset is being treated in a particular way.

Further, one could foresee a situation in the context of domestic abuse, in particular financial abuse, where a dogged refusal to treat an asset as matrimonial may be an exertion of ongoing coercive control by one party enforcing their will and intentions over the other. There is a

23 *Standish* (n 2 above) para 51. This might be the principle that most affects – or vexes – clients and family law practitioners, where matrimonial assets are largely limited to the family home, or perhaps affected by negative equity.

24 *Ibid* para 52.

25 *Jones v Kernott* [2011] UKSC 53.

slight safety-net, in the sense that the distinction between matrimonial and non-matrimonial assets will come into play once the court has moved past the needs principle (to consider the issue of sharing). Though bringing some degree of helpful clarity, this judgment does not eradicate all potentially difficult situations, nor could it easily do so. The Supreme Court has confirmed the existing principle that matrimonial property should normally be shared on an equal basis, though there may be justified departures from that rule. This would seem to uphold the old 'yardstick of equality' maxim.²⁶ However, with that in mind, there will inevitably be a shift in argument between parties as to when an asset can truly be said to be non-matrimonial in nature, and then – even if so categorised – as to when can it be 'matrimonialised' to become a matrimonial asset, in the full and proper sense.

The final principle from the Court (which is somewhat fact-specific but will potentially have those tasked with providing financial advice in a state of some excitement) is that transferring an asset for the purpose of estate or tax planning does not, without more, show that asset has been treated as shared or mixed. Rather, the aim is simply to save tax.²⁷ While that may well be the intention of the parties involved, the special position of spouses in relation to some tax arrangements surely suggests that (in public policy terms at least) they are permitted special arrangements as between themselves for tax purposes precisely because their assets are familial. Even if an estate- or tax-planning arrangement is not possible in law only by virtue of the parties being spouses, it may be that it has only been entered into as a result of the trust between spouses. If the arrangement would not have been entered into with a friend or business associate but relies on the spousal bond, it suggests the transaction has a familial element.

On the facts of the case before it, the Supreme Court's reasoning was bolstered by the fact that the investment funds were transferred not just as part of a tax-planning arrangement but also with a view to being held on trust for the children of the marriage. Therefore, they were not to be used or kept for the benefit of the wife, now or in the future: as such, the Court concluded, they were not matrimonialised because they were not being treated as an asset that was being shared between them.²⁸ It is hard not to lean towards the argument made on the wife's behalf that the investment funds were being transferred for the benefit of the children and as such were being used for the family. The Court rejected this, however, saying it elides the benefit to the children, merging it with a benefit to be shared between the spouses,

26 *Standish* (n 2 above) para 40.

27 *Ibid* para 56.

28 *Ibid* paras 60–61.

namely that of a lower tax bill.²⁹ Here, the intended tax benefit was to be passed on to the children. The Court concluded that the investment funds were not matrimonialised by the 2017 transfer: the proportion considered to be non-matrimonial thus remained unchanged. It did not enter the pot and would not therefore be subject to the sharing principle.

AFTERMATH AND IMPLICATIONS FOR EQUITY AND FAMILY LAW

Many cases will not progress beyond the 'needs and compensation' stage to reach the sharing principle. When assets go beyond needs or compensation the court must decide whether they are matrimonial or non-matrimonial for the sharing principle. While these principles are often associated with 'big money' cases, they will also matter in more modest disputes. Clearer statements of principle therefore provide courts and practitioners with a firmer basis for predicting how assets will be characterised, offering welcome certainty in an area where privately crafted agreements are often reached in anticipation of judicial outcomes.

At the same time, policy tensions remain. It is potentially problematic to allow a spouse to rely on the domicile of the other to claim a benefit (even if not for themselves but for other family members) while simultaneously asserting that the assets protected by those arrangements are not available to be shared with that same spouse as they are not family assets. While in this case the courts accepted there was clear intention for the children to benefit from the exercise, one can envisage other factual scenarios where the benefit to be derived from the assets is different.

