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Delivering equality: equality mainstreaming and constitutionalisation of socio-economic rights

DR ANNE SMITH

*Lecturer, Transitional Justice Institute, University of Ulster
and*

EITHNE McLAUGHLIN*

Professor of Social Policy, Queen's University Belfast and Coordinator of the Equality and Social Inclusion in Ireland Project

Introduction

This article examines the role (if any) of law in the promotion and protection of equality. It frames its analysis against the backdrop of recent equality developments and proposals in the context of Northern Ireland. Our particular purpose is to address the question: are equality mainstreaming and the constitutionalisation of socio-economic rights viable tools to address inequality? These two legal tools are recognised as forming only parts, albeit highly important parts, of a bigger equality jigsaw. Constraints of space mitigate against examination of the other pieces of the jigsaw in this article.¹

Regarding equality mainstreaming, we examine the operation of the equality mainstreaming model that has been adopted in Northern Ireland, most notably s. 75 of the Northern Ireland Act 1998 (the 1998 Act). In respect of constitutionalism, although

* Before completing this article, Eithne, one of the co-authors, died. Finishing it in Eithne's absence was very difficult and I hope that the final article, which is dedicated to her memory, is a fitting tribute to her. I would like to thank Eithne's husband, Pat, for his kind offer of support and assistance. Thanks are also due to Christine Bell and Fionnuala Ni Aolain for their helpful comments on earlier drafts. A special thanks goes to Mary O'Rawe for all her help. Responsibility for the views expressed and for any errors that may remain are those of the authors. Interview quotations are from interviews conducted by Anne Smith, the late Stephen Livingstone and Rachel Murray as part of a project funded by the Nuffield Foundation, "Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with comparisons from South Africa", February 2005. Although this article draws upon the interviews conducted for that research, the views in the article are those of the present authors alone. Similarly, the article draws on the independent element of the operational review of the statutory equality duty undertaken by Neil Faris and Eithne McLaughlin in 2004 for the NIO but does not represent the views of any parties other than the authors named.

1 This would include, inter alia, examination of the Human Rights Act 1998 (in particular, the restricted scope of Article 14 of the European Convention on Human Rights), a review of administrative law with the uncertain status of equality as a principle, the proposed Single Equality Bill for Northern Ireland, the Equality Bill 2009 for Great Britain, Targeting Social Need (TSN), the New TSN and now the anti-Poverty Strategy, proposals on equality law reform by the ECNI to the OFMDFM ("Proposals for legislative reform", February 2009) and a review of the Race Relations Order (NI) 1997.

Northern Ireland has been provided with a “constitutional moment”² through the Good Friday/Belfast Agreement (the Agreement),³ as a corollary of which the constitutional protection of social and economic rights⁴ became more fully politically achievable, at the time of writing, constitutionalisation has yet to occur.⁵ Consequently, we draw upon experience from other jurisdictions that have constitutionalised social and economic rights, most notably South Africa, to help reach a conclusion on the second route’s capacity to deliver equality.⁶ Having taken into account the strengths and weaknesses of the South African experience, as the precise model of protecting social and economic rights in a Bill of Rights for Northern Ireland has yet to be determined, the article is intended to contribute to and inform the present discussion in Northern Ireland and in other jurisdictions currently in the process of constitutionalising socio-economic rights. In so doing, the article stands at the interface of academic praxis with real policy issues.

Juxtaposing these two “routes to equality” in itself provides a good illustration of the necessity of adopting a multi-layered, holistic approach to equality and the inefficacy of relying solely on litigation and the “rights discourse” or mainstreaming alone to deliver societal equity. Combining (examination of) both tools demonstrates the utility of sometimes having a legal framework that does not automatically resort to litigation and the need to sometimes “take a step outside of” the rights discourse and to gain a remedy within the political domain. Equally, it demonstrates the necessity of sometimes “taking a step inside” the rights discourse and having the ability to pursue litigation where political and related enforcement mechanisms may be insufficient. This is particularly the case when the political remedies and/or enforcement mechanisms are limited, especially for the most vulnerable groups in society who are not well represented in the democratic process and whose voices may not otherwise be heard. By adopting a “both and” rather than “either/or”

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- 2 This term is borrowed from Nolutshungu who identified two essential elements within a constitutional idea: that of a constitutional moment and that of a constitutional function. The constitutional moment is the transition or the new beginning which is more concerned with reaching a deal between the parties and the need to secure accommodation of all the parties’ interests rather than focusing on the constitutional function, the construction of a well-functioning constitutional structure. See SC Nolutshungu, “The constitutional question in South Africa” in I Shivji (ed.), *State and Constitutionalism: An African debate on democracy* (Sapes Trust (Southern Africa Political and Economic Series) 1991).
 - 3 “Agreement reached in the multi-party negotiations Cm 3883” (1998) 37 *ILM* 751. The Agreement resulted from the talks in Northern Ireland in 1998 which produced a blueprint for how future relationships within and between the Republic of Ireland, Northern Ireland and the United Kingdom should be developed.
 - 4 Social and economic rights refers to rights such as the right to health, right to housing, right to an adequate standard of living, right to education and so on.
 - 5 We write in February 2010. Under Strand 3, para. 4 of the Human Rights section of the Agreement, the NIHRC was given the task of consulting and advising the British government on the content of a Bill of Rights for Northern Ireland. In December 2008, the NIHRC submitted its advice, “A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland”, 10 December 2008, available at www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_%28December_2008%29.pdf. Two draft Bills of Rights preceded the publication of the 2008 report: NIHRC, “Making a Bill of Rights for Northern Ireland. a consultation by the Northern Ireland Human Rights Commission” (September 2001) and “Progressing a Bill of Rights for Northern Ireland: an update” (April 2004). The NIO published its response to the NIHRC’s advice on 30 November 2009; NIO, “A Bill of Rights for Northern Ireland: next steps”, consultation paper, November 2009, available at www.nio.gov.uk/consultation_paper_-_a_bill_of_rights_for_northern_ireland_next_steps.pdf. The NIHRC recently published its response to the NIO’s consultation paper on 17 February 2010, NIHRC, “A Bill of Rights for Northern Ireland: next steps”, response to the Northern Ireland Office, February 2010, available at [www.nihrc.org/dms/data/NIHRC/attachments/dd/files/71/Response_to_NIO_consultation_on_a_Bill_of_Rights_for_Northern_Ireland_\(February_2010\).pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/71/Response_to_NIO_consultation_on_a_Bill_of_Rights_for_Northern_Ireland_(February_2010).pdf). These documents will be discussed further.
 - 6 The authors are cognisant of the close relationship between an equality right and socio-economic rights. Due to space constraints, the primary focus is on socio-economic rights.

approach, this article adds a more nuanced perspective to the ongoing debate on the achievement and delivery of equality. While there has been much written on mainstreaming and the recognition and enforcement of social and economic rights as individual issues,⁷ few, if any, scholarly works examine mainstreaming and constitutional protection in conjunction with each other. This article seeks to fill that gap and adds to the nascent literature on both mainstreaming and constitutional protection/review of social and economic rights.

For conceptual clarity and coherence of argumentation, we first consider what we mean by the terms “equality”, “mainstreaming” and “constitutionalisation” (for the purposes of this paper.) In so doing, it is important to bear in mind that what is being postulated here is not a radical or new way of thinking about these three terms. Rather, this article is part of a wider project, highlighted by others, offering a more contemporary understanding of the three concepts. Following on from this, the second part of the paper will analyse the strengths and weaknesses of both tools under consideration in terms of their capacity and potential to deliver equality. Where limitations are identified in equality mainstreaming, we examine what role, if any, the constitutionalisation of socio-economic rights might play in helping to deliver equality more effectively. Given that constitutionalisation prospects in respect of Northern Ireland are still some distance from fruition, here we supplement our analysis by drawing upon the South African model of constitutionalisation and its jurisprudence to help evaluate the capacity of constitutionally based socio-economic rights to deliver equality.

We use this comparative constitutional approach to offer the prospect of expanding our understanding of the problems and opportunities that accompany the protection of equality in contemporary Bills of Rights in the globalised world. The point is not, of course, that we can readily transfer to Northern Ireland what has happened in South Africa or elsewhere. Rather, experience elsewhere is used to help “raise or sharpen awkward questions” to facilitate those involved in the Northern Ireland Bill of Rights debate to “step back”⁸ from the immediacy of the Northern Ireland context and engage more fully in a process of reflection. The article is therefore written to provide some guidance in respect of what to do and what not to do in refining and finessing the process of constitutionalising and mainstreaming equality.

The article is unique in that while the jurisdictional focus on mainstreaming equality is primarily on Northern Ireland, Northern Ireland’s experience in terms of implementing the statutory equality duties articulated in the Agreement can and has been exported to national and international levels. At the national level, despite the statement that proposals in the 1998 *Partnership for Equality* White Paper “relate to the particular circumstances of Northern Ireland and do not carry implications for equal opportunities and race relations strategies in the different context of Great Britain”,⁹ the Northern Irish statutory duty has since been

7 Regarding mainstreaming, see C McCrudden, “Mainstreaming human rights” in C Harvey (ed.), *Human Rights in the Community: Rights as agents for change* (Oxford: Hart 2004), available at SSRN, <http://ssrn.com/abstract=568642>; for information on socio-economic rights, see M Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford: OUP 2007); N Haysom, “Constitutionalism, majoritarian democracy and social and economic rights” (1992) 8 *South African Journal of Human Rights* 451–63.

8 K McEvoy and R Rebouche, “Mobilizing the professions: lawyers, politics, and the collective legal conscience” in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford: OUP 2007), p. 277.

9 Dr Mo Mowlam’s introduction to *The Partnership for Equality. The government’s proposals for future legislation and policies on Employment Equality in Northern Ireland*, White Paper (1998) available at www.ccruni.gov.uk/equality/docs/pfe98.htm#intro.

used as a model for the development of positive duties and mainstreaming practices in Great Britain in the Race Relations Act 2000 (RRA) and the Disability Act 2005. In April 2007, a positive duty in respect of gender equality was introduced and as part of a future Single Equality Act, the Discrimination Law Review considered the introduction of a generic positive duty in Britain.¹⁰ The Northern Ireland case is also influential internationally, for example, in the ongoing equality mainstreaming review being undertaken as part of the development of the Equality Commission for Northern Ireland's (ECNI) anti-discrimination programme.¹¹

Definitional issues: equality, mainstreaming and constitutionalisation

EQUALITY

The concept of equality has generated debate amongst moral and legal philosophers for centuries. Equality can mean anything and everything. It has meant different things to different people producing a situation in which equality can be described both as a word “in which a number of differing conceptions have always been in competition”¹² and as “an extremely dynamic principle . . . offering wide scope for divergent interpretations of its content”.¹³ It thus belongs to that category of words with both a vague conceptual meaning and a rich emotive meaning, with the conceptual meaning being subject to constant redefinition.¹⁴ It is therefore unsurprising that, in the literature, equality proves an “elusive notion”,¹⁵ whereby “conceptions of equality are notoriously protean”.¹⁶ Broadly speaking, a distinction is frequently drawn between formal and substantive concepts of equality.

Formal equality

Essentially, formal equality requires that all persons who are in the same situation be accorded exactly the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender.¹⁷ This formulation resonates with the original Aristotelian conception of equality, that like cases should be treated alike. It is the least formally contentious and therefore less technically problematic concept from a black letter law point of view, yet it fails to recognise that it is only in certain

10 Department of Communities and Local Government, “Discrimination law review: a framework for fairness: proposals for a Single Equality Bill for Great Britain”, a consultation paper (June 2007), available at www.communities.gov.uk/documents/corporate/pdf/325332.pdf. The Government Equalities Office issued “The Equality Bill – government response to the consultation” (July 2008), setting out its proposals for an Equality Bill for Great Britain which was introduced in the House of Commons on 24 April 2009 and became an Act of Parliament on 8 April 2010.

11 The ECNI is the body that was set up under the Agreement to oversee the implementation and enforcement of s. 75. The ECNI published its final report on s. 75 in November 2008, see “Section 75: keeping it effective – reviewing the effectiveness of Section 75 of the Northern Ireland Act 1998”, Final Report, November 2008. This report and the ECNI's role will be discussed further below.

12 C McCrudden, “Institutional discrimination” (1982) 2(3) *Oxford Journal of Legal Studies* 303–69, at 346.

13 J Schwarze, *European Administrative Law* (London: Sweet & Maxwell 1992), p. 546.

14 CL Stevenson XLVII, *Mind* (1938), p. 331, cited by C McCrudden in “Institutional discrimination” (1982) 2(3) *Oxford Journal of Legal Studies* 303–67, at 346.

15 N Bamforth, “Conceptions of anti-discrimination law” (2004) 24(4) *Oxford Journal of Legal Studies* 693–716, at 704.

16 D Harris, “Equality, equality rights and discrimination under the Charter of Rights and Freedoms” (1987) 21 *University British Columbia Review* 389–428, at 390.

17 This version of equality is described by McCrudden as equality as “individualized justice”, C McCrudden, “Theorising European equality law” in C Costello and E Barry (eds), *Equality in Diversity* (Dublin: Irish Centre for European Law/Ashfield Publications 2003), pp. 20–1.

contexts that these characteristics are irrelevant¹⁸ and that same treatment will result in equitable treatment. It is somewhat invidious and counter-intuitive to promote and require formally equal treatment, if people, partly through starting from very different places to which law affects a considered blindness, ultimately do not end up equally situated. For instance, if black and white citizens are required to be treated the same on the grounds that they are, for all relevant purposes, “alike”, a virtue is somehow made of ignoring very real differences in income, housing and basic health and educational levels. This, in itself, will have an adverse impact upon the opportunities for advancing black and other disadvantaged citizens. As O’Cinneide states “while being superficially attractive, [equal treatment] ignores the specific contexts in which real individuals are situated”.¹⁹ Formal equality therefore is a negatively based concept and equates to fairly limited and reactive discrimination rather than anything more far-reaching.

Substantive equality

The authors’ preferred concept of equality moves away from this limited and symmetrical approach to one which is concerned with making sure that laws or policies do not impose subordinating treatment on groups already suffering social, political or economic disadvantage. The focus is on the group and on the impact of the law on its social, economic or political conditions. It recognises that sameness of treatment can reinforce inequality and, in certain circumstances, equality (of result) actually requires differential or preferential treatment. This focus on differential treatment orients the right to equality from a negatively oriented right of non-discrimination to a positively oriented right to substantive equality. This concept is proactive, requiring the state to take positive measures to promote equality. This positive and “thick” concept of equality requires the state to adopt an asymmetrical and substantive approach and to facilitate or provide so as to create “equality of opportunity”. However, the ability of “equality of opportunity” to deliver a stronger and more comprehensive guarantee of equality depends on the meaning given to this concept. This particular discussion is extremely relevant to the discussions on mainstreaming and constitutional protection of socio-economic rights as equality of opportunity is a principal concept underpinning the effective operation of both legal tools. The definition applied to this term, will, of necessity, determine the ability, or inability, of both tools to deliver a substantive notion of equality.

Equality of opportunity

The potential of “equality of opportunity” to facilitate equity of approach and result depends on its categorisation as either “timid” or “robust”. A timid approach is about creating a common starting point for treatment by removing illegitimate criteria, while ignoring the varying ability of different groups to compete once fair procedural requirements are in place. Considerations affecting ability to avail of the opportunities on offer is underplayed in such a scenario. Hepple argues that equality of opportunity in this sense operates as a procedural requirement that is not concerned with results. Meanwhile, it leaves unchallenged and unexamined notions of “merit” that may be stacked against underprivileged groups.²⁰

18 S Fredman, *Discrimination Law* (Oxford: OUP 2002), pp. 7–10.

19 C O’Cinneide “Making the use of positive equality duties: the UK experience” in Costello and Barry, *Equality in Diversity*, n. 17 above, p. 78.

20 B Hepple, “Have twenty-five years of the Race Relations Act in Britain been a failure?” in B Hepple and E Szyzszak (eds), *Discrimination: The limits of the law* (London: Mansell 1992), ch. 2.

In contrast, a more robust notion of equality of opportunity is concerned with the members of a group who have historically been disadvantaged enjoying equality in real conditions, including economic conditions. This stronger and more ambitious concept is about creating opportunities enabling and empowering people to have options and make choices. This more thorough conceptualisation of equality and all that it entails aims towards and is guided by what is referred to in the literature as the group justice theory or equality of results.²¹

Equality of results/group justice model

Under this theory, equality is based on the idea of delivering equal distribution of goods and opportunities to economically or otherwise disadvantaged groups to ensure that the result is equal in real terms. This is achieved by prohibiting practices which cannot be objectively justified and have the effect of disproportionately disadvantaging a particular group, directly or indirectly. Equality of results thus recognises that apparently identical treatment can, in practice, reinforce inequality because of past or ongoing discrimination.²² The group justice model not only aims to redress past injustices but also seeks to achieve an equal distribution of social goods. As such, equality becomes about securing greater economic and other forms of justice between groups distinguished by access to goods and has therefore been referred to as “material equality or equality of resources”.²³

The authors argue that the approach taken to equality in Northern Ireland, South Africa or anywhere, where inequality was/is a dominant issue, should be one that is significantly redistributive in its aims. As McCrudden argues, redistribution is essentially the desired result of a good equality mainstreaming process.²⁴ The authors also opine that the same argument applies to the constitutional protection of economic and social rights. If a society is to be more equal and fairer, it is important that the reallocation of resources is directed to the most vulnerable in society. However, as far as the Northern Ireland model of mainstreaming is concerned, a budgetary component is notable for its absence. For this reason, whereas public bodies may well discover through Equality Impact Assessments (EQIAs) (an issue we return to later) that their policies or actual service delivery are causing adverse effects on certain groups, uncertainty arises as how to secure the resources to address those issues. This uncertainty, we argue, can be potentially limited or reduced if the state and public bodies are under a constitutional duty to “progressively realise” the state’s obligation to ensure that resources are in place to help reduce socio-economic inequalities. We return to this issue shortly.

An important aspect of equality of results is the adoption of “group” focused measures such as preferential treatment/affirmative action. These might include using quotas to improve the under-representation of certain groups in particular areas of the employment sector or taking proactive measures actively to address the legacy of socio-economic problems and group inequalities. Due to the proactive nature and the need to implement positive legislative and programmatic measures to realise the substantive vision of equality, these approaches are perceived by some as problematic and coming into sharp conflict with

21 See McCrudden, “Theorising European equality law”, n. 17 above, pp. 22–8, and A Morris, “On the normative foundations of indirect discrimination law: understanding the competing models of discrimination law as Aristotelian forms of justice” (1995) 15(2) *Oxford Journal of Legal Studies* 199–228.

22 S Fredman, *Discrimination Law*, n. 18 above, p. 11.

23 R Dworkin, *Sovereign Virtue: The theory and practice of equality* (Cambridge, Mass: Harvard UP 2000), p. 131.

24 C McCrudden, “Mainstreaming equality in Northern Ireland 1998–2004: a review of issues concerning the operation of the equality duty in Section 75 of the Northern Ireland Act 1998”, in N Faris and E McLaughlin (eds), *The Section 75 Equality Duty: An operational review* (Belfast: NIO 2004), vol. 2, p. 23. The report is to be found at www.nio.gov.uk/sect_75_equality_duty_an_operational_review_volume_2.pdf.

the equal (as same) treatment principle.²⁵ This school of thought is in line with what has been described as the “individual justice”²⁶ model of equality and maps on to the “timid” notion of equality of opportunity described earlier. Proponents of the individual justice model are not concerned about groups so much as what is right in an individual case. This model posits the state’s role is to reduce discrimination by eliminating any use of personal characteristics that might have harmful implications for individuals and which are actually irrelevant to an individual’s entitlement to a social good or benefit. Emphasis is placed on securing fairness for the individual. As such, affirmative action is often characterised as running counter to the spirit of an equality provision and as a form of “reverse discrimination” – a practice of favouring those discriminated against in the past and discriminating against those favoured in the past.

The authors along with several others²⁷ have a number of difficulties with this approach and argue that, rather than viewing affirmative action as an exception to equality principles, preferential treatment of disadvantaged groups is actually a core part of the right to equality. This is in line with the substantive understanding of equality which views equality as a long-term goal to be achieved through measures and programmes aimed at reducing current inequality. This understanding views discrimination as so deep and entrenched against certain groups, such as women, black Americans or black South Africans, that it has become institutionalised and the simple identification and removal of formal discriminatory barriers will not suffice to provide redress. What is required is more than simple prohibition of unequal treatment, but a positive obligation on the state to confer benefits on the group concerned to remedy past injustices against the group. Thus, what could be construed as directly discriminatory measures which favour relatively disadvantaged groups at the expense of those who are relatively well off will not constitute discrimination as the consequence of such measures, in the end, tend towards a more equal society.²⁸ Affirmative action in this view is therefore a manifestation, not a limitation of equality. As Sachs convincingly argues, a Bill of Rights without a constitutionally structured programme of affirmative action, especially in countries emerging from violent conflict where inequality was at the core of that conflict, is “meaningless”.²⁹ He continues:

this deprives the Bill of Rights of its true potential as a major instrument of ensuring a rapid, orderly, and irreversible elimination of the great inequalities and injustices left behind by apartheid.³⁰

Those who have benefited from the past regime should not be able to come to court to complain that their constitutional rights are being violated because there are special programmes to deal with homelessness amongst blacks, or Catholics or whoever may be the least well off. A constitutional commitment to affirmative action establishes the goal of equal chances for all. It puts the achievement of equal rights firmly on the agenda and forces the whole of society to face up to the consequences of years of accumulated discrimination. It does so by establishing criteria and mechanisms for monitoring progress

25 MB Abram, “Affirmative action: fair shakers and social engineers” (1986) 99 *Harvard Law Review* 1312–46.

26 McCrudden, “Theorising European equality law”, n. 17 above, pp. 22–8.

27 A Sachs, “Affirmative action and good government” in P Hugo (ed.), *Redistribution and Affirmative Action: Working on the South African political economy* (Pretoria: Southern Book Publishers 1992); and McCrudden, “Theorising European equality law”, n. 17 above, pp. 22–8.

28 An example would be admission criterion to a certain occupation favouring applicants from a particular disadvantaged group who have not been able to enter into a profession due to past discrimination over other applicants who are less disadvantaged.

29 A Sachs, *Protecting Human Rights in a New South Africa* (Oxford: OUP 1991), p. 12.

30 *Ibid.*

and facilitates greater inclusiveness in the institutions of government. When these are more representative, previously alienated people are more likely to feel that these are “their police force, their courts”. Affirmative action is a crucial mechanism whereby Bills of Rights can be potentially harnessed as tools for correcting the past by ensuring that social goods are redistributed to benefit those most in need – the marginalised.³¹

MAINSTREAMING

Mainstreaming represents a particular vision of how equality can be achieved. It is a model that aims to bring equality from the “margins” to the “mainstream”³² by placing equality issues at the centre of decision making. This is achieved by ensuring that an equality perspective is incorporated in all policies and procedures and at all stages by the actors involved in decision making around these issues. Mainstreaming requires the reorganisation, improvement, development and evaluation of policy processes.³³ Accordingly, processes are designed to ensure equality issues cannot be sidelined. Rather, mainstreaming equality should result in the infusion of equality into the design and delivery of processes and policy outputs in all government departments. The distinguishing features of this approach to equality are proactivity and positivity as opposed to reactivity and negativity – features synonymous with the traditional approach of anti-discrimination law. In other words, rather than waiting for an equality violation to occur and then taking remedial action, mainstreaming is anticipatory and requires positive action from all relevant actors to ensure that those who will be most affected by the decision are facilitated to be involved at the early stages of drafting policies. Participation and involvement from those on the ground is deemed key to ensure equality issues are effectively mainstreamed. Other key aspects of this process include appropriate institutional arrangements; awareness raising; training and expertise; mainstreaming tools; reporting (and effective enforcement) mechanisms; “commitment from the top”; incentives to build “ownership” and the securing of necessary resources.³⁴ As we will see shortly, due to what we term “creative minimisation” of some of these factors, the Northern Ireland experience of equality mainstreaming has fallen well short of its goal. Before exploring these issues, the following section provides an overview of s. 75 requirements and processes.