Where parties deliberately rely on tax arrangements available solely by virtue of one spouse's status, this may be taken to indicate a shared and intentional treatment of the assets in question. Even if the parties did not expressly intend that either would benefit from the arrangement at the time it was made, such joint reliance arguably bears upon the proper characterisation of the asset in the event of subsequent dispute. Had the objective been limited to fiscal ring-fencing, the parties could have achieved this through the use of an offshore company or independent trust structure at an earlier stage. The decision instead to depend upon the domicile and activities of one spouse arguably imports an element of shared intention or mutual understanding regarding the treatment of the assets – a proposition the Court ultimately rejected.

²⁹ Ibid para 62.

Looking forward, changes in practice might include greater, more normative, use of post- or mid- nuptial agreements, for example in the form of periodical revisitation of pre-nuptial agreements, to take account of newly gained wealth, pensions, debts, windfalls, changed intentions, and odd transfers between spouses aimed at setting up intergenerational trust funds. This could provide a much clearer mechanism for the protective ring-fencing of assets which a party does not intend to share. The Law Commission's current project on financial remedies upon divorce/dissolution suggests a renewed focus on some of the principles being developed by the courts.³⁰ No doubt there will follow some interesting judgments on the application of the principles set out by the Supreme Court. The ways in which parties can argue that assets have been matrimonialised (or not) will likely be as varied as the intentions, assets, and circumstances of those involved.

CONCLUSION

On the one hand, the Court has brought a welcome degree of definitional clarity by expressly distinguishing between matrimonial and non-matrimonial assets and endorsing the concept of 'matrimonialisation'. For practitioners, this bright-line approach should assist in advising clients with greater certainty, particularly in high-value disputes where complex asset portfolios are in play. The reiteration of the sharing, needs, and compensation principles – alongside the confirmation that non-matrimonial assets are generally immune from the sharing principle – reflects a pragmatic desire to simplify an area long characterised by judicial discretion.

However, this clarity comes at a cost. By framing the analysis almost exclusively in terms of property categories, the Court avoided engaging with the more intricate equitable dimensions of the dispute. A richer exploration of how equitable principles operate in practice could have offered valuable insight into the parties' common intention and shared purpose, as well as the broader question of fairness that underpins equitable intervention. In this sense, the judgment's coherence in legal categorisation arguably came at the expense of a fuller understanding of the equitable relationships at stake.

30 Law Commission, *Financial Remedies on Divorce and Dissolution: A Scoping Paper* (Law Com No 417 2024).



The definition of sex: *For Women Scotland (FWS) Ltd v The Scottish Ministers* (2025)*

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ABSTRACT

This case concerns a legal challenge by For Women Scotland against the Scottish Government's revised statutory guidance on its Gender Representation on Public Boards (Scotland) Act 2018, which For Women Scotland argued misinterpreted the definition of 'sex' under the Equality Act 2010. The case centred on statutory interpretation and whether the term 'sex' in the Equality Act should be interpreted in light of the Gender Recognition Act 2004 which allows individuals with a Gender Recognition Certificate to be legally recognised in their acquired gender.

BACKGROUND

The *For Women Scotland* litigation reached the United Kingdom (UK) Supreme Court as an appeal from the Scottish Inner House of the Court of Session.¹ The case related to the Gender Representation on Public Boards (Scotland) Act 2018, devolved legislation by which the Scottish Government sought to increase the representation of women on public boards. Section 2 of this legislation, as introduced, had included a definition of woman that encompassed trans women, including those who had yet to receive a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004. In earlier litigation, For Women Scotland, a campaign group which advocates for a 'biological' approach to sex in law, had succeeded in a challenge to the inclusion of this definition.² That decision focused on devolution issues, with the petition succeeding on the basis that equality law was an issue reserved to the UK Parliament and that the inclusion of this definition was therefore outside of the Scottish Parliament's legislative competence.

In April 2022, following that Inner House decision, the Scottish Government issued new statutory guidance for the Gender

* First published in *NILQ* 76.AD1 (2025) 73–81 on 15 December 2025.

1 *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2023] CSIH 37.

2 *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4.

Representation on Public Boards (Scotland) Act 2018 on the basis that the court had nullified the effect of section 2.³ This guidance stated that a person who had attained a GRC had the sex of a woman, and she would count towards meeting the 50 per cent objective for representation on Public Boards. This, as the Supreme Court accepted in its judgment in *For Women Scotland*, was in line with advice of the Equality and Human Rights Commission at that time.

CASE

For Women Scotland nonetheless challenged the Scottish Government's revised guidance on the basis it was based upon an error of law in misconstruing the definition of sex under the Equality Act 2010 and sought a declaration that the statutory guidance was therefore unlawful. In the Outer House of the Court of Session Lady Haldane held that the Gender Recognition Act 2004, which is applicable throughout the UK, resulted in those holding a GRC having the sex assigned in that certificate for all matters (except for specific listed exceptions), and that the statutory guidance was therefore lawful, and was not superseded by the later enactment of the Equality Act 2010.⁴ This position was upheld by the Inner House, which agreed that the 2004 Act was a 'far-reaching' enactment. Both Scottish courts accepted that when the UK Parliament subsequently passed the Equality Act 2010 the references to women encompassed trans women who had obtained a GRC and references to men intended to include trans men with a GRC.⁵ This conclusion was the focus of the appeal to the UK Supreme Court.

The case therefore centres on the correct interpretation of the Equality Act 2010 and whether it needs to be read consistently with the Gender Recognition Act 2004. This question, however, arises as part of a dispute that is more focused on the relationship between devolved legislation and a Westminster statute than on the legal interests of affected people, which makes for an awkward vehicle by which the courts are to reach a ruling with such far-reaching implications, perhaps explaining the reluctance of the Scottish courts to adopt a sweeping approach. The Supreme Court, however, conceived its task as being one of statutory interpretation, and specifically determining the meaning of 'sex' under the Equality Act 2010 and whether the enactment of the Gender Recognition Act 2004 altered the meaning of sex within anti-discrimination law. As the Supreme Court states:

3 The definition of woman provided under s 2 of the 2018 Act was also repealed by the Scottish Parliament through the Gender Representation on Public Boards (Amendment) (Scotland) Act 2024.

4 [2022] CSOH 90, para 47.

5 [2023] CSIH 37, para 42.

The central issue on this appeal is whether references in the EA 2010 to person's 'sex' and to 'woman' and 'female' are to be interpreted in the light of section 9 of the GRA 2004 as including persons who have an acquired gender through the possession of a GRC.⁶

Section 9(1) of the Gender Recognition Act states that once a person has a GRC 'the person's gender becomes for all purposes the acquired gender', while section 9(3) states that there is an exception, where this status is 'subject to ... any other enactment'. The Supreme Court conceived of its task as determining whether the Equality Act 2010 falls within the exception under section 9(3) of the Gender Recognition Act 2004. The Supreme Court did not follow the Scottish courts and rejected arguments in favour of a variable definition of sex within the Equality Act 2010.⁷

In reaching this conclusion, the Supreme Court placed particular weight on the legislative history of the development of sex as a protected characteristic within anti-discrimination law and specifically the passage of the Sex Discrimination Act 1975, the Gender Recognition Act 2004 and Equality Act 2010. The Court concluded that the definition of sex under the of Sex Discrimination Act 1975 was 'biological', and that this carried through subsequent enactments.⁸ The Supreme Court held that the exception in section 9(3) of the Gender Recognition Act 2004 does not require an express disapplication of section 9(1) for the later Equality Act 2010 to take on the meaning it attributed to it. The Court held that the exception applies where the 'terms, context and purpose' of the enactment demonstrates a clear incompatibility or it renders the other enactment incoherent and unworkable.⁹ The Equality Act 2010 does not expressly disapply section 9(1), nonetheless, having examined the Equality Act 2010, the Court concluded that applying section 9(1) would make the Equality Act incoherent and unworkable.¹⁰ Following the Court's decision, a trans woman holding a GRC is treated as 'male' for the purposes of the Equality Act 2010, and a trans man holding a GRC is treated as 'female' for the purposes of the Equality Act 2010.