Northern Ireland model of mainstreaming

Section 75 of the 1998 Act is the legislative equality mainstreaming tool for Northern Ireland. Section 75(1), commonly referred to as the statutory equality duty, requires

31 While supportive of affirmative action, the authors also recognise the tension between the notion of equality as economic redistribution and equality as identity. This raises the thorny issue of the relationship between individual and group equality – the right of an individual not to be treated as a member of a distinctive group against their will and at the same time ensuring the group as a group enjoys equality, by adopting group-focused measures such as preferential treatment/affirmative action. Due to space constraints, the potential conflict between the notion of equality as economic redistribution and equality as identity will not be addressed as one of the authors has already examined these issues in another article, A Smith, “Constitutionalising equality: the South African Experience” (2008) 9(4) *International Journal of Discrimination and the Law* 201–49. See also C McCrudden, “Consociationalism, equality and minorities in the Northern Ireland Bill of Rights debate: the role of the OSCE High Commissioner on National Minorities” in Morison et al., *Judges*, n. 8 above, ch 15.

32 A phrase used by Mageean and O’Brien; P Mageean and M O’Brien, “From the margins to the mainstream: human rights and the Good Friday Agreement” (1999) 22 *Fordham International Law Journal* 1499–538.

33 This definition of mainstreaming is drawn upon the Council of Europe, Rapporteur Group on Equality between Women and Men, “Gender mainstreaming”, GR-EG (98) 1, 26 March 1998, p. 6.

34 P Chaney and T Rees, “The statutory equality duty in Northern Ireland in international perspective”, in Faris and McLaughlin, *The Section 75 Equality Duty*, n. 24 above, p. 23.

designated public authorities to have “due regard to the need to promote equality of opportunity”:

- between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

The Northern Ireland model has been described as the “most innovative”³⁵ measure of this nature to date as it stands out from several other attempts at equality mainstreaming. In brief, the most “innovative” aspects of this provision are equality schemes, screening and impact assessments, and enhanced (potential for) participation.³⁶

Unique features

a) Equality schemes

Each designated public authority must have an equality scheme in place, both as a statement of its commitment to the statutory duty, and as a plan for execution of the different aspects of that duty. This plan is submitted to the ECNI, a body established under the same Act. If the ECNI thinks it appropriate, a public authority may be required to revise its scheme. Before submitting a scheme to the ECNI, a public authority is required to consult with those likely to be affected by the scheme, to consider ameliorating policies and to publish the outcomes of these processes. The published equality schemes set out authorities’ arrangements for consultation under the equality duty. Consultation with those most likely to be affected by public policy decisions is thus (in theory) placed at the heart of the statutory duties.

Having received the equality scheme from the public authority in question, the ECNI either approves it or refers it to the Secretary of State for Northern Ireland who has three options: to approve the scheme; to request the public authority to make a revised scheme; or to make a scheme for the public authority. If it is referred, the ECNI must notify the Northern Ireland Assembly. Thus, failure to mainstream appropriately results in action taking place within the political field rather than through litigation, an issue to which we shall return subsequently.

b) Screening and impact assessment

Two unique techniques underlying the Northern Ireland model are screening and impact assessment. The former requires public authorities to screen or “equality proof” new and existing policies. Where screening indicates that an adverse equality impact is possible, decision makers must then fully assess the equality impact of the policies through an EQIA and consider ameliorating policies. The requirement to consider ameliorating policies means

35 Mageean and O’Brien, “From the margins”, n. 32 above, at 1524.

36 The other idiosyncrasy of the Northern Ireland model is the duty on public authorities to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group”. The words “have regard” are weaker strictures than “due regard” which is included in the equality of opportunity duty. However, due to constraints of space and length, the article will not focus on the good relations duty, but primarily on the equality duty. Suffice to state that there are strong arguments for giving priority to equal opportunities. If ensuring “good relations” was given the same level of importance as equality, this could have many problematic consequences in the Northern Irish context. For example, would promoting “good relations” justify “separate but equal” policies in areas such as education, which might run counter to equality of opportunity considerations?

that if a public authority's assessment of the impact of a policy shows possible "adverse impact" on any of the specified grounds of (in)equality, it must consider how this impact could be reduced, and whether an alternative policy or decision might lessen the adverse impact the original proposal would have had. Furthermore, the public authority should also show more generally that it considered how alternative policies and decisions might better achieve the promotion of equality of opportunity. In so doing, this model is pro-active rather than reactive as it tries to alert policymakers to potential problems before they happen. Adopting such a proactive approach and focusing on the effect of policies on equality and what steps public authorities can take to lessen the adverse impact of same falls squarely within a substantive notion of equality.

Unfortunately, no specific additional resources were allocated to public authorities to fund alternative policies or provision which would better achieve equality of opportunity. The extent to which public authorities can promote equality of opportunity thus depends in large part on the inherent equality promoting capacities of the policies themselves. In some cases, these policies and provisions are inherently productive of inequality rather than equality.³⁷ Furthermore, not all policies are subject to screening as public authorities can "screen out" those policies and practices which they think do not need to be impact assessed. On the one hand, this is a sensible way forward as it would be unrealistic and costly to screen all policies. However, on the other hand, as McCrudden notes, some public authorities may take advantage of this approach to evade impact assessments of the most difficult issues.³⁸ This concern has been noted by the Children's Law Centre (CLC), Northern Ireland:

When a public body carries out a screening exercise on a policy to decide whether or not an EQIA is necessary it has often been the case that policies have been screened out where they should not have been. This is concerning as the majority of public bodies, despite a stated obligation to consult on screening, do not and there is no way of knowing that a screening decision has been made by a public authority as the process is not transparent.³⁹

Arguably, if public authorities were under a constitutional obligation to ensure that *all* policies complied with fundamental principles such as equality, fairness, dignity, and respect for civil and political as well as economic and social rights, they would be obliged not to default from their basic obligation. Failure to do so could result in a court-based enforcement which public authorities would want to avoid.

This is in stark contrast to the current enforcement mechanism under s. 75 which relies on statutory protection and action taken in the political arena rather than litigation. Paradoxically, compliance with the statutory equality duty with less emphasis placed on litigation may result in public authorities taking their equality mainstreaming duties more seriously than the supposed threat of face-to-face litigation and adjudication. In this context, the outcome of the case of *R (Kaur & Shah) v London Borough of Ealing* (hereinafter the *Southall Black Sisters* (SBS) case)⁴⁰ is extremely relevant. Although the case concerned s. 71 of the RRA which involves "specific duties" on public authorities to promote race

37 For example, compulsory competitive tendering for ancillary services in the public sector and commissioning a mixed economy of care services.

38 McCrudden, *Mainstreaming Equality*, n. 24 above. To negate this problem, the ECNI in its final report on s. 75 states that where a public authority proposes, following screening, to screen out the policy, a 12-week consultation will remain a requirement. ECNI, "Section 75", n. 11 above, p. 39.

39 CLC, "Response to the Equality Commission's Consultation on its Section 75 effectiveness review", August 2007, p. 7 (on file with the authors).

40 [2008] EWHC 2062 (Admin).

equality,⁴¹ this duty was partly modelled on s. 75. Ealing Council had decided to withdraw funding from SBS, a specialist domestic violence centre, as it wanted to use that funding to provide cross-community support and assistance to victims of domestic violence irrespective of race. The council had carried out an initial Race Equality Impact Assessment (REIA), but a full REIA was not carried out until after the legal proceedings had begun. SBS therefore argued that the council had acted unlawfully and was in breach of its public sector race duties. Ealing Council withdrew from the case agreeing to carry out a new REIA on any new proposals. The threat of further litigation influenced the council's decision to accept it had erred in not carrying out a full REIA at the appropriate time. The outcome of the case shows how the threat of litigation can make public authorities take mainstreaming more seriously. As Lord Justice Moses stated, REIA "should be an integral part of the formation of a proposed policy, not justification for its adoption . . . [The REIA] is not satisfied 'by ticking boxes', it [REIA] must be undertaken as a matter of substance and with rigour".⁴² This is a very powerful conclusion, a conclusion which it is doubtful would or could have been achieved under the "enforcement" mechanisms of Article 67 of the RRA or s. 75 of the 1998 Act alone. This judgment also helps to illustrate the causative relationship between mainstreaming and litigation. If public authorities do not approach EQIAs substantively and rigorously, then this is where "taking a step inside" the rights discourse can be helpful.

c) Participation

In determining whether there is a possible adverse impact, examining alternatives and considering ameliorative policies requires direct consultation with those likely to be most affected by the policies themselves. This approach allows groups, especially those who would have hitherto been excluded from decision making, to become involved in influencing governmental decisions. Thus, combining the participative approach with impact assessment contributes to the growing of deliberative and participative democracy and the introduction of new forms of governance for public services. This point is aptly summed up by Harvey:

Too many discussions of participation and deliberation fail to show how policies and institutions might be redesigned to achieve substantive goals. Consultation can be a paper exercise regarded by government as no more than a troublesome mechanism that must be endured. The Northern Ireland provisions indicate how we might move beyond this in the sphere of equality by building processes into public decision-making and policy formulation. This is most evident in the equality field where public authorities [are] required to construct institutional mechanisms to evaluate and respond to the impact of their work on equality.⁴³

However, like the previous two features, the impact of participation has also been negated/diluted by "creative minimisation" of the statutory duty. In other words, there has been a lack of meaningful consultation as public authorities have adopted consultation methods which have been those most convenient and least effortful for the public authorities concerned rather than those which are most successful or effective in engaging

41 S. 71(1) of the RRA states: "Everybody or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need – (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups."

42 R (*Kaur & Shah*) v *London Borough of Ealing* [2008] EWHC 2062 (Admin), paras 24 and 25.

43 C Harvey, "Governing after the rights revolution" (2000) 27 *Journal of Law and Society* 61–97, at 86.

with consultee communities.⁴⁴ Before further examination of these and other issues, we now turn to focus on the second piece of our jigsaw, the constitutional protection and adjudication of socio-economic rights.

CONSTITUTIONAL PROTECTION AND ADJUDICATION

Traditionally, the constitutionalisation of rights signals that such rights belong to a category of fundamental minimal entitlements that the state has to respect, protect and fulfil.⁴⁵ If the state fails to adhere to these obligations, then, by virtue of constitutionalisation (if by no other means),⁴⁶ individuals have the right to petition the courts on the grounds that their constitutional rights have been violated. Unlike the situation whereby these rights are secured and retained by ordinary legislation, this particular method gives the courts the power to challenge, veto and, in some instances, strike down social and other incompatible/unconstitutional legislation. As such, constitutionalised rights are directly enforceable (justiciable) through the courts.

On a number of levels, attributing the power to judges to substitute their own views for those of democratically elected representatives is deeply problematic. This is particularly the case in respect of socio-economic rights, given the redistributive element necessarily contained within these rights. Some scholars argue that, as such rights have huge monetary implications and require expenditure decisions, it is inappropriate and illegitimate for courts to determine such issues on a case-by-case basis, which will undoubtedly have knock-on effects for other governmental concerns and priorities. Such balancing, weighing and expenditure exercises are, therefore, properly the function of democratically elected parliaments⁴⁷ as opposed to courts. Both legitimacy and institutional concerns are raised in the literature. For example, Waldron⁴⁸ and Dahl⁴⁹ individually argue that shifting the onus of interpretation and elaboration of rights away from the political forum and elected officials, where popular discussion might make a difference, into the hands of non-elected and non-accountable judges could lead to the “disabling of representative institutions”,⁵⁰ displacing popular self-government⁵¹ in favour of government “by judiciary”. Rather than

44 The ECNI's final report on s. 75 also found a similar finding: “public authorities have sought the views of representative organisations rather than seeking the views of the public and those directly affected by policies”. ECNI, “Section 75”, n. 11 above, p. 41.

45 The tripartite obligation is borrowed from H Shue, *Basic Rights: Subsistence, affluence and US foreign policy* (Princeton, NJ: Princeton UP 1996).

46 Ordinary legal provision may equally permit access to the courts in a variety of scenarios.

47 These are only some objections to making socio-economic rights justiciable. Due to space constraints, the article will not revisit other issues about the justiciability of social and economic rights which have already been well documented in several scholarly writings. For a general overview, see Baderin and McCorquodale, *Economic, Social and Cultural Rights*, n. 7 above; Haysom, “Constitutionalism”, n. 7 above; M Pieterse, “Coming to terms with judicial enforcement of social and economic rights” (2004) 20 *South African Journal on Human Rights* 383–417.

48 J Waldron's writings include: “A right-based critique of constitutional rights” (1993) 13(1) *Oxford Journal of Legal Studies* 18–51; “The core of the case against judicial review” (2006) 115 *Yale Law Journal* 1346–406; *Democracy and Disagreement* (Oxford: Clarendon Press 1999); “Taking group rights carefully” in G Huscroft and P Rishworth (eds), *Litigating Rights* (Oxford: Hart 2002).

49 R Dahl, *Democracy and its Critics* (New Haven: Yale UP 1989).

50 Waldron, “A right-based critique”, n. 48 above, at 28.

51 S Gardbaum, “The new commonwealth model of constitutionalism” (2001) 49 *American Journal of Comparative International Law* 707–60, at 740.

facilitating governance by the people for the people, embellishing judicial authority to this degree is clearly “counter-majoritarian”⁵² and, as such, can be viewed as anti-democratic.

We are not persuaded by this line of argumentation. Firstly, the case is not made out that the simple presence of a redistributive element in the enforcement of socio-economic rights is sufficient to bar their justiciability. As McKeever and Ni Aolain rightly point out, redistribution is a feature of many judicial decision-making contexts from tort damages to competition law.⁵³ While acknowledging that the potential redistributive element for social and economic rights may be greater, the fact that the courts are already involved in a range of issues⁵⁴ which have important resource implications makes their role in socio-economic cases more tenable. Secondly, the anxiety underpinning usurpation arguments is rooted in a traditional and dated understanding of the doctrine of separation of powers. According to this view, the legislature makes the law, the executive implements the law and the judiciary applies and enforces the law. We argue that this overly simplistic conventional analysis actually represents a misunderstanding of democracy in practice and does not reflect reality. Realpolitik demands countenancing and facilitating the operation of a “pragmatic mixture of functions”.⁵⁵ Such “mixture” and blending of functions per se lacks purchase in arguing for the exclusion of social and economic rights from the reach of the courts, thereby reducing them to the status of poor cousins, inferior and distinguishable from civil and political rights where the court’s reach is staunchly defended as key to the democratic process. This point was noted in the South African case of *First Certification Judgment*:

A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that, by including social and economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers . . . The fact that social and economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.⁵⁶

Recognising the justiciability of socio-economic rights does not preclude an acknowledgment that they fall along a “justiciability spectrum”.⁵⁷ Socio-economic rights do not have the degree of self-execution displayed by other rights. Rather an obligation is imposed on states to ensure they take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of these rights by all appropriate means, including particularly the adoption of legislative and other measures. The fact that states are enjoined simply to create programmes progressively to realise socio-economic rights and to ensure that basic needs receive a degree of legislative priority dilutes a further

52 This phrase was coined by Professor Bickel and has set out the contours of the debate in A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American politics* (New Haven: Yale UP 1986). See B Friedman, “A history of the countermajoritarian difficulty: part one – the road to judicial supremacy” (1998) 73 *New York University Law Review* 333–433.

53 G McKeever and F Ni Aolain, “Thinking globally, acting locally: enforcing socio-economic rights in Northern Ireland” (2004) 2 *European Human Rights Law Review* 158–80, at 161. See also J King, “The pervasiveness of polycentricity” (2008) *Public Law* 101–24.

54 For example, claims in tort, equality and contract.

55 B Neuborne, “Judicial review and separation of powers in France and the United States” (1982) 57 *New York University Law Review* 363–442, at 370–1.

56 *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 77–8.

57 D Brand, “Introduction to socio-economic rights in the South African Constitution” in D Brand and C Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria: Pretoria UP Law Press 2006), p. 22.

anxiety in respect of the implications of justiciability of social and economic rights. A demand for social and economic rights is not a demand for state handouts. On the contrary, the demand is for government to put in place special policies and, where appropriate, legislative arrangements to facilitate access to such rights. As Fabre rightly notes:

The point of having constitutional social rights protected by the judiciary is not to substitute judicial policy-making for governmental policy-making: it is to remedy violations of rights resulting from bad government policy-making.⁵⁸

Rights without a remedy are simply paper rights. If a violation of socio-economic rights results in no engagement of institutional authority or enforceable sanction, such rights are rendered at a stroke both meaningless and “toothless”.⁵⁹ As Porter states:

The idea that you have a right but nowhere to go for a hearing or a remedy when it is violated . . . really attacks the central place accorded to individual dignity and equality of citizenship and to rights holders as the “subjects” of rights.⁶⁰

Viewed in this way, constitutionalisation is about providing an adjudicative forum/space for individuals or groups to hold government and others to account for actions that affect their lives. The possibility of enforcement by the courts may help deter “bad government policy-making” in the first place as government will want to avoid litigation for several reasons. Firstly, having policies and other governmental provision successfully contested in the courts sends out a negative signal at both national and international level that the government is failing to uphold its constitutional obligations, thereby placing a potentially important spotlight on government inaction or failure to follow through on its commitments. This may motivate government to address proactively the unmet needs of the most vulnerable people in society. If litigation does occur, the government and state authorities will be required to give well-reasoned, public justification for social and economic policies. Whether the court ultimately finds in favour of or rejects the government’s policy, constitutionalisation helps raise the profile of the need for effective enforcement and ensures public power accountability through government “being kept on its toes”⁶¹ as the subject of the scrutiny of justification.

Another important factor to note, and one which is demonstrated by the South African experience to date, is that the courts have potential to issue non-adjudicatory remedies as well as adjudicatory ones. In so doing, by “creat[ing] their own competence”,⁶² the judiciary can limit its own role to allow detrimentally affected people and communities to be involved in a process of dialogue with government officials. This is potentially empowering of civil society organisations and representative activist groups. Constitutionalisation, therefore, need not result in a “constitutional gag” and/or a “foreclosure of issues”⁶³ as argued by opponents of constitutional social rights, but can proactively complement and supplement equality mainstreaming by placing an emphasis on dialogue. A combination of both

58 C Fabre, *Social Rights under the Constitution: Government and the decent life* (Oxford: Clarendon Press 2000), p. 178.

59 M Tushnet, “Social welfare rights and the forms of judicial review” (2003–04) 82 *Texas Law Review* 1894–919, at 1901.

60 A Nolan, B Porter and M Langford, “The justiciability of social and economic rights: an updated appraisal”, prepared for the Human Rights Consortium, Belfast, November 2005, p. 5 (on file with the authors).

61 K Asmal, “Designing a Bill of Rights for a diverse society”, speech to Chatham House, London, 26 September 2007, British Irish Rights Watch, available at www.birw.org/BOR%2010.html.

62 P Macklem and C Scott, “Constitutional ropes of sand or justiciable guarantees?” (1992) 141 *University of Pennsylvania Law Review* 1–148, at 35–6.

63 S Holmes, *Passions and Constraint: On the theory of liberal democracy* (Chicago: University of Chicago Press 1995), pp. 10 and 202; and S Holmes, “Gag rules or the politics of omission” in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge UP 1988), pp. 19–58.

constitutionalisation and mainstreaming can, therefore, help contribute to the notion of deliberative and participative democracy referred to earlier.

Viewed in this way, constitutionalisation disputes the merit in traditional steadfast liberal adherence to the benefits of parliamentary sovereignty. Constitutionalising can make for a more dynamic and vibrant interaction between organs and aspects of governance, which, in itself, is potentially transformative and facilitative of transition from an unequal to a more just and equal society. This may be an uncomfortable conclusion for those of the “democratic positivist”⁶⁴ school of thought. However, on the basis that traditional and historic assumptions about equality have manifestly not delivered an equal society, locally or globally, it is time to reconceptualise the notion of constitutionalisation so the focus is not on the traditional doctrine of parliamentary sovereignty. Rather, constitutionalisation should be conducted more fully to emphasise and establish the responsibilities of governments in their relationship with citizens and to help ensure that those who most need protection and the facilitation of their active agency are not denied their most basic rights: dignity and equality including “equality of citizenship”. Characterised in this way, constitutionalisation is about enhancing democracy and accountability as courts, in their role as arbiter of the rights-based relationship between government and citizens, can assist in a functional and concrete way in ensuring the needs of the most disadvantaged citizens are met. For those who are not convinced that courts are the most appropriate institution to adjudicate socio-economic rights claims, we argue that we can and should move beyond the highly polarised and increasingly stale debate as to which institution is best – be it parliament or court – that has heretofore dominated the discourse on constitutionalisation.⁶⁵ Rather, as Porter suggests, the debate should be about exploring and creatively investigating how courts might usefully enhance capacity to deliver results in this area, and/or how courts might be assisted by other institutional actors including parliament in performing an adjudicative role⁶⁶ which enhances the democratic experience of all concerned.

Strengths and weaknesses of mainstreaming and constitutionalisation as tools for delivering equality

The foregoing discussion posits equality mainstreaming and the constitutionalisation of socio-economic rights as viable tools to address inequality. However, this is no unqualified panacea claim. Both tools bring their own conundrums and challenges. We have not sought in this article to provide a full overview of equality mainstreaming and s. 75. Readers

64 M Hunt, “Reshaping constitutionalism” in Morison et al., *Judges*, n. 8 above, p. 468.

65 This debate has been referred to by Hunt as “democratic positivism” and “liberal constitutionalism”: *ibid.*, p. 68. As noted earlier, Jeremy Waldron and Robert Dahl are “democratic positivists” as they are concerned with courts having the final say on the meaning of rights and having the power of judicial review. “Liberal constitutionalists” include Ronald Dworkin who argues that courts should be the final arbiters of rights. See generally, R Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard UP 1977); *Freedom’s Law* (Cambridge, Mass: Harvard UP 1996); *Law’s Empire* (London: Fontana Press 1986). For some of the most influential essays on the continuing debate between constitutionalism and democracy, see R Bellamy (ed.), *The International Library of Essays in Law and Legal Theory: Constitutionalism and democracy* (Aldershot: Ashgate 2009).

66 Nolan et al., “The justiciability”, n. 60 above.

can avail of fuller description and critique in a number of previous reports/reviews.⁶⁷ In this paper, we seek to concentrate on only those features underpinning s. 75 that have been particularly problematic.

Writing in 2000, Livingstone, Osborne, Wilford and Wilson stated that s. 75:

is unable to address the substance of inequality rather than the processes in which public authorities engage. It will not matter if a range of inequalities in Northern Ireland remain [sic] entirely unchanged by [s.] 75 – as, in large measure, they probably will. Equality schemes will still be accepted by the Equality Commission or, if passed upwards, by the Northern Ireland Secretary, as long as public bodies go through the requirements of schedule 9 of the act [sic]. Schedule 9 . . . focuses entirely on the processes on which compliance is seen to depend. No substantive achievements are required at all . . . It is an administrative–bureaucratic instrument, rather than being policy-driven, and considerations of effectiveness and efficiency have hardly figured in its elaboration.⁶⁸

Unfortunately, 10 years later, s. 75 is still primarily procedural in nature with little evidence showing that it produces much in the way of substantive results. In this regard, McLaughlin and Faris found that widespread “formal/thin”⁶⁹ compliance with the statutory equality duties has been achieved, in stark contrast to the almost complete implementation failure of the duty’s non-statutory precursor, the Policy Appraisal and Fair Treatment (PAFT) guidelines.⁷⁰ However, “thick” compliance, which is defined as that which engages with both the spirit and the letter of the law, has been less forthcoming.⁷¹ This finding is also supported by Osborne:

While there has been effective compliance in the fulfilling of the procedural requirements of the statutory obligations [thin compliance], something public officials are comfortable with, there is little evidence as yet that public organisations are taking mainstreaming to mean the wholesale reconsideration of how things are done both internally and in terms of how they formulate and deliver policy.⁷²

The compliance conundrum of thin being too easy and thick being too difficult accounts for much of the disillusionment with the statutory duty which developed within

67 A number of reports examining the operation of s. 75 have been carried out both by the ECNI and by several writers: ECNI, “Section 75”, n. 11 above; Faris and E McLaughlin, *The Section 75 Equality Duty*, n. 24 above; Chaney and Rees, *The Statutory Equality Duty*, n. 34 above; McCrudden, *Mainstreaming Equality*, n. 24 above; A Trotman, *Assessing the Role of OFMDFM in Contributing to the Effectiveness of Section 75 of the Northern Ireland Act* (Belfast: ECNI 2007), available at www.equalityni.org/archive/pdf/OFMDFMNIOFinRpt03071gramamend.pdf; B Dickson and C Harvey, *An Assessment of the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998* (Belfast: ECNI 2006), available at <http://www.equalityni.org/archive/pdf/CommissRole011206.pdf>; Simon Bridge Associates, *An Assessment of the Effectiveness of Section 75 of the Northern Ireland Act 1998 in Terms of the Development and Implementation of Public Policy* (Belfast: ECNI 2007), available at www.equalityni.org/archive/pdf/FinalRptImpactsPolicySimonBridge.pdf.