The Court insisted that the case is not about the status of trans people generally, but on the significance of holding a GRC, and whether this can be said to legally change one's sex for the purposes of the Equality Act. It specifically states that being trans remains a protected characteristic under the Equality Act and indeed started the judgment with a statement that:

6 *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2025] UKSC 16, para 25.

7 *Ibid* paras 189–197.

8 *Ibid* para 265.

9 *Ibid* para 156.

10 *Ibid* para 264.

It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word ‘woman’ other than when it is used in the provisions of the EA 2010.¹¹

This could be treated as packaging, with the Court assuaging itself as to the even-handedness of a decision which has implications which reach far beyond the facts of the case. Much as the Court would loudly insist that ‘a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people’,¹² it was obliged to acknowledge that its interpretation of the Equality Act would have implications across areas such employment, sports and other associations, with the court’s statements indicating that it will be possible for a range of bodies to adopt policies which restrict the participation of trans people in single-sex activities. Within maximalist readings of the judgment, including by the Equality and Human Rights Commission, this was rapidly presented as mandating such exclusions in a broad range of circumstances.¹³

ANALYSIS

There are many reasons to question the decision in *For Women Scotland*, and many of the problems resultant from the adoption of a position based around biological sex are beyond the scope of a short case note. The Court reached for the presumption that there is a uniform meaning in a particular term across a statute almost reflexively,¹⁴ hoping that it would avoid the complexity involved in the more nuanced approach which had been adopted by the lower courts. But to do so, it had to neglect, sidestep or fudge its approach to several significant issues, including the application of the European Convention of Human Rights (ECHR), the application of European Union (EU) law and the consequential effect of its judgment for Northern Ireland. Instead of bringing clarity, *For Women Scotland* is likely to trigger multiple strands of litigation, and particularly so if the maximalist readings of the decision are adopted.¹⁵

11 Ibid para 2.

12 Ibid para 248.

13 Equality and Human Rights Commission, ‘[An interim update on the practical implications of the UK Supreme Court judgment](#)’ (25 April 2025).

14 As set out in cases like *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61, para 14 (Lord Hope).

15 This analysis draws upon the authors’ work, alongside Sylvia de Mars and Anurag Deb, in Anurag Deb, Sylvia de Mars, Colin Murray and Aoife O’Donoghue, ‘[Limits to the UK Supreme Court’s reach: Northern Ireland, the Windsor Framework and trans rights](#)’ (*Administrative Court Blog* 30 April 2025).

First, in terms of the ECHR, the Human Rights Act 1998 is only mentioned in passing in the judgment.¹⁶ The Court did not consider section 3(1) on the necessity of reading and giving effect to primary and subordinate legislation in way that is compatible with Convention rights. It also did not address section 6(1) on the requirement that public authorities act in ways that are ECHR compatible. The Court did not engage in any detailed consideration of whether its interpretation of ‘sex’ is compatible with Article 8 ECHR, which is a particularly problematic omission given that the Gender Recognition Act 2004 was passed in response to *Goodwin v United Kingdom* which found that states should not leave trans people in an intermediate zone in terms of their acquired gender, neither treated as fully female nor male outside of proportionate exceptional circumstances, or they would find themselves in breach of Article 8 ECHR.¹⁷ The Supreme Court, unsurprisingly in light of its general jurisprudence on statutory intention, did not reference the explanatory notes or the comments of ministers in Parliament as regards to the passage of the Gender Recognition Act in its decision. In this instance, this approach undoubtedly facilitated the Court’s reaching an interpretation of these provisions which hollowed out much of the value of a GRC, notwithstanding the statements of ministers in enacting key measures.¹⁸ But, in sidestepping ministerial comments, the Court was also avoiding the underlying legal issues which generated this position, which will inevitably give rise to further human rights challenges to the Equality Act as it is now interpreted. The Supreme Court anchored its use of the term ‘transgender status’ in *AP, Garçon and Nicot v France*,¹⁹ but in that case Strasbourg discussed the issues at stake in terms of transition in gender identity and the recognition of trans people in the gender they present.²⁰ It does not provide authority for the ECHR allowing for trans people to be separated out from the gender in which they present. The Supreme Court’s adoption of a general approach to issues of sex/gender which is immutable and binary in *For Women Scotland* is thus difficult to square

16 *For Women Scotland* (n 6 above) para 67.