68 R Osborne, S Livingstone, R Wilford and R Wilson, *Equality and Institutional Change in Northern Ireland, Report to the ESRC* (London: ESRC 2000), p. 5.

69 Formal or thin compliance is defined as that which obeys the letter of the law.

70 PAFT guidelines were discretionary and were a non-statutory way of trying to secure equality outcomes. However, due to their discretionary nature, they were extensively criticised as being ineffective. See R Osbourne, R Cormack and S Shortall, “The implementation of the policy, appraisal and fair treatment guidelines” in E McLaughlin and P Quirk (eds), *Policy Aspects of Employment Equality* (Belfast: SACHR 1996).

71 Faris and McLaughlin, *The Section 75 Equality Duty*, n. 24 above.

72 R Osborne, “Progressing the equality agenda in Northern Ireland” (2003) 32 *Journal of Social Policy* 339–60, at 365.

civil society over the 2000 to 2004 period. This disillusionment seems to have extended beyond 2004 to 2008, as noted by the ECNI's final report: "The majority of the organisations (the voluntary and community sectors) indicated that in their experience any representations made to the public authorities have not affected a change."⁷³

The above findings are disappointing as equality mainstreaming process has the potential to involve groups in influencing governmental decision making with its emphasis on consultation and participation. In fact the facilitation of inclusive process and fair exchange of views is exactly why equality mainstreaming should and could be so important in ensuring substantive equality as it allows the effects of policies and laws to be benchmarked against the experience of affected groups and individuals.

Consultees now have access to organisations and individuals in a way that would not have been facilitated before the introduction of s. 75. Networks and consultative forums have been established to facilitate debate between various stakeholders. There has in theory been a significant development in what one might term the "civic dialogue" aspect of s. 75.

However, the reality paints a different story. As the above quotation from the ECNI's final report shows, the inclusion of minorities and the disadvantaged within decision-making processes does not necessarily change the substance of the decisions made nor lead to reductions in inequality and increases in equality for two reasons. First, attainment of effective rather than token inclusion is far from easy. Analyses of social partnership and other forms of participative governance have shown how a wealth of sub-processes act to limit the impact of the inclusion of the disadvantaged and to maintain privileged power relations and the status quo. These various processes can turn apparently democratic forms of governance into charades.⁷⁴

Secondly, as noted above, the restriction of mainstreaming to process rather than content means it has to be parasitical on specific policies. In order to achieve fair or meaningful equality of opportunity, it is necessary to build bridges between negative and positive equality duties, that is between freedom from unlawful discrimination on the one hand, and the enjoyment of the social minimum of socio-economic rights on the other.⁷⁵ Such rights are necessary if all citizens are to have the basic opportunity of developing the capabilities necessary for meaningful participation in the competition for advantage. In other words, rather than adopting the timid notion of equality of opportunity discussed earlier and which paradoxically is manifested in the s. 75 emphasis on procedural requirements, more emphasis should be placed on the robust understanding of equality of opportunity leading to equality of results. Given that this has not been done in the most innovative legislative attempt to secure equality to date, it is clear that mainstreaming equality alone is insufficient for the achievement of substantive equality.

This is where constitutional protection and adjudication of socio-economic rights could potentially play a role. Framing such rights in a way which places more emphasis on engaging with the effects of government policies and takes into consideration broader historical, social and economic factors, allows the reality to be addressed that certain groups are more vulnerable than others. In such circumstances, the state may be required to take positive action even if this entails expenditure of resources and/or to ensure that those who

73 ECNI, "Section 75", n. 11 above, p. 66.

74 E McLaughlin, *Equality and Social Policy: Towards a concept and practice of peaceful policy*, Equality Project Working Paper No 11 (2005), available at www.qub.ac.uk/sites/EqualitySocialInclusionInIreland-HomePage/ProjectPublications/.

75 D Millar, "What is social justice?" in N Pearce and W Paxton (eds), *Social Justice: Building a fairer Britain* (London: IPPR & Politicos 2005).

are affected by its policies are consulted and engaged. The extensive protection and judicial enforcement of social and economic rights in the post-apartheid South African Constitution make it appropriate to draw upon this experience to test the validity or otherwise of our arguments.

It is important to remember at the outset that, as is the case in Northern Ireland, the inclusion of socio-economic rights in the South African Constitution was not uncontroversial.⁷⁶ Given the inequalities and the systemic discrimination and injustices of the apartheid era,⁷⁷ the South African Constitutional Court (SACC) noted that South Africa had “great experience in constitutionalising inequality”.⁷⁸ However, despite this or arguably due to this “great experience”, the Final Constitution which was adopted in 1996,⁷⁹ includes an extensive list of social and economic rights.⁸⁰ The South African Constitution therefore affirms the indivisibility and interdependence of all rights, a fundamental principle recognised in international law.⁸¹ Some of these rights, such as the right to basic education and the right not to be refused emergency medical treatment, are directly enforceable like civil and political rights. Other rights including the right to have access to adequate housing, to health care services, sufficient food and water and social security are referred to as “access rights”. The extent of the state’s positive duties regarding these rights is qualified by three key elements: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation of these rights”; and (c) “within available resources”.⁸² As stated earlier, these qualifications take into consideration some of the concerns about making socio-economic rights justiciable. Indeed, some social activists and academics argue that the SACC has shown too much deference to the state and has adopted

76 D Davis, “The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles” (1992) 8 *South African Journal on Human Rights* 475–90.

77 Chaskalson described the apartheid era as a “wicked system of law”. See A Chaskalson, “From wickedness to equality: the moral transformation of South African law” (2003) 1(4) *International Journal of Constitutional Law* 590–609.

78 *Prinsloo v Van Der Linde and Another* 1997 (6) BCLR 756, at para. 20 (CC).

79 As part of the negotiated settlement, South Africa had an Interim Constitution for two years which came into effect in April 1994, after the first democratic elections. The Interim Constitution was drafted under the auspices of the Convention for a Democratic South Africa which was dominated by the two main political organisations, the African National Congress (an anti-apartheid group) and the National Party. The Interim Constitution was agreed upon and passed by the old parliament as the Constitution of the Republic of South Africa 200 of 1993. A Final Constitution was then adopted in 1996 (the Constitution of the Republic of South Africa 1996) and came into force in February 1997. The Final Constitution was drafted by an elected Constitutional Assembly during the tenure of the Interim Constitution. Space constraints preclude a discussion on how the controversy over socio-economic rights was overcome. For an excellent analysis of the drafting of these and other rights in both constitutions, see H Ebrahim, *The Soul of a Nation: Constitution-making in South Africa* (Cape Town: Oxford UP 1998).

80 Such rights include the right to adequate housing (s. 26), the right to have access to health services, food, water and social security (s. 27) and guaranteeing the right to education (s. 29).

81 Article 22 of the Universal Declaration of Human Rights 1948 states that rights to economic, social and cultural rights are indispensable to human “dignity and the free development of personality”. See also the preambles to both the International Covenant on Civil and Political Rights and the ICESCR respectively: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”; “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.” The indivisibility of rights was also reaffirmed by the Vienna Declaration and Programme for Action (1993), para. 5: “All Human Rights are universal, indivisible, interdependent and interrelated.”

82 Ss 24 to 29 of the Final Constitution 1996.

interpretative strategies that are designed to give too much discretion to government in implementing social rights.⁸³ These interpretative strategies have resulted from the SACC using the “reasonableness test”. In that regard, the potential of constitutionalisation of socio-economic rights to help deliver substantive equality may be limited, something which will now be explored through the examination of a necessarily select list of South African socio-economic cases.

Unsurprisingly, given that under apartheid the white minority enjoyed better access to housing, health care, education and other services than the black majority,⁸⁴ the SACC has heard a series of cases concerning housing and forced evictions. The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others*⁸⁵ (hereinafter the *Berea* case) is an apt illustration of how a legal approach can help supplement a non-legal approach. Briefly, the case concerned the City of Johannesburg applying for an order of eviction in respect of 400 residents (including men, women and children) of inner-city buildings on the basis that the living conditions were both unsafe and unhealthy. As no alternative accommodation had been offered, the evictions would most likely result in the evictees being homeless. They therefore resisted the eviction claiming that the city’s housing policy violated s. 26 of the constitution – the right to adequate housing. The case was eventually appealed to the SACC. Adopting a creative and innovative approach, before the SACC heard the case, it ordered both parties “to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions”.⁸⁶ Following this court order, an agreement was reached between both parties which resulted in over 400 residents being temporarily relocated without forced eviction. Furthermore, it has been reported that the new buildings are less hazardous as they have water, electricity and sanitation facilities.⁸⁷

Unlike the tokenistic approach to consultation adopted in the Northern Ireland incarnation of equality mainstreaming, the *Berea* case shows how dialogue and engagement with the affected communities arising from the judicial enforcement and implementation of socio-economic rights resulted in tangible benefits for the rightsholders. With the emphasis on participation, the concept of deliberative/participatory democracy, referred to earlier, has been brought one step forward by constitutionalisation and court enforcement of socio-economic rights.

The judgment is also a landmark ruling as it shows that the courts can utilise non-adjudicatory remedies, to ensure that the state fulfils its constitutional obligations, this without encroaching too much on the legislature and/or the executive. In so doing, this approach helps to ensure that the formulation and articulation of policies and law are not the sole preserve of a particular branch of government or other power elite within society. Rather, through the SACC’s encouragement of dialogue between the parties, the SACC’s

83 M Pieterse, “Possibilities in the domestic enforcement of social rights: contemplating the South African Experience” (2004) 26(4) *Human Rights Quarterly* 882–905; and S Liebenberg, *Needs, Rights and Transformation: Adjudicating social rights*, Working Paper No. 8 (New York: Center for Human Rights and Global Justice, New York Law School 2005), available at www.nyuhr.org/docs/wp/Liebenberg%20-%20Needs,%20Rights%20and%20Transformation.pdf.

84 K Govender, “Attempting to achieve substantive equality in one of the most unequal societies in the world: the South African experience” (paper presented at NICEM’s Annual Human Rights and Equality Conference, Belfast, October 2005), p. 5 (on file with the authors).

85 (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008).

86 *Ibid.*, para. 12.

87 H Moray et al., “Victory for engagement in relocation from San Jose”, *Business Day*, 9 September 2008, quoted by C Mbazira, *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* (Pretoria: Pretoria University Law Press 2009), p. 176.

approach to constitutional rights adjudication usefully remedied socio-economic inequalities by ensuring that the process of furthering equality is a “shared project”.⁸⁸ Focusing on rightsholders and what is at stake for them as far as dignity and equality are concerned diminishes the worry around which organ of government should deliver. This shift in focus has had two positive results. One, it has helped to ensure that rather than closing down the debate about rights or hiving them off to a “rarefied court”,⁸⁹ constitutionalisation can help bridge the gap between the government and the governed, thereby reducing the myths that usually come with the traditional understanding of constitutionalisation. Secondly, as Christiansen eloquently states, when a court order supports the work of popular movements, non-governmental organisations and poverty activists, it helps to support the “further realization of social justice” with limited judicial involvement and “very beneficially, coordinates cause lawyering and broader popular movement”.⁹⁰

Arguably, one of the reasons why participation was more effective in the *Berea* case than under equality mainstreaming as played out in Northern Ireland is the fact that, following a court order, the state authorities were *constitutionally required* to consult and negotiate with the affected communities. This kind of gravitas is not achievable by virtue of the enforcement mechanisms underpinning s. 75. As noted earlier, one of the unique features of s. 75 is that the remedy for failure to mainstream adequately is not through litigation but via the political domain. Before a complaint enters the political arena, the primary body responsible for the enforcement and implementation of s. 75 is the ECNI. The ECNI can initiate two types of investigations: an investigation of a complaint by an individual who claims to have been directly affected by the failure of a public authority to comply with its approved equality scheme⁹¹ and an investigation initiated by the ECNI where it believes that a public authority may have failed to comply with its approved equality scheme.⁹²

One organisation, the CLC, which has taken complaints to the ECNI regarding the introduction of pieces of legislation, found the process of the ECNI’s intervention to be “unduly long and drawn out”.⁹³ While the CLC opines that the majority of delays were and continue to be caused by procedural matters, a point of concern is that these “delays have often resulted in loss of any remedy where there is a suspected breach of an approved Equality Scheme”.⁹⁴ Even when there has been a breach of s. 75, there are extremely limited sanctions following the outcome of an investigation. These result in either a referral to the Secretary of State or laying the report before the Northern Ireland Assembly. The latter happens if the public authority is a government department. The ECNI views itself as “lack[ing] teeth”⁹⁵ in both instances. As it is “given no power to direct a public authority to take any action . . . the Commission appears fairly powerless in this area”.⁹⁶ This powerlessness has been further exacerbated by the High Court holding that the ECNI had erred in its handling of a complaint by the CLC which challenged the introduction of Anti-Social Behaviour Orders (ASBOs) in Northern Ireland alleging a breach of the Northern

88 C Harvey, “Protecting the marginalized” in Morison et al., *Judges*, n. 8 above, p. 530.

89 F Klug, “The long road to human rights compliance” (2006) 57(1) *NILQ* 186–204, at 201.

90 E Christiansen, “Using constitutional adjudication to remedy socio-economic injustice: comparative lesson from South Africa” (2008) 13 *Journal of International Law and Foreign Affairs* 369–405, at 399.

91 Sch. 9, para. 10 of the 1998 Act

92 Sch. 9, para. 11 of the 1998 Act. The ECNI has completed eight such investigations. See ECNI, “Section 75”, n. 11 above, p. 54.

93 CLC, “Response”, n. 39 above, p. 9.

94 *Ibid.*

95 ECNI, “Section 75”, n. 11 above, p. 55.

96 Dickson and Harvey, *Assessing the Role of the Equality Commission*, n. 67 above, pp. 96–7.

Ireland Office's (NIO) equality scheme.⁹⁷ The Court held that the CLC, was not "directly affected" by a breach of an equality scheme by the NIO.⁹⁸ This restrictive interpretation has important implications for the meaningful and effective implementation of s. 75 as representative bodies are not permitted to make a complaint on behalf of their client base. This, as the CLC states:

undermines the effectiveness of the Commission's complaints procedures and consequently the effectiveness of section 75 in its entirety. We do not believe that it was the intention of section 75 that paragraph 10 complaints could only be taken by individuals. This is particularly the case given the lack of public knowledge of section 75, the complexity of the processes which surround it and the vulnerability of some of the section 75 categories, such as children and young people.⁹⁹

The effectiveness of s. 75 is also undermined through the fact that not all policies are subject to screening. As indicated earlier, public authorities can "screen out" those policies and practices which, in their opinion, do not need to be made impact-assessed. Furthermore, there has been a generalised attempt by the Northern Ireland government departments to exempt what they describe as "high level policy"¹⁰⁰ from the demands of s. 75. This has had obvious implications for the legislation to realise fully its potential.¹⁰¹ The fact that these policies tend to have the greatest impact on the Northern Ireland public is precisely the reason why these very policies need to be subject to more fulsome scrutiny and regulation. The ECNI has stated it will provide advice to government departments to promote clarity on an approach to EQIA regarding high-level policies.¹⁰² While we welcome this long overdue advice, arguably, if those senior "high-level" decision makers were required to give well-reasoned, public justification for their decisions, as would happen if rights such as economic and social rights were to be constitutionalised, this could potentially serve to enhance public power accountability as well as more fully protecting the most vulnerable from unjust and unfair policies.

The South African *Grootboom* case¹⁰³ is another case with strong resonance for constitutionalising socio-economic rights in Northern Ireland. This concerned the right to housing for squatters. The SACC held that the government had failed to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the constitutional right to have access to adequate housing. The government's housing policy in this respect was "unreasonable" and therefore unconstitutional. Close scrutiny of the government's housing programme resulted in the government being restrained from issuing eviction orders. Thus, the SACC's judgment helped prevent large-scale homelessness. That said, compliance with the judgment was far from efficient as, four years after the judgment, the living conditions of members of the plaintiff class were

97 *In the Matter of an Application for Judicial Review by Peter Neill* [2006] NIQB 66.

98 The ECNI has noted that the court's judgment has influenced the ECNI's interpretation of "directly affected". ECNI, "Section 75", n. 11 above, p. 54.

99 CLC, "Response", n. 39 above, p. 10.

100 High-level policies, such as the development of government's budget and priorities, are those which tend to have the greatest impact on the Northern Ireland populace.

101 The ECNI has noted that it "will as a matter of priority, provide targeted and detailed advice across government departments to ensure clarity on equality impact assessment of high level policies". ECNI, "Section 75", n. 11 above, p. 39.

102 *Ibid.*, p. 45.

103 *South Africa v Grootboom* 2001 (1) SA 46 (CC). Other seminal eviction cases are *President of South Africa & Others v Modderklip Boerdery & Others*, Constitutional Court of South Africa, Case CCT 20/04, unreported judgment of 13 May 2005 and *Port Elizabeth Municipality v Various Occupiers* (1) 2005 SA 217 (CC).

similar to those prior to the judgment.¹⁰⁴ Furthermore, the judgment made no reference to the necessity to subject the housing policy to further review. As one report stated: “we won the championship, but where’s the trophy?”¹⁰⁵ On this view, a pyrrhic victory was achieved. This shows that, even where socio-economic rights are judicially enforceable, there are still numerous challenges in securing these rights in practice – an area where effective equality mainstreaming processes could clearly assist.

A later South African case, involving the right to access health care (the *TAC* case),¹⁰⁶ dealt with overcoming some of these challenges. Following a searching analysis of the government’s justification in refusing to provide a drug, nevirapine, that would prevent mother-to-child transmission of AIDS in public hospitals, the SACC rejected the government’s reasons as unreasonable and unconstitutional. Unlike a previous health care case, the *Soooramoney* case,¹⁰⁷ the SACC adopted a more robust and less deferential approach and held that resources were available.

In the *TAC* case, the SACC’s orders¹⁰⁸ had a direct and immediate impact on the enjoyment of socio-economic rights by hugely vulnerable people. As such it is a stellar example of how constitutionalisation can help benefit the quality of lives of the most marginalised. As Geoff Budlender states:

Many people see the TAC case as a model in a way which has a real impact on people’s lives. The TAC case has literally saved the lives of very many thousands of kids. That destroys the arguments of those who say these are just paper rights and have no value.¹⁰⁹

However, a less welcome aspect of the judgment was the SACC’s acknowledgment that s. 27(1)¹¹⁰ would never “give rise to a self-standing and independent positive right”.¹¹¹ This aspect of the judgment has been criticised as causing the “most damage to the vindication of social rights”.¹¹² To a certain extent, while we understand why some would find this particular aspect of the judgment problematic, the SACC is rightly concerned not to cross

104 M Tushnet, “Social welfare rights”, n. 59 above, at 1905.

105 Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, challenges and strategies* (Geneva: COHRE 2003), p. 9, available at www.cohre.org/library/Litigating%20ESCR%20Report.pdf.

106 *TAC (Treatment Action Campaign) v Ministers of Health* 2002 (10) BCLR 1033 (CC).

107 *Soooramoney v Minister of Health (KwaZulu-Natal)* (CCT32/97) 1998 (1) SA 765 (CC). This case concerned a terminally ill diabetic who was denied access to a renal dialysis machine that would have prolonged his life. The hospital had adopted a policy where terminally ill patients were given lower priority than those who had greater chances of surviving. The applicant challenged this policy arguing that his right to health and emergency medical treatment had been violated. Where resources are scarce, the SACC held that the government policy was consistent with the constitutional right to health care and emergency treatment.

108 The orders included directing the government to remove the restrictions on the distribution of the drug to extend the nevirapine programme throughout the entire country and the state was obliged to make provision if necessary for counsellors in hospitals and clinics where the programme was not in place: *TAC (Treatment Action Campaign) v Ministers of Health* 2002 (10) BCLR 1033 (CC), para. 765.

109 Interview with Geoff Budlender in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights*, n. 105 above, p. 98.

110 S. 27(1) reads: “Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

111 *TAC (Treatment Action Campaign) v Ministers of Health* 2002 (10) BCLR 1033 (CC), para. 39.

112 M Pieterse, “Possibilities”, n. 83 above, at 898. Pieterse and other writers have debated the SACC’s rejection of the “minimum core standard” which has developed in international law. See D Davis, “Adjudicating the socio-economic rights in the South African Constitution: towards ‘deference lite’?” (2006) 22 *South African Journal on Human Rights* 301–27; and Liebenberg, *Needs, Rights and Transformation*, n. 83 above.

the constitutional Rubicon when it comes to dealing with delicate and sensitive choices found in socio-economic jurisprudence. That said, it is important that courts do not, as the Canadian Supreme Court has stated:

carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult . . . [to do so] would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.¹¹³

Although there is risk that if courts do not adopt a robust approach and are deferential to the legislature, it may well “diminish the role of courts in the constitutional process”, as the South African experience has shown, the process of constitutionalisation has at least afforded victims a forum for a hearing and potentially a remedy when a right is violated. This finding is, of course, qualified in that sometimes remedies do not necessarily result in the immediate amelioration of socio-economic conditions. The fact that socio-economic jurisprudence has produced somewhat of a mixed bag in these terms simply reflects the reality that judges are just as capable of making narrowly restrictive decisions (such as *Soobramoney*) as progressive ones (such as *TAC* and *Berea*) in the complex area of social and economic rights. This is no more than a trend which is evident in all aspects of the law and does not, therefore, form a legitimate basis for rejecting the role that constitutionalisation and the subsequent adjudication of socio-economic rights can play in advancing equality.

THE PROPOSED CONSTITUTIONALISATION OF SOCIAL AND ECONOMIC RIGHTS IN A BILL OF RIGHTS FOR NORTHERN IRELAND

There are still some sectors of opinion, especially within the political arena, strongly opposed to the constitutionalisation of socio-economic rights in a Bill of Rights for Northern Ireland. Interestingly, this appears less linked to the issues explored above and more to a continuing allegiance to the “democratic positivism” school of thought discussed earlier.

The Northern Ireland Human Rights Commission (NIHRC), the statutory body responsible for consulting and advising the British government on the content of a Bill of Rights for Northern Ireland, finally submitted its advice to the Secretary of State for Northern Ireland on 10 December 2008.¹¹⁴ Within this advice, the NIHRC has proposed an extensive list of socio-economic rights.¹¹⁵ This decision has not been uncontroversial.¹¹⁶ Suffice, for the purposes of this paper, to state that some of the controversy has arisen from the ambiguous nature and lack of guidance of the Agreement and s. 69(7) of the 1998 Act which simply states:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill

¹¹³ *RJR-MacDonald Inc. v Canada (AG)* [1995] 3 SCR 199, para. 136.

¹¹⁴ NIHRC, “A Bill of Rights”, n. 5 above.

¹¹⁵ The right to health, the right to an adequate standard of living, the right to accommodation, the right to work, environmental rights, the right to social security: *ibid.*, pp. 44–50.

¹¹⁶ For an analysis of the controversy surrounding the inclusion of socio-economic rights from the period 2000–05, see the report by S Livingstone, R Murray and A Smith, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with comparisons from South Africa* (London: Nuffield Foundation, February 2005), pp. 110–12.

of Rights for Northern Ireland. Among these issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.¹¹⁷

The Bill of Rights consultation process has been dogged in respect of the interpretation of what precisely the Agreement means. One of the most problematic phrases has been “the particular circumstances of Northern Ireland”¹¹⁸ and the lack of consensus both within and outside the NIHRC on its exact meaning has taken its toll on the constructiveness of the project undertaken. In 2003, a former NIHRC commissioner noted: “I wouldn’t say there is agreement on it . . . I think we all have different understandings or conceptions of what that is about.”¹¹⁹ A number of years later, there still seems to be “different understandings or conceptions”. This is aptly illustrated as the two then commissioners (Lady Daphne Trimble and Jonathan Bell) who dissented from the NIHRC’s final Bill of Rights advice opined that, by including socio-economic rights alongside other rights and issues, the NIHRC had gone beyond its remit.¹²⁰ The recent debate in the Northern Ireland Assembly¹²¹ is also indicative that some politicians, especially from the Unionist political tradition, oppose the NIHRC’s advice, arguing that it has exceeded its remit by including socio-economic rights: “It [the NIHRC] was not mandated to devise a new bill of rights or to change our socio-economic context through the creation of numerous new rights.”¹²² Supporting this argument, another Unionist

117 Strand 3, para. 4 of the Human Rights section of the Agreement.

118 For an overall analysis of the different elements of the NIHRC’s mandate and other problematic phrases of the Agreement on the Bill of Rights, see A Smith, “The drafting process of a Bill of Rights for Northern Ireland” (2004) *Public Law* 526–36.