17 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

18 See, for example, David Lammy’s explanation in committee session, as Parliamentary Under-Secretary of State for Constitutional Affairs, on the Gender Recognition Bill that ‘[o]nce a person has recognition of their acquired gender, he or she will be protected against discrimination on the basis of that acquired gender, in the same way as any other person of that gender is protected’: Gender Recognition Bill, Standing Committee A, col 185 (16 March 2004).

19 *AP, Garçon and Nicot v France* (unreported, 6 April 2017) para 140.

20 It should be noted that the Supreme Court had previously advanced a binary approach to sex/gender as being inherent to many areas relating to public provision of services in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, para 55.

with Strasbourg's Article 8 jurisprudence on personal characteristics. This may generate difficulties for public bodies seeking to comply with the judgment in light of their Human Rights Act obligations.

The Supreme Court also neglected to engage in a detailed discussion of EU law. It did refer to how the Equality Act 2010 had been amended to protect against indirect discrimination in light of the jurisprudence of the Court of Justice of the European Union (CJEU), which meant that 'transgender people (irrespective of whether they have a GRC) are protected by the indirect discrimination provisions of the EA 2010 without the need for a certificated sex reading of the EA 2010'.²¹ But the development of anti-discrimination law in the UK and the meaning of sex as a protected characteristic was, from inception, intertwined with EU law. The Court did not, for example, reference the requirements of EU law at the time of the passage of the Equality Act 2010 which, going as far back as *P v S and Cornwall County Council* case, that trans people are protected against discrimination in relation to gender reassignment as 'essentially if not exclusively' a form of sex discrimination.²² This decision was followed by *Richards*, in which the UK Secretary of State for Works and Pensions was found to be wrong in using 'men who have not undergone gender reassignment surgery' as the correct comparator to a 'trans woman', with the CJEU reiterating the stance it had adopted in *P v S and Cornwall County Council*.²³ Furthermore, although the Supreme Court mentioned the UK House of Lords' decision in *Chief Constable of West Yorkshire v A*, it did not address Lord Bingham's finding that the meaning of sex under the Sex Discrimination Act 1975 had to be given a trans-inclusive meaning as a result of the UK's EU law obligations:

In my opinion, effect can be given to the clear thrust of [EU] law only by reading 'the same sex' ... and 'woman', 'man' and 'men' [in the relevant pieces of domestic legislation] as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender.²⁴

The Equality Act 2010 was enacted in the context of the UK being an EU member state. It is therefore implausible to insist that the meaning of sex within the enactment does not fully reflect the requirements of EU law. The unspoken element of the UK Supreme Court's reasoning, necessary to bridge these inconvenient facts, is that the UK has, in the interim, left the EU and the domestic courts are no longer generally

21 For Women Scotland (n 6 above) para 260.

22 C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170, para 21.

23 C-423/04 *Richards v Secretary of State for Work and Pensions* ECLI:EU:C:2006:256, para 24.

24 *Chief Constable of West Yorkshire v A (No 2)* [2004] UKHL 21, para 11.

bound to interpret domestic law in light of EU law's requirements.²⁵ In its rush to take advantage of this opportunity, however, the UK Supreme Court did not engage with the challenges which its decision posed for Northern Ireland.