119 Interview with a former commissioner, April 2003.

120 Submitting evidence to the Northern Ireland Affairs Committee (NIAC), Lady Trimble in response to a question that the NIHRC had gone beyond the proposals in the Agreement, stated: “I do think that that is the case. If you look at the proposals around the socio-economic rights, the areas that those are addressing are by and large common societal problems right across the UK; if you look at housing, that is a problem right across the UK, it is not specific to Northern Ireland; ditto the environment, and rights to social security. So it seems to me to be rather difficult to come up with a proposal that there should be rights around these areas in Northern Ireland when there are not similar rights in the rest of the UK.” Minutes of Evidence Taken before the NIAC, A Bill of Rights for Northern Ireland, House of Commons, Lady Trimble, available at www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/uc360-ii/uc36002.htm. The NIAC is conducting a short inquiry into the process towards a Bill of Rights for Northern Ireland: see www.parliament.uk/parliamentary_committees/northern_ireland_affairs/niac0809pn15.cfm. In March 2010, Lady Daphne Trimble resigned from the NIHRC to take part in the recent parliamentary election and Jonathan Bell also resigned to take up his MLA (Member of the Assembly) position.

121 It is interesting to note that the Northern Ireland Assembly had a similar debate in 2001 when politicians were divided as to whether or not the NIHRC had exceeded its remit. Like the 2009 debate, the Unionist politicians argued that socio-economic issues should not have been included in the 2001 draft Bill of Rights document (NIHRC, “Making a Bill of Rights”, n. 5 above) whereas the Nationalist political parties were in favour of such rights. See Northern Ireland Assembly, *Official Report* (2001–02), 25 September 2001.

122 Northern Ireland Assembly, Mr Kennedy, Private Members’ Business of the NIHRC, 3 November 2009, at 79, available at www.niassembly.gov.uk/record/reports2009/091103.pdf. The two commissioners who dissented from the NIHRC’s final advice represent the two main Unionist political parties: Lady Trimble (the Ulster Unionist Party) and Jonathan Bell (the Democratic Unionist Party).

politician stated, “[the words of the phrase ‘the particular circumstances of Northern Ireland’] do not open the door to economic, social and cultural rights”.¹²³

The NIO’s long-awaited consultation on the NIHRC’s advice also shares this view. The consultation paper states that socio-economic rights do not relate to Northern Ireland specifically but, if they are to be considered, should be addressed not in terms of a regional debate but in a national discussion on a possible UK Bill of Rights and Responsibilities which was launched by the government’s Green Paper in March 2009.¹²⁴ In this paper, the government’s position on socio-economic rights is very clear. Decision making in this regard should remain with Parliament, not the courts, as this would impinge “on the principle of democratic accountability”¹²⁵ as well as the separation of powers between the three branches of government (the judiciary, the executive and the legislature). The government’s refusal to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) is also a further indicator of its opposition to making socio-economic rights justiciable.

We find both the government’s and the Unionist arguments problematic for several reasons. Firstly, their opposition to the inclusion of socio-economic rights ignores the overwhelming cross-community support in Northern Ireland for their inclusion.¹²⁶ Secondly, poverty is without doubt a very particular and increasingly documented feature of “the particular circumstances of Northern Ireland”. There is evidence that as a result of the conflict, people in Northern Ireland suffer from high levels of social deprivation, including poor health standards, reduced life expectancy rates and high levels of unemployment.¹²⁷ The Poverty and Social Exclusion Survey for Northern Ireland found “on a mixed measure of income and deprivation, that 37.4% of children in Northern Ireland live in households experiencing poverty” with, as a further Northern Ireland-specific feature “higher poverty rates . . . to be found in families who define themselves as ‘Irish’ or ‘Catholic’”.¹²⁸ The Northern Ireland Anti-Poverty Network has gone so far as to comment in evidence to the UK Parliamentary Select Committee on Work and Pensions that “child poverty levels in Northern Ireland are a skeleton in the cupboard that has been ignored on a national level”.¹²⁹ In fact, having examined evidence on poverty and particularly child poverty in Northern Ireland in 2004, the UK Parliamentary Select Committee on Work and Pensions

123 Northern Ireland Assembly, Miss McIlveen, Private Members’ Business on the NIHRC, 3 November 2009, at 79, available at www.niassembly.gov.uk/record/reports2009/091103.pdf. A similar debate also occurred in the Bill of Rights Forum which comprised of civil society and political parties. The forum was set up in December 2006 to assist the NIHRC in providing advice to the British government on a Bill of Rights for Northern Ireland. The forum produced its report to the NIHRC in March 2008, “Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland”, available at www.billofrightsforum.org/bill_of_rights_final.pdf. For the discussion around socio-economic rights, see pp. 78–102.

124 Ministry of Justice, *Rights and Responsibilities: Developing our constitutional framework* (London: MoJ, March 2009), p. 43, available at www.justice.gov.uk/publications/docs/rights-responsibilities.pdf.

125 Ibid.

126 Hanratty notes that “90% of people here [Northern Ireland] think that the Bill should protect social and economic rights”; K Hanratty, “Time to get involved”, *Fortnight*, July/August 2009, p. 8. A number of surveys have been conducted indicating a high level of cross-community support for the inclusion of social and economic rights. See NIHRC, Opinion Poll MRHI, 2004.

127 NIHRC, “Making a Bill of Rights”, n. 5 above, p. 84.

128 P Hillyard, G Kelly, E McLaughlin, D Patsios and M Tomlinson, *Bare Necessities: Poverty and social exclusion in Northern Ireland* (Belfast: Democratic Dialogue 2003), pp. 32 and 46, available at www.ofmdfmi.gov.uk/bare-necessities.pdf.

129 Memorandum submitted by the Northern Ireland Anti-Poverty Network to the House of Commons Select Committee on Work and Pensions, September 2003, available at www.publications.parliament.uk/pa/cm200304/cmselect/cmworpen/85/85we24.htm.

was strongly of the view, that “*special measures* [our emphasis] are needed to bring Northern Ireland into line with household income levels in other parts of the UK”.¹³⁰

Research recently conducted by the Committee on the Administration of Justice (CAJ) is also instructive in this regard, with evidence pointing to the fact that poverty indices in the most deprived wards in Belfast actually show an increase in poverty over the past number of years.¹³¹ A recent report for the Office of First Minister and Deputy First Minister (OFMDFM) highlighted in particular the levels of fuel poverty faced by lone parents, revealing that lone parents in Northern Ireland on average spend 56 per cent of their income on fuel compared with 26 per cent in the rest of Britain.¹³²

In 2009, persistent poverty in Northern Ireland was found to be more than double that in Great Britain with the problem of child poverty particularly entrenched and posing even greater challenges than elsewhere in the UK.¹³³ Northern Ireland’s most disadvantaged children and young people live in communities that face social exclusion and still experience violence that is the legacy of the conflict. Furthermore, according to Horgan and Monteith, disadvantaged young people are at risk of being attracted to paramilitary groups if society does not address their social exclusion.

The corrosive effect that growing up in persistent poverty can have – in particular the evidence that such children are more likely to be suspended or excluded from school and be in trouble with the police – has added significance [our emphasis] in a society emerging from conflict. The interaction of poverty with the legacy of the conflict makes it both more difficult to end high levels of worklessness and more acceptable to use violence, including violence for political ends, than in other parts of the UK and Ireland. This puts the most socially excluded young people at particular risk.¹³⁴

The recent upsurge in dissident republican paramilitary activity demonstrates that this is no mere paper risk. Another knock-on effect of the coincidence of poverty and conflict legacy is inordinately high levels of mental ill health. The Department of Health, Social Services and Public Safety estimates “that prevalence figures for mental health problems are 25% higher than in England”.¹³⁵

Even this brief and non-exhaustive overview provides strong evidence that Northern Ireland suffers particularly from certain highly entrenched forms of poverty and the increasingly emerging links between poverty, conflict and the legacy of conflict attest for the need to address socio-economic rights as very firmly linked to the particular circumstances of Northern Ireland. Therefore, to consider socio-economic rights as part of the debate over a UK Bill of Rights, rather than solely concentrating on the Northern Ireland debate as the NIO proposes, is misleading and perturbing for a number of reasons. Firstly, such an approach fails to take account of the above *prima facie* evidence of the need

130 House of Commons Select Committee on Work and Pensions, *Child Poverty in the UK 2nd Report 2003–04 Session* (London: The Stationery Office 2004), available at www.publications.parliament.uk/pa/cm200304/cmselect/cmworpen/85/8502.htm.

131 CAJ, *Equality in Northern Ireland: The rhetoric and the reality* (Belfast: CAJ 2007), p. 138.

132 P Hillyard and D Patsios, *Child Poverty and Differential Rates of Household Inflation* (Belfast: OFMDFM 2009), ch. 3, available at www.ofmdfmi.gov.uk/child_poverty_and_differential_rates_of_household_inflation-2.pdf.

133 G Horgan, *Speaking Out Against Poverty: The views and experiences of children and young people in deprived areas of Northern Ireland* (Belfast: Save the Children 2009).

134 G Horgan and M Monteith, *What can we do to tackle Child Poverty in Northern Ireland?* (York: Joseph Rowntree Foundation, November 2009), p. 10, available at www.jrf.org.uk/sites/files/jrf/tackling-child-poverty-Northern-Ireland-summary.pdf.

135 *Ibid.*, p. 9.

for such rights to be part of a Northern Ireland Bill of Rights. Furthermore, the UK's Green Paper highlights the need to keep the Northern Ireland Bill of Rights discussion/process separate from that of the UK debate: "the Government does not wish the public debate about a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland".¹³⁶ As noted in the introduction to this paper, 10 years after the Agreement, Northern Ireland still does not have a Bill of Rights and, as Justice points out in its recent report on *Devolution and Human Rights*, merging the two processes/debates may stymie even further what has been a long and at times contentious process.¹³⁷ Not only would this dampen the expectations of the Northern Ireland populace, the British government would also be in breach of its international obligation as it is a requirement under the Agreement to have a Bill of Rights reflecting "the particular circumstances of Northern Ireland". The other guarantor of the Agreement, the Irish government, has also stated that the international obligation of the UK is to implement a Northern Irish Bill of Rights, not a UK Bill of Rights:

Regarding the bill of rights for Northern Ireland, I reiterate the commitment of the Government to ensure the full and effective implementation of all aspects of the Good Friday Agreement and the St Andrews Agreement. In that context, we attach importance to a specific bill of rights for Northern Ireland as envisaged in the Good Friday Agreement. The Government has consistently communicated that position in contacts with the current British Administration and with the Conservative Party Front Bench.¹³⁸

It is the responsibility of both governments to fulfil their commitments under the Agreement. If the British government and/or Irish government fail to do so, it is arguable that both governments are shying away from their duties and are guilty of shirking their responsibility.¹³⁹

Thirdly, the Agreement clearly recognises the need to deal with the economic and social inequalities in Northern Ireland.¹⁴⁰ Fourthly, both the Committee on Economic, Social and Cultural Rights and the Council of Europe have strongly recommended the inclusion of such rights in a Bill of Rights "without delay".¹⁴¹ Finally, as previously discussed, while the

136 Ministry of Justice, *Rights and Responsibilities*, n. 124 above, para. 4.38.

137 Justice, *Devolution and Human Rights* (London: Justice, February 2010), p. 22, available at www.justice.org.uk/images/pdfs/Devolution%20and%20Human%20Rights.pdf.

138 Answer of the Taoiseach in response to a question by Deputy Eamon Gilmore, 21 October 2009, Parliamentary Debates, Vol. 692, No. 3, p. 564, available at <http://debates.oireachtas.ie/Xml/30/DAL20091021.PDF>.

139 The recent political agreement, the Hillsborough Agreement, states that a working group will be set up and will submit a report by the end of March on any "outstanding issues" from the St Andrews Agreement: the Bill of Rights is one of those "outstanding issues". Within four weeks of the working group's initial report, the First Minister and Deputy First Minister will agree a programme to carry out the working group's agreed outcomes: Agreement at Hillsborough Castle, 5 February 2010, p. 21, available at www.rte.ie/news/2010/0205/niagreement.pdf.

140 The Agreement recognises that tackling economic disadvantage and promoting social inclusion are key components of building a lasting peace, p. 19.

141 E/C.12/GBR/CO/5, 22 May 2009 (Concluding Observations), para. 10. See also the committee's previous UK Concluding Observations wherein it stated: "The Committee strongly recommends the inclusion of effective protection for economic, social and cultural rights, consistent with the provisions of the Covenant, in any bill of rights enacted for Northern Ireland." See E/C.12/1/Add.795, June 2002 (Concluding Observations), paras 18, 29 and 37. Similarly, the Council of Europe Experts also recommends the inclusion of socio-economic rights recognising that "economic and social rights assist in promoting social cohesion and stability": Comments by the Council of Europe Experts on certain aspects of a future Bill of Rights for Northern Ireland (Strasbourg 2004), paras 34, 27 and 33, quoted by D Holder, "Why a Bill of Rights for Northern Ireland should include economic and social rights" (2009) 8 *NIHRC Review* 13.

separation of powers is a fundamental doctrine, it cannot and should not be used as a bar to making socio-economic rights justiciable. As the South African experience has shown, such rights are justiciable without endangering the separation of powers doctrine. The South African experience has, in fact, been drawn upon by the NIHRC in its formulation as to the progressive realisation of some of the proposed socio-economic rights. In that regard, the NIHRC's advice also reflects international and comparative constitutional law more broadly, acknowledging that such rights cannot always impose immediate obligations on states, thus diffusing some of the knee-jerk angst around the fraught issue of resources allocation. It is, however, vital, as the South African experience has illustrated, that this principle of progressive realisation be used for the effective realisation of socio-economic rights rather than to retard their advancement.

Conclusion

This article has demonstrated that the answer to the question posed in our introduction – “Are equality mainstreaming and the constitutionalisation of socio-economic rights viable tools to address inequality? – is a qualified “yes”. Such legal tools will never provide any kind of panacea as both have limitations as well as benefits. However, the use of both tools together can offer an important synergy to advance socio-economic rights in a post-conflict society. How constitutionalising is undertaken, the methodology of equality mainstreaming, and the development of effective underpinning enforcement mechanisms are of particular concern in this regard. As a first step to improving the current situation in Northern Ireland, it is important that the government ensures that the ECNI has sufficient powers to oversee the effective implementation of s. 75.

While the South African experience has been tempered by some disappointing decisions, constitutionalisation of socio-economic rights and their judicial enforcement can and have helped contribute in making the “deep scars”¹⁴² of the legacy of apartheid less visible in South African society. While constitutionalisation and adjudication have not delivered in some cases, it is nonetheless significant that through constitutionalisation of socio-economic rights, the South African government has been prevented from “backsliding”¹⁴³ on its constitutional obligations and is to some extent being “kept on its toes”.¹⁴⁴ The South African experience also makes it clear that, if socio-economic rights are excluded from a Bill of Rights, “you will be throwing a rope of sand to a drowning man”.¹⁴⁵

Returning to the proposed Bill of Rights for Northern Ireland, the NIO's consultation paper states:

A Bill of Rights which has the support of the people of Northern Ireland could play an important role in underpinning the peace, prosperity and political progress of Northern Ireland by . . . protecting those made vulnerable by the particular circumstances of Northern Ireland.¹⁴⁶

In disregarding socio-economic rights, the government is not only ignoring the widespread support from all sides of the community in Northern Ireland for the inclusion of such rights, but also advice from various international bodies. The exclusion of socio-economic rights from a Northern Irish Bill of Rights runs the risk of undermining rather than underpinning prosperity. For this and other reasons, the NIHRC has rejected the

¹⁴² *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC), para. 40.

¹⁴³ Interview with Geoff Budlender, n. 109 above, p. 98.

¹⁴⁴ Asmal, “Designing a Bill of Rights”, n. 61 above, p. 605.

¹⁴⁵ *Ibid.*

¹⁴⁶ NIO, “A Bill of Rights”, n. 5 above, p. 8.

NIO's consultation paper, a stance which is strongly endorsed and supported by the authors of this article.¹⁴⁷ As Northern Ireland embraces yet another stage of the consultation process,¹⁴⁸ we challenge the Secretary of State to ignore at his peril the views of "those made vulnerable by the particular circumstances of Northern Ireland". It behoves the government to listen to those views and respect these wishes. Failure to do so may result in a Bill of Rights, if it ever in fact comes to fruition, not having the "full support of the people of Northern Ireland". If this is the case, it "will amount to nothing more than a meaningless document consisting of empty political rhetoric".¹⁴⁹ We sincerely hope that this will not be the case.

147 NIHRC, "A Bill of Rights", n. 5 above.

148 The NIO's consultation process started on 30 November 2009 and ended on 1 March 2010. The NIHRC has criticised the limited nature of the consultation process as being "inadequate". *Ibid.*, pp. 17–27.

149 M Cowling, "Judges and the protection of human rights in South Africa: articulating the inarticulate premise" (1987) *South African Journal on Human Rights* 177–201, at 183.

Absent friends: common law constitutionalism and the Northern Ireland Bill of Rights debate

TIM CUNNINGHAM¹

PhD Student, Transitional Justice Institute, University of Ulster

The Bill of Rights debate in Northern Ireland – an overview

In November 2009, the then Secretary of State for Northern Ireland, Shaun Woodward issued a consultation paper on the way forward for a Bill of Rights for Northern Ireland.² To say that these proposals were greeted with a degree of scepticism would be something of an understatement.³ Significantly, however, the timing of the Northern Ireland Office (NIO) consultation document meant that progress on this issue was circumscribed by the dissolution of Parliament.

The new Conservative–Liberal Democrat government has given a commitment to establish a commission to investigate the creation of a British Bill of Rights that incorporates and builds on “all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties”.⁴ There is also a general commitment to continue to promote peace, stability and economic prosperity in Northern Ireland, standing firmly behind the agreements negotiated and institutions they establish.⁵

Where exactly this leaves the local Bill of Rights debate, and indeed the 2009 proposals, is therefore a matter for some conjecture. It is worth noting that, while in opposition, the Conservative Party concluded that the proposals contained in the November 2009

1 This article began as a thesis that was submitted as part of the requirements for the LL.M. in international human rights at Queen’s University Belfast. Particular thanks go to Professor Brice Dickson of QUB, my thesis supervisor; Professor Christine Bell, Director of the Transitional Justice Institute, University of Ulster; and Aileen Gilmore, Deputy Director of the Committee on the Administration of Justice; all of whom provided valuable comments on the development of this article.

2 *A Bill of Rights for Northern Ireland: Next steps* (Belfast: NIO, November 2009).

3 The consultation document has been rejected by the NIHR which has described it as an “inadequate response to what should be in a Bill of Rights for Northern Ireland”, press release, 17 February 2010, available at www.nihrc.org/. Professor Christopher McCrudden, a leading commentator on this issue, has described the proposals as “not only disappointing, but positively dangerous”, *Irish News*, 16 February 2010, p. 14, while the Committee on the Administration of Justice (CAJ) has stated that the consultation document has “generated concern and anger among a broad swathe of civil society who have been engaging in good faith in the debate and process about a Bill of Rights for Northern Ireland over the course of the past twelve years” (submission to *A Bill of Rights for Northern Ireland: Next steps*, n. 2 above, available at www.caj.org.uk/).

4 “The Coalition: Our programme for government”, Cabinet Office, Ref. 401238/0510, May 2010, www.cabinetoffice.gov.uk/409088/pfg_coalition.pdf, p. 11.

5 *Ibid.*, p. 28.

document were “very sensible” and posed questions for future debate.⁶ It is the prediction of this author that deliberations on the best way forward for protecting rights specifically within the context of the particular circumstances of Northern Ireland will continue throughout the life of this Parliament, regardless of any developments relating to a British Bill of Rights and the extension and protection of “British liberties”. It is the intention of this article to seek to inform these future deliberations.

It is worth recalling that the latest current phase of the Bill of Rights debate commenced in December 2008 when the Northern Ireland Human Rights Commission (NIHRC) submitted advice to the Secretary of State for Northern Ireland on the way forward for a Bill of Rights for Northern Ireland.⁷ This article will focus on those proposals, as well as a number of other aspects of the wider Bill of Rights debate, in order to examine the extent to which considerations of common law constitutionalism have been absent from the wider deliberations on this issue.

It is important to be clear about the purpose of this article. It is not to argue that Northern Ireland does not need a Bill of Rights – in fact this author would largely agree with the substantive proposals that the NIHRC submitted to the Secretary of State in December 2008. Neither will this article suggest that future developments within the domestic courts are likely to provide an adequate alternative to a Bill of Rights for Northern Ireland. This article will, however, argue that the extensive deliberations that have taken place as part of the wider Bill of Rights debate have largely omitted developments within the domestic courts with respect to common law rights protection. In particular, it will argue that one consequence of this omission is that the impression has been created that international human rights instruments, including the European Convention on Human Rights (ECHR) (via the Human Rights Act 1998) represent the sole remedies for those challenging an alleged human rights violation in the domestic courts.

The evolution of the Bill of Rights debate in Northern Ireland

It is first necessary to examine briefly the evolution of the Northern Ireland Bill of Rights debate in order to identify the extent of the problem. The Belfast Agreement reached in multi-party talks in 1998 mandated the new NIHRC to:

consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principle of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the European Convention on Human Rights – to constitute a Bill of Rights for Northern Ireland.⁸

6 D Grieve QC MP, Shadow Justice Secretary, “What price justice?”, lecture to the Northern Ireland Bar, 4 February 2010.

7 NIHRC, *Advice to the Secretary of State on a Bill of Rights for Northern Ireland* (Belfast: NIHRC, December 2008). While this document might be seen to have ushered in the “latest phase” of the debate, discussions about a Bill of Rights for Northern Ireland have been running since the 1970s, see e.g. *A Bill of Rights for Northern Ireland Through the Years – the views of the political parties* (Belfast: CAJ, July 2003), available at www.caj.org.uk/publications.

8 *The Belfast Agreement: An agreement reached at the multi-party talks on Northern Ireland*, Command Paper Cm 3883 (1998), Strand 6, para. 4.

The first substantive draft advice produced by the NIHRC to fulfil its mandate appeared in 2001,⁹ with a follow-up document in 2004.¹⁰ The 2001 document was largely based upon the reports of a number of working groups which comprised a range of experts tasked with identifying particular issues for attention in the proposed Bill of Rights. In addition, a working paper, *Taking Forward a Bill of Rights for Northern Ireland*,¹¹ was produced by members of the commission, in February 2005, to assist the newly appointed commissioners in assessing the progress made.