Non-discrimination law in Northern Ireland has a much longer history than in other parts of the UK, and the main body of the Equality Act 2010 does not apply in Northern Ireland, with the exception of a limited number of provisions that were not relevant to the judgment.²⁶ Equality, moreover, is a devolved matter in Northern Ireland. This places Northern Ireland in a different position to Scotland, as the devolution of this area of law-making means that the Representation on Public Boards (Scotland) Act 2018, even in its original form, would have been within the legislative competence of the Northern Ireland Assembly. That having been said, the current sex discrimination law is analogous to other parts of the UK, and, ordinarily, the UK Supreme Court ruling would be persuasive in this context. The issue, however, is that not all parts of the UK left the EU on the same terms, and the Windsor Framework maintained a connection between Northern Ireland law and significant EU law rights and equality protections. Article 2(1) of the Windsor Framework states that:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.²⁷

Article 2 imposes two obligations upon the UK. The first element of Article 2(1) directly references the 1998 Agreement and commits to non-diminution, as a result of Brexit, of any EU law which sustains the provisions of its chapter on Rights, Safeguards and Equality of Opportunity, while the second expressly references a collection of EU anti-discrimination laws listed in Annex 1. In the *Allister* case the UK Supreme Court found that under section 7A of the European

25 European Union (Withdrawal) Act 2018, s 6(1).

26 These three provisions are s 82 (offshore work), s 105(3) and (4) (expiry of Sex Discrimination (Election Candidates) Act 2002) and s 199 (abolition of presumption of advancement).

27 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/Northern Ireland (now called Windsor Framework), Decision no 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

Union (Withdrawal) Act 2018, the Windsor Framework (or Protocol) is operative within domestic law and obligations therein must be given effect,²⁸ and this has been affirmed by the Northern Ireland Court of Appeal in *Dillon* in the context of Article 2 (although this decision is currently under appeal to the UK Supreme Court).²⁹ This decision accorded a broad meaning to the ‘civil rights’ of everyone in the community under the 1998 Agreement, and the specific listing of measures in Annex 1 should provide a powerful indication that they are presumed to be connected to this commitment.

Both aspects of Article 2 are potentially relevant to the *For Women Scotland* decision, but it is the express commitment of the six equality directives listed in Annex 1, which are subject to dynamic alignment between EU law and Northern Ireland law under Article 13(3) of the Windsor Framework, that are most significant.³⁰ These measures include the most significant EU law protections against sex discrimination in relation to the provision of goods and services, employment and social security. As noted above, the CJEU, in interpreting these measures, has treated gender reassignment discrimination as *essentially, if not exclusively*, a form of sex discrimination. Insofar as EU law continues to apply in Northern Ireland, trans individuals should therefore be considered to hold the sex that they have acquired, rather than the sex they were assigned at birth. This means that in Northern Ireland a GRC is given its full meaning in contexts in which EU law applies. The Windsor Framework, in short, could be interpreted as precluding a general interpretation of ‘sex’ as meaning ‘biological sex’ in the context of gender reassignment.³¹

CONCLUSION

Far from producing clarity, therefore, this decision opens the door to a range of resultant litigation and highlights the strains that devolution imposes on attempts to impose one-size-fits-all standards from Westminster in many areas of law. Lost in much of the furore around

28 *In re Allister* [2023] UKSC 5, para 74.

29 *In re Dillon and Others* [2024] NICA 59, para 85.

30 Race Equality Directive: Directive 2000/43/EC; Framework Directive (religion and belief; age; sexual orientation; and disability): Directive 2000/78/EC Gender Goods and Services Directive: Directive 2004/113/EC; Equal Treatment Directive (Recast) (employment): Directive 2006/54/EC; Equal Treatment Directive (self-employment): Directive 2010/41/EU; Equal Treatment Directive (social security): Directive 79/7/EEC.

31 Equality Commission for Northern Ireland, ‘Legal paper and information: the meanings of “sex”, “men”, “women” and “gender reassignment” in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities’ (June 2025) 14.

For Women Scotland is the underlying problem of representation on public boards and the aim of the Scottish Parliament to ensure that women should make up half of non-executive board membership. But in determining the question of whether ‘a trans woman who has a GRC counts towards achieving the goal set in the gender representation objective’ in the negative,³² the Supreme Court sustained a narrative that trans women were displacing ‘biological’ women on boards. It is a narrative that overlooks the existence of trans men in balancing out any such effect, and, indeed, the case’s outcome ensures that any trans men on a public board will count towards the representation of women under the 2018 Act.

32 *For Women Scotland* (n 6 above) para 267.

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