The NIHRC's work on this issue has included a range of workshops, conferences, information events and public and private meetings with organisations, individuals and political parties. From January 2006 to November 2008 alone, the NIHRC convened 54 meetings of an internal Bill of Rights Working Group and held seven weekend seminars.¹² During this period, the NIHRC also met with individual political party representatives in the Northern Ireland Assembly on 18 occasions and met with the human rights spokespersons from the major parties at Westminster.¹³ The NIHRC also met with NIO officials, the Secretary of State, UK government ministers, the Taoiseach, the Minister for Foreign Affairs and Irish government officials.¹⁴

In addition to the work of the NIHRC, thinking on this issue was also developed by a number of other elements within civil society. Following the lack of agreement around the publication of the 2004 NIHRC document, the NIO established a Bill of Rights Forum, where, from December 2006 until March 2008, 14 political representatives sat down with 14 civil society representatives to try to work out consensus proposals under an independent chair.¹⁵ The NIHRC welcomed the establishment of the forum and, while it remained independent from the process, observed the forum's proceedings.¹⁶ A final report by the forum was submitted to the NIHRC on 31 March 2008,¹⁷ and, according to the NIHRC, its deliberations "paid rigorous attention to the proposals contained in the Forum Report, with each considered in detail".¹⁸ In addition to the forum, a Human Rights Consortium was set up in 2000, again, independent of the NIHRC, which developed its own programme of activities that included research, education and lobbying. In early 2008, the consortium ran a publicity campaign to raise awareness of a Bill of Rights for Northern Ireland and the NIHRC met regularly with the consortium during this time.¹⁹

9 NIHRC, *Making a Bill of Rights for Northern Ireland: A consultation by the NIHRC* (Belfast: NIHRC 2001).

10 NIHRC, *Progressing a Bill of Rights for Northern Ireland* (Belfast: NIHRC, April 2004).

11 NIHRC, *Taking Forward a Bill of Rights for Northern Ireland* (Belfast: NIHRC 2005).

12 NIHRC, *Advice*, n. 7 above, p. 11.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid., p. 13.

17 Bill of Rights Forum (BORF), *Bill of Rights Forum Final Report: Recommendations to the NIHRC on a Bill of Rights for Northern Ireland* (Belfast: BORF 2008).

18 NIHRC, *Advice*, n. 7 above, p. 13.

19 Ibid. The Human Rights Consortium has continued to have a significant advocacy role in the Bill of Rights debate, currently organising a quite extensive publicity campaign opposing the NIO proposals issued in November 2008. See www.billofrightsnio.org/support/index.php.

The Northern Ireland Bill of Rights debate and the common law

What is significant for the purposes of this article is that, in spite of the volume of materials and discussions that these various processes generated, there has been little mention of how common law rights might assist, or indeed complement, the development of a Bill of Rights for Northern Ireland. Indeed, virtually the only references to the common law at all in the documents issued by the NIHRC in 2001, 2004 and 2008 relate to interpretation clauses.²⁰

An exception to this general trend did occur in the 2001 document which at least acknowledged the existence of one common law right and how this could be linked to the NIHRC's proposals. This document proposed a number of clauses for the Bill of Rights regarding the participation rights of children which included a requirement that:

The State shall ensure to every child the right to express his or her views freely in all matters concerning him or her. The State undertakes to consider such views and to give them due weight in accordance with the age and maturity of the child.²¹

The document went on to propose an additional clause which required that:

every child has the right to participate effectively, either directly or indirectly through an independent representative, in all proceedings affecting him or her, whether administrative or judicial, in public or private law. Every child has the right of access to the law and to legal representation.²²

The NIHRC's proposals explained that the first of the clauses above reflected the terms of Article 12 of the UN Convention on the Rights of the Child and also, significantly:

the common law principle that children with the requisite understanding may be entitled to make their own decisions on issues which directly affect them, subject to the overriding "best interests" principle.²³

The document further stated that the second clause was designed to guarantee that the principle in question:

which is already accepted in practice under the common law and under most children's legislation, is adhered to in all formal legal and administrative proceedings.²⁴

Significantly, however, by the publication of the final advice to the Secretary of State in December 2008, even this modest reference to common law principles had been omitted. The 2008 document continued to propose a separate section on children's rights, although with some modifications on the 2001 proposals. In terms of participation of children, the two clauses identified above had been replaced by a single clause which stated provisions should be drafted to ensure that:

Public authorities must take all appropriate measures to ensure the right of every child to be informed of their rights and to have his or her views respected, considered and given due regard in all matters affecting the child, taking into consideration the child's age, level of understanding and evolving capacities.²⁵

20 NIHRC, *Making a Bill of Rights*, n. 9 above, p. 93; NIHRC, *Progressing a Bill of Rights*, n. 10 above, p. 22; NIHRC, *Advice*, n. 7 above, p. 57.

21 NIHRC, *Making a Bill of Rights*, n. 9 above, p. 65.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

In relation to the explanation provided of how the NIHRC had reached its recommendation, the document merely alluded to drawing upon the authority of Article 12 of the UN Convention on the Rights of the Child, along with a reference to the fact that this provision does not appear in the ECHR.²⁶ At a stroke, therefore, what had been identified as an existing common law principle in the 2001 document had, in effect, become a proposed additional right that implicitly derived its authority solely from the UN Convention on the Rights of the Child by the time of the 2008 advice.

The common law and the Bill of Rights debate beyond the NIHRC

Looking beyond the work of the NIHRC, it is worth noting that the final report issued by the Bill of Rights Forum, which ran to some 250-plus pages, omitted any reference to the common law whatsoever,²⁷ somewhat mirroring the approach taken by civil society organisations in submitting responses to the NIHRC's consultations.²⁸

A similar approach is evident with respect to the more academic discussions which took place in relation to this issue. For example, in the Special Double Issue on the Proposed Bill of Rights for Northern Ireland of the *NILQ*, references to the common law, or indeed common law constitutionalism or judicial activism, are notable by their absence.²⁹ Harvey would appear to be the sole contributor making reference to judicial activism, but that is within the context of a single reference to the United States and the Northern Ireland Bill of Rights in comparative perspective.³⁰ Harvey does make one other reference to the judiciary, although that is within the context of his argument for a human rights court, which, he suggested, could dispel concerns in a context where "distrust of the judiciary is a fact".³¹

It is worth noting that this special Bill of Rights edition of the *NILQ* contained articles on the wider need for a Bill of Rights for Northern Ireland:³² children's rights;³³ equality issues;³⁴ issues of criminal justice;³⁵ language issues;³⁶ victims' rights;³⁷ education rights;³⁸ economic, social and cultural rights;³⁹ the implementation of a Bill of Rights;⁴⁰ and the importance of a Bill of Rights as a process.⁴¹ Certainly, looking at the materials, one might be forgiven for believing that rights protection is located exclusively within international human rights instruments.

26 NIHRC, *Advice*, n. 7 above, p. 134.

27 BORF, *Final Report*, n, 17 above.

28 NIHRC, *Summary of Submissions on a Bill of Rights* (Belfast: NIHRC, July 2003).

29 Special Double Issue on the Proposed Bill of Rights for Northern Ireland (2001) 52 *NILQ* 229–406.

30 C Harvey, "The implementation of a Bill of Rights for Northern Ireland" (2001) 52 *NILQ* 342, at 358.

31 *Ibid.*, p. 370.

32 S Livingstone, "The need for a Bill of Rights in Northern Ireland" (2001) 52 *NILQ* 269.

33 U Kilkelly, "Children's rights in the Bill of Rights: meeting or exceeding international standards?" (2001) 52 *NILQ* 286.

34 M Beirne, "Equality issues" (2001) 52 *NILQ* 296.

35 P Mageean, "Issues of criminal justice" (2001) 52 *NILQ* 303.

36 C O'Murchadha and L Reynolds, "A Bill of Rights for Northern Ireland: language issues in context" (2001) 52 *NILQ* 309.

37 B Gormally, "Victims and the Bill of Rights" (2001) 52 *NILQ* 316.

38 E Craig and L Lundy, "Education rights in the Bill of Rights" (2001) 52 *NILQ* 325.

39 L Allamby, "Economic, social and cultural rights" (2001) 52 *NILQ* 335.

40 Harvey, "The implementation", n. 30 above, at 342.

41 R Murray "The importance of a Bill of Rights in Northern Ireland as a process: comparative reflections from South Africa" (2001) 52 *NILQ* 385.

Judges and the protection of rights – a brief overview

In some senses, perhaps, the general neglect of the role of the courts in developing rights protection under the common law might be somewhat unsurprising. Writing in 2001, Harvey referred to the “fact” of distrust of the judiciary’s capacity to deliver the goods when it comes to protecting rights, something which he believed necessitated the establishment of a human rights court.⁴²

Livingstone was critical of the role of the judiciary in securing rights protection during the context of the Northern Ireland conflict and concluded that judges might not be trusted when it comes to interpreting a Bill of Rights.⁴³ Beyond the particular circumstances of the Northern Ireland conflict, Ewing and Gearty delivered an even more damning critique of the judicial role in relation to rights protection. They argued that many of the restrictions on political freedom came not from legislation but judge-made initiatives authorising the extension of executive power. They concluded that the “harsh reality is that we need to be protected by parliament from the courts”.⁴⁴

It is, perhaps, also worth noting that while a number of commentators have identified difficulties with respect to the role of the judiciary in protecting rights, a range of reasons have been suggested for those difficulties – beyond merely a natural aversion on the part of the judiciary towards rights claimants. Some commentators have argued for example that the dualist/monist structural divide has created difficulties with respect to implementing international human rights obligations at the domestic level.⁴⁵

Certainly, in recent years, assessments of the role of the judiciary in relation to the protection of rights have been somewhat more favourable.⁴⁶ Dickson has revisited the theme explored earlier by Livingstone concluding that there is now a “freshness and sophistication” in the judicial reasoning apparent in the last 10 years which was not apparent before that.⁴⁷ Certainly, Dickson did not unequivocally endorse all the Law Lords’ reasonings – he found the ruling in *McKerr* to be “lame”.⁴⁸ Significantly however, for the purposes of this article, Dickson “largely” agrees with the analysis provided by Livingstone of the earlier cases.⁴⁹

The common law constitutional difficulty

In this context, it is important to acknowledge that a significant body of work has developed since the 1990s at UK level around the extent to which the judiciary can, or

42 Harvey, “The implementation”, n. 30 above, at 370.

43 S Livingstone, “The House of Lords and the Northern Ireland conflict” (1994) 57 *Modern Law Review* 333.

44 K Ewing and C Gearty, *Freedom under Thatcher: Civil liberties in modern Britain* (Oxford: OUP 1990), pp. 270–1.

45 Anthony has argued that the House of Lords in *McKerr* [2004] UKHL 12, by holding that no investigation could be ordered because the Human Rights Act 1998 did not apply to events that pre-date its coming into force, effectively “placed at one remove from the ECHR events that had already been said by the European Court of Human Rights to lack full and effective investigation”. G Anthony, “Human rights in Northern Ireland after *Re McKerr*” (2005) 11 *European Public Law* 5. Anthony and Mageean locate the origin of this difficulty back at the doctrine of parliamentary sovereignty which places domestic human rights law generally at one remove from international norms: G Anthony and P Mageean, “Habits of mind and ‘truth-telling’: Article 2 ECHR in post-conflict Northern Ireland” in J Morison et al. (eds), *Judges, Transition and Human Rights* (Oxford: OUP 2007).

46 B Dickson, “The House of Lords and the Northern Ireland conflict – a sequel?” (2006) 69 *Modern Law Review* 383; B Dickson, “Safe in their hands? Britain’s Law Lords and human rights” (2006) 26 *Legal Studies* 329.

47 *Ibid.*, at 414.

48 *Ibid.*

49 *Ibid.*, at 384.

indeed should, seek to curb the actions of the executive and the legislature.⁵⁰ It is the extent to which the final authority delivered by a court may impinge upon the actions of Members of Parliament or ministers of the Crown, however, that has generated what Dickson has referred to as a “prolific and fierce debate”.⁵¹

The crux of this debate has tended to focus on the extent to which judicial findings may impinge upon Dicey’s central proposition that “the sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political constitution”.⁵² According to Dicey, Parliament has the right to make or unmake any law whatever: and, further, no person or body is recognised as having a right to override or set aside the legislation of Parliament.⁵³ Leyland argues that, while constitutional practice has moved “steadily” towards a system of review of the constitutionality of Acts of the Westminster Parliament, Diceyan notions of the sovereignty of Parliament still retain a high degree of influence and Acts of Parliament remain sovereign.⁵⁴

A classic interpretation of this principle was expounded recently in the Northern Ireland High Court.⁵⁵ The case related to a challenge brought against the decision by the Northern Ireland Court Service to refuse the applicant permission to lodge a court application for an occasional liquor licence in the Irish language.⁵⁶ One of the grounds for the challenge was that the Administration of Justice (Language) Act (Ireland) 1737 requires that in Northern Ireland all court proceedings and associated documents be in the English language.⁵⁷ It was argued by the applicant that this Act was incompatible with the European Charter for Regional and Minority Languages and as such was in breach of the applicant’s legitimate expectation that the UK would act consistently with its international legal obligations under the charter.⁵⁸

Dismissing the application, Treacy J ruled that the distinction between international law and domestic law was long accepted by the courts in the United Kingdom and that, where it is intended to give domestic effect to obligations arising from international treaties, the method of achieving this is by incorporating the relevant treaty into domestic law.⁵⁹ For Treacy, this:

well established legal position reflects the constitutional principle that in the UK the Executive does not have lawmaking powers unless these are conferred upon it by Parliament. The ratification of an international treaty such as the Charter is an Executive action effected under prerogative power and involves no delegation

50 See, for example, R Dworkin, *Justice in Robes* (London: Harvard UP 2006); M Elliott, “The sovereignty of Parliament, the hunting ban and the Parliament Acts” (2006) 65 *Cambridge Law Journal* 1; D Jenkins, “Common law declarations of unconstitutionality” (2009) 7 *International Journal of Constitutional Law* 183; J Jowell, “Parliamentary sovereignty under the new constitutional hypothesis” (2006) *Public Law* 562–80.

51 B Dickson, “The role of judges in developing constitutions” (2006) 57 *NILQ* 332, at 332; see also, B Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford: OUP 2007).

52 A Dicey, *Introduction to the Study of the Law of the Constitution* 8th edn, reprint (Indianapolis: Liberty Classics 1982), p. xxxvi.

53 *Ibid.*

54 P Leyland, “Administrative law and human rights” in P Leyland and G Anthony (eds), *Textbook on Administrative Law* (Oxford: OUP 2008), p. 182.

55 *In the Matter of an Application by Caoimhin MacGiolla Cathain for Judicial Review* [2009] NIQB 66.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*, para. 32.

of legislative power by the legislature. Moreover, unlike legislation, such an exercise does not require the assent of Parliament.⁶⁰

Treacy J went on in his judgment to find that the Crown cannot change unambiguous law by the exercise of prerogative powers, citing as authority for this the *Case of Proclamations*,⁶¹ which found that: “The King by his proclamations or other ways cannot change any part of the common law, statute law, or customs of the realm.”⁶²

The judgment concluded that if the ratification of an international treaty had the effect of altering domestic law then the Executive would be able to supplant the legislature by making legislation by the back door without any form of parliamentary consent or approval.⁶³ This would, he argued: “clearly emasculate the constitutional principle that in the UK the Executive does not enjoy lawmaking powers unless these are bestowed upon it by Parliament”.⁶⁴

In other words, the executive *cannot* make law unless it is first approved by the democratically elected (ergo democratically accountable) legislature – with judicial oversight upholding the supreme authority of the elected Parliament.⁶⁵ A number of problems with this approach have been identified, however, creating what Morison and Livingstone have labelled as a constitutional crisis.⁶⁶ In their view, the moving locus of power in the post-modern UK state has raised serious questions, for example, about the democratic or, indeed, accountable nature of many actions of an evermore amorphous executive.⁶⁷

Significantly however, as Lord Steyn has pointed out, the doctrine of parliamentary sovereignty is itself a common law construct⁶⁸ and is therefore open to judicial modification. Indeed, he went so far as to declare that:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.⁶⁹

Lord Steyn went on to speculate that, were circumstances to arise where a sovereign Parliament sought, for example, to attempt to abolish judicial review, the courts would have to consider whether such an action was lawful.⁷⁰

In the case in question (the challenge by the Countryside Alliance to the Hunting Act 2004), the House of Lords, as it happens, held unanimously that the Hunting Act was valid, notwithstanding that it was passed without the consent of the second chamber.⁷¹ The fact that the Hunting Act was passed in accordance with the requirements of the Parliament Acts of 1949 and 1911 ensured its “constitutionality”.⁷² Five Law Lords did, however,

60 *In the Matter of an Application by Caoimhin MacGiolla Cathain for Judicial Review* [2009] NIQB 66, para. 33.

61 [1611] 12 Co Rep 74, at 75.

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 The case also, of course, highlights problems with the application of international law within the domestic context, see reference to *McKerr* at n. 45 above.

66 J Morison and S Livingstone, *Reshaping Public Power: Northern Ireland and the British constitutional crisis* (London: Sweet & Maxwell 1995).

67 *Ibid.*

68 *R (Jackson) v Attorney General* [2006] 1 AC 262, para. 102.

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*, para. 39.

72 *Ibid.*

expressly state that if the House of Commons alone were to try to delete from the 1911 Act the section which prevents it from extending the maximum permitted life of a Parliament beyond five years, that would not be a constitutional Act.⁷³

It is also worth noting that, when the previous government was pushing another of its Asylum and Immigration Bills through Parliament, a provision which would have ousted the jurisdiction of the courts to hear challenges against decisions of the Immigration Appeal Tribunals was dropped following an outcry from, among others, the Lord Chief Justice, Lord Woolf.⁷⁴ Similarly, proposals in the Legislative and Regulatory Reform Bill were also dropped on the grounds that they would have allowed ministers to do “all sorts of things that only an elected Parliament should be able to do”.⁷⁵

What these cases appear to show is that among a number of Law Lords there has been a desire to flex some constitutional muscle in order to identify boundaries beyond which the executive and the legislature should not tread. The apparent willingness of courts within Northern Ireland to impose similar boundaries, as evidenced in a number of recent rulings, is therefore worth considering in more detail within the context of the broader debate on the protection of rights.

Quashing the Sexual Orientation Regulations – the Christian Institute and the curate’s egg

One such ruling was delivered recently by the High Court in Northern Ireland.⁷⁶ The case in question relates to an application for judicial review of the making of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 by the Office of the First Minister and Deputy First Minister (OFMDFM).⁷⁷ The applicants were various Christian organisations⁷⁸ and the respondent was the OFMDFM. There were, however, four interveners in the case: the Catholic Church (through the “Northern Bishops”) in support of the applicants; and the Coalition on Sexual Orientation (COSO), the Equality Commission for Northern Ireland (ECNI) and the NIHRC, all in support of the respondent.⁷⁹

The case arose following the publication by OFMDFM of a consultation document in July 2006 – *Getting Equal: Proposals to outlaw discrimination on the ground of sexual orientation in the provision of goods and services in Northern Ireland*.⁸⁰ The consultation period ran from 29 July 2006 to 25 September 2006,⁸¹ the start date for consultation chosen to avoid “the twelfth fortnight” around 12 July.⁸² The closing date was determined by a desire to lay the Northern Ireland and Great Britain Regulations before Parliament at the same time.⁸³ In the event, a decision was taken on 3 October 2006 to delay the proposals in Britain⁸⁴ and the Northern

73 *R (Jackson) v Attorney General* [2006] 1 AC 262. See Lord Nicholls of Birkenhead, paras 57–9; Lord Steyn, para. 79; Lord Hope of Craighead, para. 118; Baroness Hale of Richmond, para. 164; Lord Carswell, para. 175; Lord Brown of Eaton-under-Heywood, para. 194.

74 See Dickson, “The role of judges”, n. 51 above, at 350.

75 *Ibid.*

76 *The Christian Institute and Others v The Office of the First Minister and Deputy First Minister* [2007] NIQB 66.

77 *Ibid.*, para. 1.

78 *Ibid.*

79 *Ibid.*, paras 3 and 4.

80 *Ibid.*, para. 12.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

84 *Ibid.*

Ireland Regulations were finally made on 8 November 2006, with analysis of the consultation published on 27 November 2006.⁸⁵

The general position of the applicants was that the orthodox belief of Christians and of the other major world religions is that homosexual practice is sinful and that the regulations imposed on those who held such orthodox beliefs certain duties that were inconsistent with the practice of their religious faith.⁸⁶ The applicants argued that they were not opposed to the principle of equality legislation relating to sexual orientation but they objected to the many aspects of the form of the legislation that had been adopted.⁸⁷ In essence, the applicants and the Northern Bishops contended that there had not been equality of treatment between the anti-discrimination measures on the grounds of sexual orientation on the one hand and orthodox beliefs on the other.⁸⁸ The respondents contended that the regulations relating to sexual orientation were designed to fill a significant and unsupportable gap in the framework of equality legislation and that the exemptions from the regulations which had been introduced for all religious groups achieved a fair balance between competing interests.⁸⁹

Among the arguments put forward in the case by the applicants was that the OFMDFM had been in breach of its duty to act in a procedurally fair manner and/or in breach of the applicants' procedural legitimate expectations that they would be properly consulted about the content of the regulations.⁹⁰ In particular, it was contended that the failure to consult properly manifested itself in: failing to allow sufficient time for the consultation period; failing to allow the standard minimum period of 12 weeks for the consultation period; providing the consultation period to fall during a period when many organisations would not be aware of the consultation exercise; and initiating a consultation exercise when the proposals were no longer at a formative stage.⁹¹

It was also contended that the OFMDFM had failed to carry out proper consultation by consulting upon proposals which were fundamentally different from those which the applicant believed to be the subject of the consultation exercise.⁹² The original consultation document had stated that the OFMDFM was "minded to accept that it is not appropriate to legislate for harassment within these Regulations" as future legislation was "a more appropriate vehicle" and would allow "more time to deal with the complex arguments".⁹³ However, the consultation paper did invite views and reasons for the inclusion of harassment provisions.⁹⁴ Some consultees did subsequently advocate inclusion of harassment provisions in their responses to the consultation and the respondent accepted their arguments.⁹⁵ Following legal advice, the harassment provisions were included in the regulations.⁹⁶ The applicants contended, therefore, that there was a fundamental difference between the consultation paper and the final regulations. The respondent contended that the harassment section of the consultation document invited comment on the inclusion of

85 *The Christian Institute and Others v The Office of the First Minister and Deputy First Minister* [2007] NIQB 66.

86 *Ibid.*, para. 8.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*, para. 10 (a)

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*, para. 29.

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

harassment in the regulations and that the introduction of the harassment provisions did not mean that anything had gone “clearly and radically wrong” with the consultation exercise.

In addition, it was argued that the OFMDFM had failed to take into account (or had given manifestly insufficient weight to) the consultation responses so that it breached its public law obligation conscientiously to take into account the product of consultation before finalising the draft of the regulations.⁹⁷

Fair and proper consultation

The applicants’ claim that they had a legitimate expectation of adequate consultation in relation to the making of the regulations⁹⁸ was rejected by the court.⁹⁹ Significantly, however, the applicants also contended that, even if there was no duty to consult the applicants in relation to the regulations, the respondent did engage in consultation and thereby was under a duty to consult properly.¹⁰⁰ The respondents’ argument that the duty to consult properly only arose by concession was rejected by the court. The judgment referred to the comments of Auld LJ in the Court of Appeal in *R (Edwards) v Environment Agency*¹⁰¹ that: “It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case.”¹⁰²

The court concluded that, once consultation is embarked upon, it must be carried out properly.¹⁰³ The court also referred to the four requirements of consultation as stated in *R (Coughlan) v North and East Devon Health Authority*:¹⁰⁴

To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.¹⁰⁵

Looking specifically at the consultation on the harassment provisions and the changes that had been made to the regulations from that which appeared in the original proposals, the court referred to *R (Smith) v East Kent Hospital NHS Trust*.¹⁰⁶ In that case, the hospital trust had made recommendations to the Secretary of State for the reduction of services at a local hospital.¹⁰⁷ The consultation document had suggested four options but, in the event, the proposal selected had a number of elements in common with all the options.¹⁰⁸ Silber J stated that the concept of fairness should determine whether there was a need to re-consult if the decision-maker wished to accept a fresh proposal, but that the court should not be too liberal in the use of the power of judicial review to compel further consultation on any change.¹⁰⁹ He concluded: “there should only be re-consultation if there is a fundamental

97 *The Christian Institute and Others v The Office of the First Minister and Deputy First Minister* [2007] NIQB 66, para. 10(b).

98 *Ibid.*, para. 13.

99 *Ibid.*, para. 18.

100 *Ibid.*, para. 19.

101 [2006] EWCA Civ 877, para. 90.

102 *Ibid.*

103 *Ibid.*

104 [2001] QB 213, at para. 108

105 *Ibid.*, para. 21.

106 [2002] EWHC 2640 (Admin), at para. 31.

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt”.

There was held to be no fundamental difference in the *Smith* case.¹¹⁰ It is also worthy of note that the respondent in the *Christian Institute* case also relied on *R (Greenpeace Limited) v Secretary of State for Trade and Industry*¹¹¹ which involved a challenge to the decision to support nuclear new build as part of the United Kingdom’s future electricity generating mix.¹¹² There was found to be procedural unfairness, as the consultation document in that instance was manifestly inadequate.¹¹³ It contained no proposals as such and no information of any substance on the two issues of critical importance, namely the economics of new nuclear build and the disposal of nuclear waste.¹¹⁴ Sullivan J stated:

In reality, a conclusion that a consultation exercise was unlawful in the grounds of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went “clearly and radically” wrong.¹¹⁵

In the *Christian Institute* case, the court went on to conclude that there was indeed an absence of proper consultation in relation to the harassment provisions.¹¹⁶ It pointed out that the consultation document was drawn in a manner that pointed to the issue of harassment on the grounds of sexual orientation being addressed by other means, and that the regulations “are fundamentally different from the scheme of the consultation paper”.¹¹⁷ The court concluded on this point that:

It was unfair to the consultees who agreed with the proposed deferral of harassment to induce them not to address their objections to the respondent and then to introduce harassment provisions.¹¹⁸

By reason of the finding of an absence of proper consultation, and taking into account the scope of the harassment provisions, the regulations were quashed.¹¹⁹

Some possible implications of the *Re Christian Institute* judgment

Looking at the judgment from the perspective of common law constitutionalism, there are a number of interesting elements worthy of note. For example, the court in this case had little difficulty in quashing the legislation, albeit that it was secondary in nature.

It is also noteworthy that the judgment devoted a not inconsiderable amount of focus to the procedural requirements on public bodies when it comes to consultation. While the court rejected the arguments about legitimate expectation of consultation in this instance, there was an interesting analysis of caselaw on this issue. The court referred, for example, to the comments of Stanley-Burnton J in *R (BAPIO Action Limited and Others) v Secretary of State for the Home Department*¹²⁰ that:

On any basis, however, a duty to consult, if not expressly or impliedly imposed by the legislation (and it is not suggested that there is any obligation necessarily

¹¹⁰ [2002] EWHC 2640 (Admin).

¹¹¹ *Ibid.*

¹¹² *Ibid.*, para. 32.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, para. 34.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, para. 43.

¹²⁰ [2007] EWHC 199 (QB).

implied), must be based on special circumstances. One of those circumstances may be an established practice of prior consultation.¹²¹

Equally, while the court accepted that, generally, there had been proper consultation in this case (with the exception of the harassment provisions), the court very much set out its stall in terms of what is required from public authorities in relation to “proper consultation”. This includes, as outlined above, that consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.¹²² Furthermore, the court clearly stated that the duty to “consult properly” arises once there has been consultation – and not merely by concession. Moreover, the finding by the court that there was an absence of proper consultation on the harassment provisions due to the fact that the original proposals misled consultees is again, it is suggested, a significant finding.

Given the importance currently attached to consultation as a tool of participatory democracy, and indeed the centrality of consultation to other statutory provisions,¹²³ the findings of the court in this case may well be useful in assisting further challenges to actions of the executive. Undoubtedly, however, the judgment is disappointing to those who would have benefited directly from the harassment provisions. The judgment is also clearly disappointing to organisations like the NIHRC and the Equality Commission who intervened in support of the harassment regulations. It is, however, respectfully suggested that from the point of view of these organisations and, indeed, from the point of view of other civil society NGOs, the judgment is something of a curate’s egg, in that it is “good in parts”. Unfortunately, the positive aspects to the ruling were ignored by both the NIHRC and the Equality Commission in the press releases they issued at the time, which both focused merely on the consequences of the quashing of the regulations from the perspective of the lesbian, gay, bisexual and transgendered communities.¹²⁴ As such, the aspects of the ruling which related to the procedural requirements of proper consultation went unreported in terms of the wider discussion of the case in the media.

Beyond the *Christian Institute* ruling

The ruling in the *Christian Institute* case should also be considered alongside a number of other recent judgments in which the common law might be seen to have “punched its weight” in terms of delivering rights protection. The courts have continued to use the common law in order to ensure the fairness of the trial process, for example. Requa has pointed to the finding in *Davis* that measures aimed at maintaining anonymity of multiple witnesses were held to have undermined the ability of the accused to carry out an effective

121 [2007] EWHC 199 (QB), para. 17.

122 *Ibid.*, para. 21.

123 Northern Ireland Act 1998, s. 75, Sch. 9.

124 “Sexual Orientation Regulations ruling”, press release, NIHRC, 11 September 2007; “Equality Commission comment on the High Court decisions on the application for judicial review of the making of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006”, Equality Commission for Northern Ireland, 11 September 2007.

defence and deprived the appellant of a fair trial.¹²⁵ The common law principle that Lord Mance invoked in the *Davis* ruling was “a right to confrontation”.¹²⁶

Regarding the right to liberty, it is worth noting the House of Lords’ ruling in *R (Smith) v Parole Board*.¹²⁷ In this case, the Lords held that a failure on the part of the Parole Board to hold an oral hearing prior to revoking a licence, for a determinate sentence prisoner who had been released on licence, was a breach of the common law duty to act fairly. Also looking at the issue of prisoners’ rights – although for those within prison rather than those released on licence – the common law again came to the rescue in *R (Al-Hasan) v Home Secretary*.¹²⁸ In this case, the House of Lords found that a prison governor had breached the common law principle of natural justice regarding the disciplining of prisoners who had refused to submit to a squat search.

Within the context of the particular circumstances of Northern Ireland, other examples of the common law being used to curtail abuses of executive power include the ruling in the challenge to the appointment of Bertha McDougall as the interim victims’ commissioner.¹²⁹ In this case, no less than 67 questions were laid out for referral to the Attorney General with regard to protecting the due administration of justice. The judgment cited the common law offence to pervert or obstruct the course of justice and contempt of court.¹³⁰

This is not to suggest that the performance of the common law in upholding the protection of rights is entirely favourable. Indeed, sceptics may well point to the willingness of the courts in the *Christian Institute* and *MacGiolla Catbain* cases above to strike down legislation designed to provide protection against discrimination on grounds of sexual orientation while upholding a law that directly discriminates against Irish language speakers. Furthermore, the ruling of the Law Lords in cases like *McKerr*, along with recent critical comments from Lord Hoffmann¹³¹ about the NIHRC, may well lead those sceptical about the role of the judiciary in protecting rights to argue that they have much to be sceptical about. Critics might also point to rulings such as *R v Chief Constable of the RUC, ex parte Begley* in which the Lords rejected the notion that the common law recognises a right for a suspect to have a solicitor present during a police interview as further evidence of the failure of the common law to deliver the goods when it comes to protecting rights.¹³² Similarly, sceptics are likely to be further bolstered by a number of cases in which the common law failure to protect rights has been challenged by the European Court of Human Rights. In *HL v United Kingdom*, for example, the Strasbourg court found that there had indeed been a violation of Article 5 of the ECHR.¹³³ Previously, the House of Lords had ruled that the detention of a mentally ill patient at a hospital was justified on the common law doctrine of necessity.¹³⁴

125 M Requa, “Hearsay, human rights and judicial dialogue: Article 6(3)(d) in UK courts” (2010) Autumn *International Journal of Evidence and Proof*, forthcoming.

126 *Ibid.* See also *R v Davis (Iain)* [2008] UKHL 36; [2008] 3 WLR 125.

127 [2005] UKHL 1.

128 [2005] UKHL 13.

129 *Re Donnes Application* [2006] NIQB 79.

130 *Ibid.*, para. 4.

131 *Re E’s Application* [2006] NICA 37.

132 [1997] 1 WLR 1475.

133 *HL v UK* (2004) 40 EHRR.

134 *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458.

The situation is, of course, further complicated when one considers ways in which rights claims may conflict. In *R v Connor*, the Law Lords had to address the issue of whether the common law prohibition on the admission of evidence of the jury's deliberation prevailed even if the Court of Appeal was presented with a statement from a juror which, if admitted, would provide prima facie evidence of jury partiality in breach of Article 6 of the ECHR.¹³⁵ Dismissing the appeal, Lord Steyn did nevertheless acknowledge that in certain cases the court does have the power to admit evidence about the deliberations of the jury in order to prevent injustice.¹³⁶ Indeed, one section of his speech captures well the essence of the common law itself:

The common law rule is a judge made rule. Where the reason for a judge made rule stops, it may be appropriate to qualify its reach. Where a new situation arises which was never previously considered the scope of the rule may be reconsidered . . . So far as judges have propounded a rule which, in the light of experience, is potentially productive of injustice, it is not beyond their power to put the matter right.¹³⁷

One could undoubtedly speculate at length about the extent to which judge-made rules may, or may not, be an adequate mechanism for ensuring the protection of rights. That is not, however, the purpose of this article. The point here is not that judges should be left to protect human rights in place of a Bill of Rights. Neither is this article arguing that there should be an attempt to recast proposals for a Bill of Rights for Northern Ireland which would include common law rights. My aim is merely to argue that the value of the common law in protecting rights should be acknowledged within the wider deliberations around a Bill of Rights.

Conclusions

One might, of course, question whether it matters that consideration of common law rights or the wider UK-wide debate about judicial activism are absent from the Northern Ireland Bill of Rights debate. It is respectfully suggested that there are indeed a number of serious problems with the current approach and it is to these that we now turn.

First, it is worth noting that one of the central points of contention with regard to the current Bill of Rights debate in Northern Ireland is the extent to which any such Bill might curtail the authority of elected politicians. In a speech to delegates at the World Bar Conference, for example, the First Minister of Northern Ireland stated that he was:

wary of an over-extensive Bill of Rights which could usurp the role of democratically elected politicians and push judges into the political spotlight . . . Let politicians make laws – even at times bad laws – and be accountable for them to the electorate, rather than leaving important decisions to those who have no democratic mandate.¹³⁸

Such arguments have, in fact, been around as long as the Bill of Rights debate has itself.¹³⁹ What is significant is that these arguments, certainly when put forward by politicians, tend to assume that the relationship between the judiciary, the legislature and the executive is presently a fixed one, with definite and identifiable boundaries. As this article has noted, however, there is at the moment a “fierce and prolific debate” taking place within the UK about the current limits of judicial power, including the extent to which the notion of parliamentary sovereignty

135 [2004] UKHL 2.

136 *Ibid.*

137 *Ibid.*, para. 17.

138 “Northern Ireland First Minister and DUP Leader, Rt Hon. Peter Robinson MP MLA, addresses delegates at the 2008 World Bar Conference”, press release, 30 June 2008, www.dup.org.uk/.

139 Murray, “The importance of a Bill of Rights”, n. 41 above.

itself may be open to modification by the judiciary. Set within the context of a judiciary operating without fixed and definite boundaries, one might view a Bill of Rights for Northern Ireland therefore as an opportunity for clarifying current constitutional ambiguities, rather than simply delivering an additional layer of judicial authority.

Another problem with the approach to the Bill of Rights debate to date, particularly with respect to the advice submitted to the Secretary of State by the NIHRC, relates to misunderstandings which may arise about current legal protections available in Northern Ireland. If a right or principle which is already accepted as part of the common law is not named as such, but rather is presented as a proposal which emanates solely from “international standards”, then the perception may well be created that the right does not presently exist anywhere in domestic law. It may well be that this was a deliberate tactic in order to “over-emphasise” the need for a Bill of Rights by downplaying existing protections. If that was the case, then it is suggested that this was a mistaken approach. Given the emphasis that has been placed on the Bill of Rights deliberations as an educative process,¹⁴⁰ one might conclude that it is a process which has misled quite a number of participants about an important area of rights protection.

In addition to the misinformation aspect of the debate, there is another difficulty which is more insidious. If rights protection is to be measured in terms of the volume of international instruments which have been successfully incorporated into domestic law, then genuine advances in rights protection that take place within the realm of common law may be overlooked, simply because they do not fit into what has become a conventional rights protection narrative. Such a problem may not be confined to the Bill of Rights project, but could spill over into other areas of the NIHRC’s work. Indeed, it is suggested that this has already happened, as evidenced by the response to the ruling in the *Christian Institute* case, where a number of positive aspects of the judgment were overlooked by both the Equality Commission and the NIHRC. It is also worth noting that a visit to the NIHRC website reveals a section entitled “Your Rights”. Unfortunately, the rights in question relate solely to those contained in the Human Rights Act 1998.¹⁴¹

A new way forward?

It has become something of a cliché about the Bill of Rights process in Northern Ireland that it is too important to be left to one narrow group or organisation in society, including the NIHRC.¹⁴² The irony is that one might now argue that the deliberative process around this issue has, in fact, largely omitted the contribution of one key institution in society – namely the courts. International standards for human rights have much to offer those seeking protection from rights abuses – but so do domestic courts. What the domestic courts say about a right to consultation, or a right to confrontation, is as relevant – if not more so – as the findings of UN treaty-monitoring bodies. It is vital that those seeking to promote and protect rights are aware of all the tools at their disposal – including those advances which common law constitutionalism has to offer.

In terms of recommendations for the way forward, it is suggested that one starting point might be a wider consideration of those rules and principles developed by judges as part of the common law for protecting rights, since this is the area that would appear to be most neglected to date. This might include an event, sponsored perhaps by the NIHRC, which seeks to move judicial rights protection on to the radar of Northern Ireland’s human

140 Murray, “The importance of a Bill of Rights”, n. 41 above.

141 www.nihrc.org/.

142 Harvey, “The implementation of a Bill of Rights”, n. 30 above, at 368.

rights community and, indeed, civil society generally. In such a scenario, aspects of judgments in cases such as those involving the Christian Institute, Brenda Downes, the Countryside Alliance and others could be “dusted off” and used to examine how rights protection could be developed by strategically litigating in certain areas.

In this context, it is worth noting that the remit of the NIHRC extends beyond proposals for a Bill of Rights for Northern Ireland. The NIHRC is required, for example, to keep under review the adequacy and effectiveness in Northern Ireland of “law and practice relating to the protection of human rights”.¹⁴³ The NIHRC is also required to promote understanding and awareness of the importance of human rights in Northern Ireland and, for this purpose, it may undertake, commission or provide financial or other assistance for research and educational activities.¹⁴⁴ Certainly, there is little doubt that highlighting ways in which the common law might be used to further rights protection in Northern Ireland would fall within this broader remit.

Looking beyond the NIHRC to the wider human rights community in Northern Ireland, it is suggested that any stasis in legislating for a Bill of Rights for Northern Ireland should be viewed as an opportunity for the courts to become the focus of attention in terms of pushing forward a broader rights agenda. The attraction of this approach from the campaigner’s perspective is that advancement of rights protection within the courts (through greater use and awareness of common law rights) and continued campaigning for a strong and inclusive Bill of Rights are not mutually exclusive. The attraction for the judiciary is that such a scenario would provide an even wider opportunity for it to demonstrate the freshness and sophistication of judicial reasoning that has hitherto eluded many within the human rights community. Again, the point here is not that campaigners should be forced to abandon their efforts to seek a Bill of Rights for Northern Ireland, but rather that they should not put all their eggs in the Bill of Rights basket.

In this context, it is worth considering Harvey’s argument¹⁴⁵ that, in addition to legislating for a Bill of Rights, a multiplicity of mechanisms and strategies (including those of an educational variety) are essential to achieving the goal of a human rights culture in Northern Ireland. It would seem that the hour has perhaps arrived for common law constitutionalism to be acknowledged as having some contribution to make in developing that culture.

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

144 *Ibid.*, s 69(6).

145 Harvey, “The implementation of a Bill of Rights”, n. 30 above, at 371.

The O'Brien defence refined: legal rights, equitable wrongs and commercial responsibilities

MICHAEL HALEY

Keele University

The prevalence of home ownership has inevitably ensured that the family home is exploited as security for the raising of additional finance. As the Law Commission acknowledged:

It is, in many cases, the single most valuable asset of its owner. It has great economic significance as a means of securing capital advances by way of loan and of recovering debts owed.¹

This emphasis upon the home as property entails that it has a dual role to play, that is to provide a setting within which family life can be enacted and to afford a significant capital asset.² While in the majority of cases these two functions coexist well, major difficulties are likely to emerge when a creditor elects to enforce its security in the family home. A commonplace scenario arises where, say, one co-owner is in business and the other has offered the home as security for a loan or other financial facility for that business. The latter co-owner is, thereby, acting as a mere guarantor for the former.³ If matters then go awry, the divergence between the respective interests of the homeowner and the lender becomes stark.

This tension was recognised by Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* who cautioned against the court taking an overly paternalistic approach, “Their home is their property. The law should not restrict them in the use they make of it.”⁴ This sourcing of finance is, moreover, heavily dependent upon lenders having the confidence that, if the need arises, the security will be enforceable against all signatories to the charge. Nevertheless, within the family sphere this type of surety relationship offers scope for undue influence, misrepresentation, duress and other wrongdoing. In a time of economic recession, the risk factor associated with such ventures is, undeniably, heightened. Lord Nicholls warned that, “The law would be seriously defective if it did not recognise these realities.”⁵ The difficulty, of course, is how to cast a fair and workable test that manages to

1 *Sharing Homes: A discussion paper*, Law Comm. No 278 (2002), at para. 1.8.

2 Lord Nicholls explained in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 463: “Finance raised by second mortgages on the principal’s home is a significant source of capital for the start-up of small businesses.” Lord Bingham agreed that such transactions are “of great social and economic importance” (at 456).

3 For example, as occurred in *Barclays Bank v O'Brien* [1993] 4 All ER 417 and the eight conjoined appeals in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449.

4 *Ibid.*, at 463.

5 *Ibid.*

preserve the commercial interests of institutional lenders while maintaining a roof over the head of a vulnerable homeowner. The solution sponsored by the House of Lords in both the *O'Brien* and *Etridge* litigation focused upon the application of the doctrine of notice.⁶ The surety's claims will, therefore, prevail over the rights of any creditor who had actual, constructive or imputed notice of the wrongdoing of the principal debtor.⁷ Conversely, the bona fide purchaser without notice enjoys a good defence to the surety's claim.⁸ Although the doctrine of notice represents a tried and tested means of determining liability between competing claimants, it is not a universal curative.⁹ Lord Nicholls admitted that, "Like every compromise, the outcome falls short of achieving in full the objects of either of the two competing interests."¹⁰

This judicial balancing act must be sensitive to shifts in social policy and changes in banking practices. The responsive nature of this jurisdiction was demonstrated clearly by the House of Lords in the *Etridge* case where a fundamental overhaul of the pre-existing law was undertaken. First, the House recast the role of undue influence and, in particular, provided a thorough and authoritative narrative as to the evidential presumptions that drive what has to be proved and by whom. It is most regrettable that these reforms appear not to have been fully absorbed and that, as Mummery LJ lamented, "fundamental misconceptions persist".¹¹ The need for a wider appreciation of the role of undue influence and the nature of its attendant evidential presumptions remains obvious. The present article aims to address this issue.

Secondly, the structure of the *O'Brien* test was remodelled so as to strengthen the safeguards available to the surety and, with the concept of constructive notice in mind, to demand more of both the lender and the independent advisor in the transactional process. As the compromise is necessarily defined in expansive terms, it continues to be tested and adapted according to the multifactorial situations that arise and drive litigation.¹² This is particularly so with the shield afforded by independent legal advice. While the prescription as to what lawyers must do in the discharge of their professional duties to surety clients is relatively clear, the range of circumstances within which an advisor's professional incompetence and lack of integrity will affect the lender remains an issue for debate. The present work will chart the evolutionary process of this jurisdiction and evaluate the current parameters of the *O'Brien* compromise.

Myth and misunderstanding

It is undeniable fact that the majority of disputes concern the relationship between husband and wife. The authorities seemingly demonstrate that wives are more likely than others to leave the management of joint financial affairs to another (i.e. the husband). The sexual and emotional ties between spouses provide a ready opportunity for the exertion of undue influence. The informality of business dealings between them increases the potential for misrepresentation as to the true nature of the financial enterprise. The scope for abuse,

6 This was not, however, a novel idea and had been canvassed previously in *De Lisle v Union Bank of Scotland* [1914] 1 Ch 22.

7 *Lancashire Loans Ltd v Black* [1934] 1 KB 380.

8 *Bainbridge v Browne* (1881) 18 Ch D 188.

9 Nor is registered land an orthodox setting for its operation: see G Battersby (1995) 15 *Legal Studies* 35 and the views expressed by Lewison J in *Thompson v Foy* [2010] 1 P & CR 16.

10 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 463.

11 *Niersmans v Pesticcio* [2004] EWCA Civ 372 at [2].

12 Incredibly, there are still instances of lenders doing absolutely nothing to protect their interests against the possible claims of a surety: see *Hewett v First Plus Financial Group* [2010] EWCA Civ 312.

however, extends well beyond this brand of familial relationship. As Lord Nicholls observed, “there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principles and others not”.¹³ Victims have, for example, included aged mothers,¹⁴ elderly and illiterate fathers,¹⁵ delusional daughters,¹⁶ vulnerable girlfriends,¹⁷ gullible cohabitants,¹⁸ impressionable employees,¹⁹ mentally impaired ex-boxers²⁰ and naive singer-songwriters.²¹

While at common law the contractual bargain was effectively sacrosanct,²² equity evolved a broader jurisdiction under which a bargain between a surety and a creditor could be overturned as a result of the equitable wrongdoing of the principal debtor. The origins of this tender approach are accredited to the decision of the Privy Council in *Turnbull & Co. v Duval*.²³ There it was held that, even though the creditor did not have actual notice of any wrongdoing, the security given by Mrs Duval could not be upheld. Although this outcome could have been based solely upon the finding of a breach of fiduciary duty,²⁴ Lord Lindley felt that there was an even stronger ground for impeaching the transaction:

Mrs Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences.²⁵

The facts of *Duval* shed little light on the reasoning underpinning this interventionist stance and it is unclear exactly what legal or equitable wrong (if any) the husband committed. Although mention is made of pressure and concealment of material facts, there was no allegation of misrepresentation or undue influence pleaded and no finding by the court that such wrongdoing had been perpetrated. Lord Browne-Wilkinson was bemused:

It is impossible to find a sound basis for holding that Mrs Duval was entitled to set aside the transaction as against her husband. How then could she set it aside as against Turnbulla?²⁶

In such circumstances, it must be for the surety to satisfy him or herself as to the nature and extent of the obligations undertaken.²⁷ Hence, Lord Browne-Wilkinson admitted of the Privy Council’s conclusion, “I can only assume that . . . it proceeded on a mistaken basis.”²⁸

13 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 475.

14 *National Westminster Bank plc v Amin* [2002] 1 FLR 735.

15 *Portman Building Society v Dusangh* (2000) Lloyds Rep Bank 197.

16 *Public Trustee v Bailey* [2005] EWHC 3524 (Ch).

17 *Burbank Securities v Wong* [2008] EWHC 552 (Ch).

18 *Butigan v Negus-Fancy* (2000) EG 67 (CS).

19 *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144.

20 *Shaw v Finnemore* [2009] EWHC 367 (Ch).

21 *Wadlow v Samuel* [2006] EWHC 1492 (QB).

22 It could, however, be overturned within the limited parameters of misrepresentation, duress and mistake.

23 [1902] AC 429.

24 Turnbull’s manager (Mr Campbell) also acted as a trustee of an estate under which Mrs Duval was a beneficiary.

25 [1902] AC 429 at 435.

26 *Barclays Bank v O’Brien* [1993] 4 All ER 417 at 426.

27 It is to be appreciated that, “An adult of competent mind is entitled to enter into a financially unwise transaction if he or she wants to”: per Lewison J in *Thompson v Foy* [2010] 1 P & CR 16 at [99].

28 *Barclays Bank v O’Brien* [1993] 4 All ER 417 at 426. The law will generally expect a signatory to a document to act responsibly and carefully so that he or she will understand the general effect of what is being signed: *Saunders v Anglia Building Society* [1971] AC 1004.

Even if wrongdoing by the husband had been established, the fundamental problem remains that the Privy Council failed to explain why the security became unenforceable simply because the creditor entrusted Mr Duval to obtain his wife's signature. The outcome-driven approach of the Privy Council is shrouded in mystery and various attempts to justify the decision have proved spectacularly unsuccessful. Lord Browne-Wilkinson observed: "Like most law founded on obscure and possibly mistaken foundations it has developed in an artificial way, giving rise to artificial distinctions and conflicting decisions."²⁹ First, the *Duval* decision has been appraised in terms that the relationship of husband and wife automatically gives to a presumption of undue influence.³⁰ This quite clearly is bad law as, for these purposes, there is nothing special or unique about this type of relationship.³¹

Secondly, it has been argued that the result was achieved due to a shift in the burden of proof that occurs when a wife makes a substantial voluntary disposition.³² This is also unsound law. It is patently unrealistic to require the lender to prove affirmatively that the surety fully understood the transaction and entered it of her own free will.³³

Thirdly, the decision has been appraised on the basis that some form of "special equity" arises whenever a wife stands as surety for her husband.³⁴ This existence of such a special equity would entail that, provided the lender is aware of the connubial ties, it must take appropriate steps to ensure that the wife fully understands the nature of the bargain.³⁵ The special equity approach was, unsurprisingly, rejected by the House in the *O'Brien* case. The creditor cannot be expected to advise its customers as to the wisdom of a proposed transaction.³⁶ Indeed, to require this would be to place a greater duty on the lender than lies with the wrongdoer.

Fourthly, and most commonly, it was thought that the outcome was rooted in some "special agency" that existed between the husband and the creditor.³⁷ This was notwithstanding the fact that there was no allusion to agency in the *Duval* decision and that Mr Duval was throughout acting for himself. This type of agency was, indeed, "special" as there was no requirement for any actual or ostensible authority to be given to the agent.³⁸ Instead, the relationship arose solely because the lender entrusted the debtor to obtain the surety's signature.³⁹ It would not, therefore, arise where the lender relied on a third party to procure the signature.⁴⁰ Once the agency was invoked, the principal could not be in a better position than the husband. The agent's misfeasance, thereby, became the principal's misfeasance.⁴¹ The special agency theory was also laid to rest in the *O'Brien* case. It can no

29 *Barclays Bank v O'Brien* [1993] 4 All ER 417 at 428.

30 *Bischoff's Trustee v Frank* (1903) 89 LF 188.

31 *Bank of Montreal v Stuart* [1911] AC 120.

32 *Hoghton v Hoghton* (1852) 15 Beav 278. Hence, the creditor would need to establish that the transaction was freely entered into with a full awareness.

33 *Barclays Bank v O'Brien* [1993] 4 All ER 417.

34 *Yerkey v Jones* (1939) 63 CLR 649.

35 This approach was sponsored by Scott LJ in the Court of Appeal in *Barclays Bank v O'Brien* [1992] 4 All ER 983.

36 *Redmond v Allied Irish Banks* [1987] 2 FTLR 264.

37 In *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, this was extended to the relationship between the lender and the surety's son.

38 *Barclays Bank plc v Kennedy* (1989) P & CR 221.

39 *Chaplin & Co. Ltd v Brammall* [1908] KB 233.

40 *Midland Bank plc v Perry* (1988) 56 P & CR 202; *Collundell Ltd v Gallon* [1986] 2 WLR 466.

41 *Kings North Trust v Bell* [1986] 1 WLR 119.

longer be argued that some form of agency arises from the creditor merely requiring the husband to obtain the wife's signature as a condition of the loan.⁴²

Accordingly, it fell to the House of Lords in *Barclays Bank v O'Brien*⁴³ to justify this interventionist jurisdiction and to distil principle from the uncertainty that had previously dogged its existence. The mechanics of the test propounded by Lord Browne-Wilkinson are expansive, but represent a familiar and convenient approach to the resolution of spousal surety disputes. The jurisdiction is founded upon the premise that a person who has been induced by the legal wrongdoing of the debtor to stand as surety enjoys an equity against the wrongdoer to set aside the transaction. If there is no wrongdoing, there is nothing that can taint the transaction. This is because the purpose of equitable intervention is to protect an individual from victimisation by another and not to protect persons from their own folly.⁴⁴ Such wrongdoing can affect the creditor who is put on inquiry by the fact that the transaction is not a conventional joint advance and, therefore, should suspect that some wrongdoing may be afoot. Understandably, if the transaction appears to the lender to be a normal joint transaction there is no reason why such warning bells will be sounded. The creditor once on inquiry will then have constructive notice of the wrongdoing unless it takes reasonable steps to ensure that the surety's consent is properly obtained.

The use of the doctrine of notice to determine priority between conflicting property claims is well established and eminently workable. It is without doubt preferable to any of the alternative theories previously sponsored. Nevertheless, it remains impossible to ensure that a surety is entirely liberated from undue influence. All the law can do is, as Lord Bingham put it, "indicate minimum requirements which, if met, will reduce the risk of error, misunderstanding or mishap to an acceptable level".⁴⁵ The broad-brush approach adopted by Lord Browne-Wilkinson merely laid out the schematics of the new jurisprudence, leaving it to be incrementally adapted and refined by subsequent authorities, of which there were to be many.⁴⁶

Establishing undue influence

Although the facts of the *O'Brien* case concerned a misrepresentation made by a husband to his wife concerning the extent of financial liability undertaken, it was the law relating to undue influence that attracted detailed attention.⁴⁷ This is not surprising as undue influence has fuelled the majority of the litigation in this area and, due to its insidious nature, can be notoriously difficult to prove.⁴⁸ In order to combat the problem, and as will become clear, the law recognises that undue influence can, in certain situations, be presumed with a

42 *Bradford & Bingley Building Society v Chandock* (unreported) 3 April 1996.

43 [1993] 4 All ER 417. Lord Hobhouse in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 479 appraised Lord Browne-Wilkinson's speech as, "a masterly exposition of principles".

44 *Allcard v Skinner* (1837) 36 Ch D 145. In *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010, Deputy Judge Stephen Morris explained, at [265]: "Mr Roberts entered into the Arrangements on the basis of his own independent and informed judgment. Regardless of whether that judgment was wise or sound, it was nevertheless his judgment."

45 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 456. The provision of information will usually offer an effective counterweight to misrepresentation.

46 Lord Hobhouse observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 479: "Experience in litigation since 1993 has not been encouraging. Disputes have continued to come before the courts; the determination of those disputes has not always carried conviction."

47 Mrs O'Brien signed the documentation because she was persuaded that it was the right thing to do. There was no pressure exerted by her husband that deprived her of the ability to give her consent freely.

48 NI Yaakub and A McGee state in "Undue influence in bank lending transactions: confusions continue" (2007) *JIBLR* 394, at 397, that, "undue influence is an obscure and difficult principle".

resultant shift in the burden of proof.⁴⁹ There are two presumptions available. The first concerns what may be described as a presumption at law of “influence” where the relationship between the parties falls within specified categories. The second presumption is purely evidential and arises when a relationship of trust and confidence is established and it is shown that the transaction demands explanation. The burden then shifts and the alleged wrongdoer must establish that the transaction was not generated by undue influence. If this burden is not discharged, it will be presumed that the influence is, indeed, undue. It is the scope for, and operation of, these presumptions that has brought about much confusion and misunderstanding.⁵⁰

Undue influence is an equitable defence that looks toward the manner in which the consent to a transaction was produced.⁵¹ Although undue influence may be described in general terms, it remains immune to precise definition.⁵² As Lord Clyde observed: “It is something which can be more easily recognised when found than exhaustively analysed in the abstract.”⁵³ The defence operates where there is some form of domination, control or other superiority that induces the complainant to enter into a bargain.⁵⁴ Ward LJ explained:

The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else’s. There is no undue influence unless the donor if she were free and informed could say “This is not my wish but I must do it.”⁵⁵

The transaction is, therefore, impeachable only if it is generated by unacceptable means.⁵⁶ Accordingly, undue influence carries with it a connotation of impropriety and unconscionable conduct.⁵⁷ It does not, however, have to be shown that the victim made no conscious decision of her own or that her will was totally overborne.⁵⁸

The types of conduct that can amount to undue influence include coercion, domination, victimisation, guileful techniques of persuasion, excessive pressure, emotional blackmail or bullying. Undue influence, moreover, may include fraudulent misrepresentation, which arises where the misstatement is made knowingly or recklessly in the context of a relationship of trust and confidence.⁵⁹ Each constitutes an improper and

49 This evidential gloss does not, however, extend to the defence of misrepresentation, which requires affirmative proof of a false statement of a material fact: *Allied Irish Bank v Byrne* [1995] 2 FLR 325; *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch).

50 See Sir Martin Nourse in *Hammond v Osborn* [2002] EWCA Civ 885 at [1].

51 *Huguenin v Basely* (1807) 14 Ves 263.

52 See Lord Scarman in *National Westminster plc v Morgan* [1985] AC 688 at 709.

53 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 477. Lord Nicholls agreed, at 457: “It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.”

54 This ascendancy requires more than significant disparity in the bargaining strengths of the parties: *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010.

55 *Daniel v Drew* [2005] EWCA Civ 507 at [36].

56 *Castle Phillips Finance v Piddington* [1995] 1 FLR 783; *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch). Not all influence, therefore, is undue.

57 See, generally, J Devenney and A Chandler, “Unconscionability and the taxonomy of undue influence” (2007) *JBL* 541.

58 *Hevett v First Plus Financial Group* [2010] EWCA Civ 312.

59 *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555. As Lord Nicholls explained in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 463: “Such a husband abuses the influence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.”

unacceptable method of persuasion. In *Hewett v First Plus Financial Group*,⁶⁰ for example, the deliberate failure of the husband to disclose that he was having an affair, and might quit the family home, when his wife acceded to the mortgage amounted to undue influence sufficient to vitiate the transaction. The mere failure to disclose material facts or to explain the transaction, however, will not usually suffice.⁶¹ As Lord Nicholls put it:

Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.⁶²

The judicial tendency has long been to compartmentalise undue influence under two generic headings: actual (Class 1) undue influence and presumed (Class 2) undue influence.⁶³ These are, as Lewison J pointed out, “no more than different ways of proving the same thing”.⁶⁴ This is an allusion to the fact that presumed undue influence is proved with the aid of an evidential presumption whereas actual undue influence must be extrinsically proved without the aid of any such presumption. The key to understanding the difference between actual and presumed undue influence lies with the requirement that the parties stand in a relationship of trust and confidence. With Class 1 undue influence, this must be affirmatively proven whereas, with Class 2 undue influence, it can be assumed. While this may appear to be a straightforward distinction, the courts continue to grapple with its operation. This is, as Enonchong warns, “a measure of how deep-seated some of the pre-*Etridge* misconceptions were. The danger now is that if they are allowed to pass unnoticed they may take root again.”⁶⁵

Once it is established (whether by implication or otherwise) that there is a relationship of trust and confidence, the next step is for the victim to show that the transaction calls out for explanation.⁶⁶ As demonstrated in *Turkey v Anadib*, it is necessary for the court to view the transaction in context, evaluate its general nature and consider what was intended to achieve for the parties.⁶⁷ On overcoming this hurdle, the burden of proof shifts to the alleged wrongdoer to prove that the relationship of trust and confidence was not abused.⁶⁸ Hence, the combined nature of the relationship and the transaction requires the alleged wrongdoer to justify the bargain and, in particular, to show that the influence did not invade the free volition of the complainant. Most commonly, this will be achieved by demonstrating that the victim had received independent legal advice.⁶⁹ Nevertheless, legal advice is not always decisive of the issue.⁷⁰ The weight or importance of such advice depends on all the circumstances and whether it has an emancipating effect is a question of

60 [2010] EWCA Civ 312.

61 *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch). For these purposes negligence does not equate with fraud: *Thompson v Foy* [2010] P & CR 16.

62 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 462, 463.

63 *Allcard v Skinner* (1887) 36 Ch D 145.

64 [2009] EWHC 1076 (Ch) at [100].

65 N Enonchong, “Presumed undue influence: continuing misconceptions?” (2005) 121 *LQR* 29 at p. 33.

66 For example, in *Curtis v Pulbrook* [2009] EWHC 782 (Ch), Deputy Judge Richard Sheldon stigmatised the transfer in issue as “extremely and manifestly disadvantageous” (at [141]) and felt that it offered “a paradigm case where the presumption of undue influence arises” (at [142]).

67 [2005] 2 P & CR 29.

68 *Roberts v Pascal* (unreported) 9 February 2009.

69 *Permanent Trustee Co (NSW) Ltd v Bridgenater* [1936] 3 All ER 501. In *Lancashire Loans Ltd v Black* [1934] 1 KB 380, an argument that a daughter was emancipated by virtue of her marriage from the influence of her mother was roundly rejected.

70 *Claghton v Price* (1998) 30 HLR 396.

fact and evidence.⁷¹ As Lewison J. pointed out, “a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another.”⁷² Deputy Judge Stephen Morris provided the overview that, if clear and independent legal advice is proffered and understood, “it requires specific and exceptional factors to conclude that the advice did not emancipate the will”.⁷³

ACTUAL UNDUE INFLUENCE

Class 1 undue influence requires affirmative proof that the wrongdoer did, indeed, exert undue influence over the victim and that this wrongdoing brought about the entry into the transaction. The complainant must adduce evidence of some improper and unfair conduct, for example, overt persuasion, emotional blackmail, coercion or bullying.⁷⁴ In *Bank of Scotland v Bennett*,⁷⁵ undue influence arose in circumstances where the wife’s will to resist had been broken down by a systematic campaign of wounding and insulting language, demeaning comparisons and an overriding fear that her husband would leave her if she did not comply with his wishes. It must be shown, moreover, that this conduct existed at the date of the impugned transaction.⁷⁶ Subsequent events are relevant only if they, “cast light on what was happening before and at the time of the impugned transaction”.⁷⁷

As regards Class 1, there is no need to establish any specific type of antecedent relationship between the parties. It must, however, be positively demonstrated that the nexus between the parties is one of trust and confidence.⁷⁸ Rarely, the necessary tie of trust and confidence may emerge from within the framework of the transaction itself. Such was demonstrated in *Macklin v Donsett* where a relationship of ascendancy and dependency arose from a dealing in which the ascendant party knew that the other was in dire financial straits.⁷⁹ More commonly, the nexus will, as Buxton LJ accepted, “spring from a historic relationship between the parties of a general nature that precedes the impugned transaction”.⁸⁰ In *Credit Lyonnais Bank v Burch*,⁸¹ the relationship of employer and employee had ripened into a relationship of trust and confidence as evidenced by the onerous nature of the transaction entered into by the latter at the request of the employer. A relationship of trust and confidence arose in *Inche Noriah v Shaik Allie Bin Omar* where the donor was aged, illiterate and infirm and allowed her nephew to manage the whole of her affairs.⁸² Similarly, in *Re Craig*, a sufficiently close relationship emerged between an old and vulnerable man and his secretary companion who managed his affairs.⁸³

71 *Curtis v Pulbrook* [2009] EWHC 782 (Ch).

72 *Thompson v Foy* [2010] 1 P & CR 16 at [99]; see also the obiter views of Millett LJ in *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144 at 156.

73 *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010 at [260].

74 Traditionally, a difference between undue influence and duress is that the latter is a narrower defence, requiring the illegitimate exertion of physical force or, at least, the threat of such force: *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389.

75 (1997) 1 FLR 801.

76 *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010.

77 Per Lewison J in *Thompson v Foy* [2010] 1 P & CR 16 at [101].

78 In *Bank of Scotland v Makris* (unreported) 15 May 2009, the parties were close friends and formed part of a business team, with the alleged wrongdoer having the greater expertise in investment matters. Nevertheless, these features did not come close to demonstrating a relationship of trust and confidence.

79 [2004] EWCA Civ 904.

80 *Turkey v Avadh* [2009] 2 P & CR 29 at 517.

81 [1997] 1 All ER 144.

82 [1929] AC 127.

83 [1971] Ch 95.

In addition to establishing that the wrongdoer had the capacity to exert influence over the complainant, it must also be shown that such influence was exerted and was, moreover, undue.⁸⁴ There must also be a causal link between the undue influence and entry into the transaction. It does not, however, have to be the sole cause and there is no place here for anything resembling a “but for” test of causation.⁸⁵ In *UCB Corporate Services Ltd v Williams*,⁸⁶ the appellate court rejected the contention that the husband, who had fraudulently procured the consent of his wife, should be able to escape the consequences of his actions by establishing that, had his wife had the opportunity to make a free and informed choice, she would have acted in the same way. Peter Gibson LJ explained:

The fact is that the husband’s fraud deprived the wife of the opportunity to make such a choice, and, as I see it, it is that fact which founds the wife’s equity (as against her husband) to set aside the transaction.⁸⁷

The crucial distinction between legitimate persuasion and undue influence is essentially an issue of fact for the court to determine.⁸⁸ This is inevitable because as Deputy Judge James Munby noted: “It is impossible to define, and difficult even to describe, at what point influence becomes, in the eyes of the law, undue.”⁸⁹ The burden of proof, not surprisingly, rests with the person alleging to be its victim – he who asserts must prove. Nevertheless, and akin to the forensic aid of *res ipsa loquitur*, once a prima facie case is demonstrated the evidential burden shifts to the alleged wrongdoer to rebut the allegation that the influence was undue. A prima facie case will be demonstrated where the complainant can show that trust and confidence were placed in the alleged wrongdoer and, importantly, that the transaction cries out for explanation.⁹⁰ As Lord Nicholls acknowledged, “On proof of these two matters the stage is set for the court to infer that, in the absence of satisfactory explanation, the transaction can only have been procured by undue influence.”⁹¹ Hence, the court is merely drawing appropriate inferences from the primary facts proved. The evidence required to establish a prima facie case will vary according to the facts of a given case, but relevant issues may include the nature of the influence alleged,⁹² the relationship between

84 *Ellse v Pickford* [2006] EWHC 3293 (Ch). There the claimant was not pressured or influenced in any way to sign the documentation and the claim of undue influence was rejected.

85 *Henett v First Plus Financial Group* [2010] EWCA Civ 312. Briggs J explained that all that had to be shown was that the “equitable wrong committed by the abuse of confidence was part of the process by which the victim’s consent to it was obtained”, at [34].

86 [2002] EWCA Civ 555.

87 *Ibid.*, at [86]. All that needs to be shown is reliance, i.e. that the influence had an impact on the thinking of the victim: *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010.

88 As Lewison J observed in *Thompson v Foy* [2010] 1 P & CR 16 at [110]: “In essence the question is whether Mrs Thompson’s volition was overborne by Mrs Foy; not simply whether she was persuaded by Mrs Foy that the transaction was a good idea.”

89 *Bank of Scotland v Bennett* (1997) 1 FLR 801 at 823. He added, at 827: “At the end of the day the question of whether or not there has, in any particular case, been actual undue influence involves a value judgment.”

90 *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch).

91 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 459.

92 In *Wallbank v Price* [2007] EWHC 3001 (Ch), the unfounded allegation was that the signatory was coerced by violence into signing the documentation.

the parties,⁹³ any existing disabilities,⁹⁴ an examination of how the “victim” normally behaved, when free of influence,⁹⁵ the number of impugned transactions,⁹⁶ and size of the gift.⁹⁷ The overarching concern is, as Lord Nicholls stated, “the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship”.⁹⁸

Accordingly, it is only when the transaction looked at as a whole cannot be explained in terms other than those of undue influence that the burden shifts.⁹⁹ In some cases this will be evident, for example, when £1.5m of a mother’s estate was signed away to her son and daughter-in-law¹⁰⁰ or when a great-uncle made a £45,000 gift to a great nephew.¹⁰¹ In other instances, an impugned transaction can be readily justified. For example, in *Thompson v Foy* a mother made a gift of £200,000 to her daughter and this was found to be explicable on the basis that the daughter and her son-in-law had made substantial improvements to the mother’s property.¹⁰² There are, however, other cases where the explanation for the transaction is less obvious and requires a closer examination of the facts. In *Turkey v Avadb*, an unusual transaction was entered between family members without the parties “having inquired whether it was favourable to one, favourable to the other or fair to each”.¹⁰³ The court took into account various factors in order to reach its determination that the transaction, curious as it may be, was explicable without there being undue influence.¹⁰⁴ A similar stance was adopted in *Greenwood Forest Products (UK) Ltd v Roberts* where the one-sided nature of the arrangements was explicable on the basis of the potential gains that would be generated if the project was successful.¹⁰⁵

PRESUMED UNDUE INFLUENCE

Class 2 presumed undue influence is posited upon there being a pre-existing relationship of trust and confidence between the parties which is of such a nature that the law must assume that one party has dominance over the other. Lord Nicholls explained:

93 The fact that a marriage might be tempestuous and the wife reluctantly complies with her husband’s sexual demands does not support a conclusion that she subordinates herself to her husband’s financial demands: *Wallbank v Price* [2007] EWHC 3001 (Ch).

94 In *Public Trustee v Bailey* [2005] EWHC 3524 (Ch), a daughter with a mental illness was persuaded by her mother to enter into an injurious transaction. The daughter’s vulnerability offered evidence that the parent had exerted actual undue influence. Similarly, in *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch), the fact that the signatory suffered from cerebral palsy and an impaired cognitive function was an issue that the court took into account.

95 *Hogg v Hogg* [2007] EWHC 2240 (Ch).

96 In *Aldridge v Turner* [2004] EWHC 2768 (Ch), 62 transactions of modest sums were successfully challenged.

97 *De Wind v Wedge* [2008] EWHC 514 (Ch).

98 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 458, 459.

99 *Turkey v Avadb* [2005] 2 P & CR 29.

100 *Hodson v Hodson* [2006] EWHC 2878 (Ch). Although rejected by the House in *Etridge* as having no substantive role to play, the expression “manifest disadvantage” continues to be employed as an evidential factor: see *Vale v Armstrong* [2004] EWHC 1160 (Ch); *Macklin v Dowsett* [2004] EWCA Civ 904.

101 *Goodchild v Bradbury* [2006] EWCA Civ 1868.

102 [2010] 1 P & CR 16. In *DeWind v Wedge* [2008] EWHC 514 (Ch), a mother made a substantial gift to her son which was occasioned by him losing money in a business venture. This provided an explanation for her actions (i.e. concern for the well being of her son) independent of the alleged influence.

103 Per Chadwick LJ [2005] 2 & CR 29 at 523.

104 See also *Re Brocklehurst* [1977] 3 WLR 696, where the kindness of the donor resulted from the ordinary motive of friendship.

105 (Unreported) 12 March 2010.

The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected.¹⁰⁶

Traditional thinking was that there were two sub-categories of presumed undue influence: Class 2A and Class 2B.¹⁰⁷ The former, as discussed below, hinges upon the pre-existence of a special relationship between the parties. The latter, now redundant, was said to arise where the complainant was able affirmatively to demonstrate the de facto existence of a relationship within which the complainant generally placed trust and confidence in the alleged wrongdoer.¹⁰⁸

Class 2A offers a mechanistic assumption that certain formal relationships are sufficiently close to give rise to the irrebuttable presumption at law that one party has influence and dominance over the other.¹⁰⁹ The categories of relationship that may qualify for the purposes of this forensic exercise are not closed and, hence, it is not possible to draw up an exhaustive list.¹¹⁰ They must expand (and possibly contract) to keep in tune with modern sensibilities.¹¹¹ In *R v AG of England & Wales*, for example, the Privy Council assumed that the relationship between a commanding officer and soldier could be classified in this way.¹¹² Other inclusions are such potentially imbalanced relationships as exist between parent and child,¹¹³ guardian and ward,¹¹⁴ solicitor and client,¹¹⁵ trustee and beneficiary,¹¹⁶ doctor and patient,¹¹⁷ and priest and penitent.¹¹⁸ The common link between these examples is that the status of the parties automatically demonstrates the requisite element of trust and confidence placed by one in the other and raises the possibility of undue influence.¹¹⁹

106 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 480.

107 See *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923.

108 The difference between Class 2A and Class 2B was articulated by Millett LJ in *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144 at 154, “in the former case there is an irrebuttable presumption of law that the relationship is one of trust and confidence; in the latter this must be proved as fact”.

109 *Shaw v Finimore* [2009] EWHC 367 (Ch). There have, however, been calls for its abolition on the basis that the claimant should always be required to establish a de facto relationship of trust and confidence: Devenney and Chandler, “Unconscionability”, n. 57 above, at 558.

110 Lord Hobhouse, in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 482, offered the general guidance that: “Typically, they are fiduciary or closely analogous relationships.”

111 In *Læder v Stevens* [2005] EWCA Civ 50, the Court of Appeal attempted to extend the category to fiancé and fiancée. Although there is old authority for this proposition (*Re Lloyds Bank* [1931] 1 Ch 289), this defies modern thinking and authority.

112 [2003] UKPC 22.

113 *Lancashire Loans Ltd v Black* [1934] 1 KB 380. The presumption continues to apply after the child has achieved adulthood. A child, however, is not to be taken to have ascendancy over a parent: *Hogg v Hogg* [2007] EWHC 2240 (Ch).

114 *Hylton v Hylton* (1754) 2 Ves Sen 547.

115 In *Markham v Karsten* [2007] EWHC 1509, the solicitor and client also cohabited with one another. Briggs J held that the professional aspect of their relationship could not be ignored and suggested that it strengthened the influence which is presumed to exist. He added, at [36]: “Nor in my judgment is it correct to confine the presumption of influence, as between solicitor and client, to transactions of a legal rather than a domestic nature.”

116 *Benningfield v Baxter* (1886) 12 App Cas 167.

117 *Re CMG* [1970] Ch 574.

118 *Allcard v Skinner* (1897) 36 Ch D 145 (undue influence of a nun by her mother superior).

119 Lord Hobhouse in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 482 described these as, “legal relationships where one party is legally presumed to repose trust and confidence in the other, the other side of the coin to the duty not to abuse that confidence”.

Significantly, the relationship between husband and wife does not fall within the category of protected relationship.¹²⁰ Devenney and Chandler, however, question the value of this classification model, asking “do we have the same ‘awe’ of doctors today as once prevailed and is the average client so respectful of a solicitor’s advice and guidance?”¹²¹ The authors make the additional point that “there is little justification in applying a ‘blanket-rule’ to all relationships of that type. No two relationships are exactly the same.”¹²²

Predominant thinking prior to *Etridge* was that the presumption relieved the complainant of the need to prove both that influence had been exerted and that it was undue.¹²³ Lord Clyde recognised that the existence of Class 2B had instilled uncertainty as to “whether the presumption is of the existence of an influence or of its quality being undue”.¹²⁴ Once it is accepted that all that is presumed is influence,¹²⁵ Class 2B became surplus to requirement. As Lord Scott observed, “it makes no sense to find, on the one hand, that there was no undue influence, but on the other that the presumption applies”¹²⁶ and added: “Either the evidence did justify the finding of undue influence or it did not.”¹²⁷ Nevertheless, this misconception “set the law on the wrong track”¹²⁸ and doggedly continues to inhibit proper understanding of the relationship between actual and presumed undue influence.¹²⁹

The extent to which presumed influence is undue remains an issue of fact and inference to be established from the evidence adduced and the nature of the transaction itself. Any alternative conclusion would mean that, say, a seasonal gift from a patient to a doctor would always be assumed to arise from undue influence exerted by the latter.¹³⁰ In order to avoid such absurdity, the law must insist upon there being additional evidence before the burden of proof is reversed. As shown, there must be something about the nature of the transaction that calls for explanation, for example, that it cannot be accounted for by the ordinary motives of a patient seeking to make a seasonal gift to a doctor.¹³¹ There is no need to show that the other party has been guilty of a wrongful or dishonest act.¹³² If, however, the transaction does not demand explanation, the burden does not shift. In *Birmingham City Council v Forde*, a litigant signed a conditional fee agreement with her solicitor

120 *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch). Neither does it include the relationship of aunt and nephew (*Randall v Randall* [2004] EWHC 2258 (Ch)), accountant and client (*Mitchell v James* (unreported) 10 July 2001), bank and customer (*National Westminster Bank v Morgan* [1985] AC 686), nor employer and employee (*Credit Lyonnais Bank v Burch* [1997] 1 All ER 144).

121 Devenney and Chandler, “Unconscionability”, n. 57 above, at 558.

122 *Ibid.*

123 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923.

124 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 477.

125 *R v AG for England & Wales* [2003] UKPC 22. This is no new thing, however, as Cotton LJ made the same point in *Allcard v Skinner* (1897) 36 Ch D 145 at 171.

126 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 513.

127 *Ibid.*, at 523. Lord Hobhouse could not see why the proof of a de facto relationship should activate, “some artificial legal presumption” (at 483).

128 Per Lord Scott in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 502.

129 *Greenwood Forest Products (UK) Ltd v Roberts* (unreported) 12 March 2010; *Randall v Randall* [2004] EWHC 2258 (Ch).

130 In the words of Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 461: “Such a presumption would be too far-reaching . . . The law would rightly be open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss.”

131 *Clare v Joseph* [1907] 2 KB 369.

132 *Niersmans v Pesticcio* [2004] EWCA Civ 372.

which contained a success fee.¹³³ Rejecting an attempt to have the agreement set aside on the basis of undue influence by the solicitor, Clarke J explained that:

Many people would regard it as unacceptable that [the solicitors] should get nothing for their work. The ordinary motives of ordinary persons do not exclude doing the decent thing, even if some persons would not be minded to do so.¹³⁴

Putting the lender on inquiry

The lender is not under any positive legal duty to make inquiries. Indeed, to require this would amount to what Sir Richard Scott VC called, “unwarrantable impertinence on the bank’s part”.¹³⁵ He emphasised:

A bank has no business inquiring into the personal relationship between those with whom it has business dealings or as to their personal motives for wanting to help one another. A bank is not to be treated as a branch of the social services agencies.¹³⁶

Nevertheless, the notion of the lender being “put on inquiry” lies at the heart of the *O'Brien* defence. It is, as Lord Hobhouse put it, “[the] additional factor before the lender’s conscience is affected and he is to be restrained from enforcing his legal rights”.¹³⁷ In general terms, this barrier is overcome whenever one party agrees to stand as surety for the debts of another. The undemanding nature of this test is obviously designed to assist a claimant,¹³⁸ but it also offers protection for the creditor in that, “it assists banks to put in place procedures which do not require an exercise of judgment by their officials”.¹³⁹ The underlying thesis of this requirement is that, if the transaction is not on its face to the advantage of the surety, there is a real risk that the principal debtor acted improperly in procuring the guarantee. Hence, the lender should be put on inquiry that the surety may not fully understand the transaction or may not be acting with a free will.

As to whether the lender is or is not put on inquiry hinges upon the facts as known to the lender or its agent. In *Burbank Securities Ltd v Wong*,¹⁴⁰ the knowledge of a mortgage broker acting for the surety was attributed to the lender. Hodge J explained:

If this were not the case, then banks and other financial institutions could readily avoid the need to take the sensible steps to minimize the commission of equitable wrongs against their customers . . . by the simple expedient of inviting applications for finance only from intermediaries appointed by their customers rather from their customers direct.¹⁴¹

In the normal course of events, it will be apparent when one party is acting as the surety for another. Lord Hobhouse acknowledged: “The bank should know who the principal debtor is and what is the purpose of the facility.”¹⁴² This entails that the lender need not adopt the role of a private investigator and has no need to survey beyond the face of the credit documentation. The requirement is simply that the disadvantageous nature of the

¹³³ [2009] EWHC 12 (QB).

¹³⁴ *Ibid.*, at [106].

¹³⁵ *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46 at 55.

¹³⁶ *Ibid.*

¹³⁷ *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 483, 484.

¹³⁸ As Lord Nicholls observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 466: “The test should be simple and clear and easy to apply in a wide range of circumstances.”

¹³⁹ Per Lord Hobhouse in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 484.

¹⁴⁰ [2008] EWHC 552.

¹⁴¹ *Ibid.*, at [35].

¹⁴² *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 484.

transaction for the surety would be obvious to an independent and reasonable person who perused the relevant forms.¹⁴³ From this perspective, it is the lender's belief as to how the money is to be used which is crucial and not how in actual fact the funds are deployed.¹⁴⁴ There is some authority to suggest that this rule gives way when the outward appearance of the transaction suggests a surety relationship, but the money is actually used for the joint benefit of the parties.¹⁴⁵ Neill LJ felt that the true purpose was the redemption of earlier mortgages, but the stated purpose was to finance a business expansion. In circumstances where only a small fraction of the monies were employed for the stated purpose, he felt the correct approach was to consider what would have been the position had the lender been alerted to how the monies were really intended to be applied. He concluded that the lender was entitled to treat the transaction as an ordinary business transaction. While this embodies an unusual twist of legal reasoning, instinctively it is to be viewed as correct. If it were otherwise, the wife would have been able to set aside a transaction that was to her benefit and which, had the true reason been disclosed, would not have put the bank on inquiry.

Returning to more conventional territory, if the expressed purpose of the transaction is, say, to discharge an existing mortgage and to buy a family holiday home for the husband and wife then, generally, there is nothing to arouse the suspicions of the lender.¹⁴⁶ Similarly, the lender's suspicions are not aroused where the joint charge is to guarantee a loan for a business that is operated jointly by the parties,¹⁴⁷ or where the debtor is a joint venture company and the surety is one of the three shareholders ("partners").¹⁴⁸ In *Burbank Securities Ltd v Wong*,¹⁴⁹ however, the lender should have doubted the veracity of the stated purpose. The lender was told that the surety was a business partner and that the money was for a joint business venture. Nevertheless, there were inconsistent claims and the lender knew that the surety was in receipt of social security payments. It was also evident, due to her medical condition, that she could not command a senior position within a company. When spoken to on the telephone, moreover, the surety merely answered "yes" to the lender's questions.

The justification for treating a genuine joint advance differently from a surety case is, as Lord Browne-Wilkinson explained in *CIBC Mortgages plc v Pitt*:

in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit.¹⁵⁰

In determining which side of the line a transaction falls, no regard is had to the argument that a surety wife will potentially derive benefit if her husband's business succeeds.¹⁵¹ Difficulties have, however, arisen where the nature of the transaction is less clear-cut and when the transaction is only in part to the benefit of the surety. For example, when a wife agrees to the transaction in order to secure funds to discharge the debt of a company in

143 *Maboney v Purnell* [1996] 3 All ER 61.

144 *Chater v Mortgage Agency Services (No 2) Ltd* [2004] P & CR 4.

145 *Hedworth v Scotlife Home Loans (No 2) Ltd* (unreported) 15 May 1995.

146 *Leggatt v National Westminster Bank* (2001) P & CR 432. There, it was plainly to the advantage of the surety wife to take a later charge (as to which she was not independently advised) to replace an earlier one that she had undertaken following legal advice.

147 *Equity & Law Life Assurance Society plc v McGrath* (unreported) 9 May 1995.

148 *Bank of Scotland v Makeris* (unreported) 15 May 2009.

149 [2008] EWHC 532 (Ch).

150 [1993] 4 All ER 433 at 441.

151 *Midland Bank v Greene* [1994] 2 FLR 827.

relation to which she and her husband are shareholders. Until the decision in *Etridge*, it was necessary for the court to embark upon an investigation as to whether the transaction, when looked at as a whole, was in substance a surety transaction.¹⁵² If it was not, there was nothing to put the bank on inquiry. Conversely, if the wife's interest was nominal then, as the potential risks significantly outweighed the possible gains, the creditor's suspicions should be aroused.¹⁵³ This particular forensic exercise has, seemingly, become otiose post-*Etridge*. Lord Nicholls explained in the context of a company run jointly by the parties:

Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business.¹⁵⁴

The role of constructive notice

In these surety cases, the doctrine of notice operates in a fashion subtly different from its conventional form. Lord Scott explained:

the constructive notice that is sought to be attributed to the bank is not constructive notice of any pre-existing right or prior equity of the wife . . . It is the notice that the bank has of the impropriety that creates the wife's right to set aside the transaction. The wife does not have any prior right or prior equity.¹⁵⁵

Accordingly, in this context the doctrine of notice offers more than a defence of the purchaser against the adverse claims of third parties, it is a constituent feature of the very right that the surety has to establish. Hence, if the creditor has constructive notice of the wrongdoing, the victim is entitled to have the transaction set aside.¹⁵⁶ The onus, however, rests on the surety to prove affirmatively that the transaction is one that puts the bank on inquiry and to establish that it is tainted by the wrongdoing of a third party. Most certainly it is not for the lender to prove the negative for, as Lord Hoffmann explained in *Barclays Bank plc v Boulter*:

a rule which generally put the burden upon the bank to show that it had no notice of vitiating circumstances could operate very unreasonably. It would mean that even when the relationship between the parties, as known to the bank, gave rise to no apparent risk of undue influence, the bank would have to prove that it had no notice of any which may in fact have been exercised.¹⁵⁷

It has never been doubted that, where undue influence has been applied, the entire transaction is voidable.¹⁵⁸ Some uncertainty arose, however, in the context of

152 *Allied Irish Bank v Byrne* [1995] 2 FLR 325.

153 *Goode Durrant Administration v Biddulph* [1994] 2 FLR 551.

154 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 466. The attempt by Lord Nicholls was, as Deputy Judge David Donaldson put it in *Bank of Scotland v Makeris* (unreported) 15 May 2009 at [49], "to create a single and clear bright line of division between those cases which required a bank to insist on the guarantor receiving independent legal advice and those which did not".

155 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 499.

156 In the wake of *Yorkshire Bank plc v Tinsley* [2004] 3 All ER 463, a substitute mortgage with the same mortgagee can be vitiated where the original mortgage was legally ineffective on *O'Brien* principles. This is so even if the second transaction was not induced by any equitable wrongdoing. Of course, this cannot apply if the second transaction is with a different mortgagee.

157 (1999) 4 All ER 513 at 519.

158 *Barclays Bank v O'Brien* [1993] 4 All ER 417.

misrepresentation as to the extent of liability. In *Bank Melli Iran v Samadi-Rad*,¹⁵⁹ the issue raised was whether a transaction involving an indebtedness of £1.2m should be upheld in part so as to accord with the misrepresentation. It would then follow that the surety would remain bound to the misrepresented financial ceiling (£140,000) with the excess amount being irrecoverable. Although this line of reasoning had appealed to the lower court, the Court of Appeal regarded it as unsound. It is now beyond argument that the surety's remedy is an all-or-nothing affair.¹⁶⁰ This is logical in that the surety might not have offered any guarantee whatsoever if the true extent of financial liability had been known. Consequently, the lender's charge will not be enforceable against the beneficial interest of the victim, but remains enforceable against the property interest (if any) of the wrongdoer.

Much of the litigation concerning the *O'Brien* defence has concerned the steps that the lender must take in order to avoid being affixed with constructive notice and to overcome the surety's defence. It is totally unrealistic to expect the lender specifically to ask of a surety whether there has been undue influence exerted or some other wrongdoing perpetrated. Indeed, as Lord Nicholls put it: "This is not a step that the banks should be expected to take."¹⁶¹ This entails that the lender will seldom acquire any actual notice of wrongdoing. Similarly, there will rarely be any relationship of agent and principal between wrongdoer and lender that could impute notice of misfeasance to the latter. Once put on inquiry, therefore, the lender must proceed on the assumption that the surety may not fully understand the full contractual obligations arising from the legal charge. This is in recognition of the complexity of the printed documentation employed and the consequence that, "it is unlikely to be read let alone understood by private guarantors who lack legal training or appropriate business experience".¹⁶² The most that can be expected of the lender, therefore, is to make sure that the surety understands the liabilities incurred and the implications of the transaction.¹⁶³ Undoubtedly, this is best achieved by means of a personal interview with the surety where the transaction can be explained and the surety advised to have recourse to independent legal advice. If communication occurs via correspondence there is always the risk that letters will be intercepted and never reach the intended recipient.¹⁶⁴ Nevertheless, lenders tend to eschew private meetings and, understandably, prefer to shelter behind the skirts of the independent legal advisor.¹⁶⁵ This tactic also avoids the threat of additional liability that would arise if the lender's representative failed to explain properly the proposed transaction. From this perspective it is not unreasonable for the lender to transfer responsibility to an independent legal advisor.¹⁶⁶ Usually, this will ensure that the lender is able to defeat the claims of a wronged surety.¹⁶⁷ Nevertheless, the established practice was viewed with unease by the House in *Etridge* because lenders, as Lord Hobhouse lamented:

were not doing anything themselves. They were instructing a solicitor, asking him to supply a formal certificate limited to comprehension and that is all. This is

159 [1995] 2 FLR 367.

160 See also *TSB v Camfield* [1995] 1 All ER 951.

161 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 467.

162 Per Lord Hobhouse in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 485.

163 As Lord Nicholls observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 476: "As a measure of protection this is valuable. But, in all conscience, it is a modest burden for banks and other lenders."

164 As occurred in *Abbey National Bank plc v Stringer* [2006] EWCA Civ 338 (a son intercepting his mother's correspondence).

165 In *Burbank Securities Ltd v Wong* [2008] EWHC 552, the lender met with the surety and, as a result, should have appreciated that she was the subject of undue influence.

166 A solicitor or, as in *Barclays Bank plc v Coleman* (2000) 1 All ER 385, a legal executive.

167 *Bank of Scotland v Hill* [2002] EWCA Civ 1081.

what had given rise to the fiction of free and informed consent where none existed and no steps had been taken to discover the true position.¹⁶⁸

While acknowledging that lenders should not be obliged to provide the advice personally, the House put in place new procedures and safeguards. These are designed to ensure that “the fiction of independent advice and consent should be replaced by true independent advice and real consent”.¹⁶⁹

While the lender is still not expected to advise the surety as to the nature of the transaction, post-*Etridge*, the creditor must engage in some form of direct contact with the surety. This was felt necessary because the surety often becomes involved with the transaction at a late stage and this tendency operated to deprive the surety of a choice of advisor and to obscure the reason why the advice was being offered. The lender is required to communicate certain information to the surety as to why independent legal advice is required. The surety should be told that the purpose of the requirement is to protect the lender in that thereafter the surety will be legally bound by the transaction. The surety should also be invited to nominate a solicitor who is to act on the surety's behalf¹⁷⁰ and subsequently provide confirmation to the lender that the transaction had been explained. The lender is then expected to put the transaction on hold until it has received an appropriate response directly from the surety. These modest steps forward mark a major improvement. The new regime, as Lord Hobhouse put it:

is a far cry from the situation which has been tolerated in the past where the wife has not appreciated that she had any solicitor or was being advised and did not know the existence of the certificate or its significance; indeed, it has been that type of situation which has given rise to the most scandalous cases.¹⁷¹

Change has also occurred as regards the information to be provided by the lender to the surety's advisor. As the lender will usually have a greater insight into the principal debtor's financial standing than that of the advisor, it is thought reasonable for the lender to furnish this information. Although the precise information to be given is fact sensitive, the House did offer general guidance. It was felt that the lender should provide details as to the stated purpose of the loan, the current amount of the principal debtor's existing indebtedness, any extant overdraft facility and the amount and terms of any new facility. A copy of the loan application form is also to be forwarded to the advisor. Of course, in order to avoid a breach of confidence, the lender will have to obtain the consent of the principal debtor to such disclosures, but this is easily achieved if the consent is made a condition of the proposed transaction.¹⁷² Although this will rarely be the case, particularly if lender and surety never engage in a face-to-face meeting, if the lender suspects that there is some wrongdoing afoot then the lender is under an obligation to report this suspicion to the surety's advisor. Due to the vagaries of the postal system, the lender should always obtain confirmation that the documentation was actually received by the advisor.

168 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 489.

169 Per Lord Hobhouse in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 489.

170 Although this may be the same solicitor as is acting for the principal debtor, the surety should be asked whether a different solicitor would be preferable.

171 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 488.

172 Understandably, the lender cannot rely on the principal borrower to furnish this type of information: *National Westminster Bank plc v Kostopolos* (2000) 1 FLR 815.

The emphasis upon independent advice

Experience has shown that pre-*Etridge* the advice provided to the surety was often perfunctory and, thereby, undermined the safeguard that it was intended to secure. A graphic example of this occurred in *Lloyds Bank plc v Wright-Bailey*¹⁷³ where the extent of an impatient solicitor's advice was:

What this document means is that if your husband fails to pay back the Bank, you will be held responsible and the bank will seek recovery from you and can sell your home.

Clearly, something was required to improve the quality and efficacy of independent advice. In Lord Clyde's words, "the wife's consultation with her solicitor is a serious step which is not to be brushed off as a mere formality or a charade".¹⁷⁴ Not surprisingly, therefore, the House felt it necessary to recast the role of the independent advisor.

First, it was accepted that the scope of the independent advisor's professional responsibilities is geared to what the advisor is retained to do by the surety, that is, to bring home the risk of the transaction. If the advisor is not instructed by the surety, but is instead instructed by the lender,¹⁷⁵ the latter cannot rely on a solicitor's inaccurate confirmation that the transaction has been explained.¹⁷⁶ Although the validity of transactions should not turn upon fine distinctions in the wording of the instructions given to solicitors (or, indeed, the certificates that they give),¹⁷⁷ the retainer must impress upon the advisor the importance of giving the surety sufficient advice about the legal implications and effect of the proposed transaction.¹⁷⁸ This will require the advisor to have a face-to-face meeting with the surety and to explain, in straightforward language, the purpose of the consultation and that the lender will rely on the advice given so as to counter any later allegation of wrongdoing. This meeting should (but strictly need not)¹⁷⁹ occur in the absence of the principal debtor for, as Lord Hobhouse acknowledged:

if the purpose is to satisfy oneself that the wife is acting freely in the knowledge of the true facts, an interview in the presence of the husband is unlikely to achieve this objective if she has been improperly influenced by him.¹⁸⁰

Obviously, there is some overlap with the information previously imparted to the surety by the lender, but it does offer a safety net for a surety whose correspondence from the lender may have been intercepted by an unscrupulous principal debtor. Unless the circumstances are exceptional,¹⁸¹ the advisor is expected not to abort the transaction by refusing to confirm that the transaction has been explained. As Lord Nicholls emphasised, "at the end of the day the decision on whether to proceed is the decision of the client, not

173 (Unreported) 3 May 1995.

174 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 479.

175 For the purposes of this classification, it matters not who actually pays the solicitor's fees: *Banco Exterior Internacional v Mann* [1995] 1 All ER 936.

176 In *National Westminster Bank plc v Amin* [2002] 1 FLR 735, the only instructions given to the advisor were provided by the lender and the surety never gave the solicitor authority to inform the bank as to what had transpired during the interview.

177 *Leggatt v National Westminster Bank* (2001) P & CR 432.

178 *National Westminster Bank plc v Amin* [2002] 1 FLR 735. There the bank asked the solicitor merely to attend to "the formalities" which Lord Scott felt was totally inapt.

179 *National Westminster Bank plc v Amin* [2002] 1 FLR 735.

180 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 486.

181 That is "where it is glaringly obvious that the wife is being grievously wronged", per Lord Nicholls *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 469.

the solicitor".¹⁸² Accordingly, a lender can rely on the advisor's certification even though the advisor finds the transaction unwise and imprudent.¹⁸³

Secondly, the advice provided must embrace what are labelled "the core minimum issues". Lord Nicholls felt obliged to offer general guidance because of a manifest failure by solicitors to appreciate what was required in these surety cases. A typical checklist of factors to be covered during the interview will now include an explanation of the loan documentation and associated legal consequences. The advisor must also disclose the details of the proposed transaction and these will include the purpose of the loan, its amount and terms and whether it can be increased without the surety being notified. In addition, the advisor should ascertain from the surety the current value of the property to be charged and whether there are any other assets available from which repayment could be made if the loan was enforced. In the light of the financial information that should have been supplied by the lender, there should also be some discussion of the principal debtor's existing debts and current overdraft facility. Absent this confidential information, the advisor should decline to provide certification that the transaction has been explained. The surety is, moreover, to be informed that withdrawal from the proposed transaction is still possible and that the advisor can open negotiations for a change of terms (e.g. to achieve a lower limit on the surety's liabilities). The advisor must not, however, provide any certification to the lender without the express authorisation of the surety. This neatly sidesteps potential problems, as experienced in the *Amin* case, as to whether or not the solicitor is retained by the surety. By providing this list of key considerations to be addressed, the House has ensured that the advice is now more rigorous and structured than it was before and that a sketchy outline of potential liability will no longer suffice.

Thirdly, the allusion to the "independent" advisor has traditionally raised doubt as to whether the solicitor must act solely for the surety. In many surety cases, the solicitor advising the surety will also represent the principal debtor either in the particular transaction or generally. The House in *Etridge*, therefore, recognised that "a simple and clear rule is needed, preferably of well-nigh universal application".¹⁸⁴ Although there may be advantages associated with seeking out a totally independent advisor (e.g. the surety may be less inhibited and the advisor more focused), separate representation is not to be insisted upon.¹⁸⁵ The solicitor's advice is not tainted merely because the advisor happens also to represent the interests of the principal debtor. Lord Nicholls explained:

When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her, both at law and professionally. These duties, and this is central to the reasoning on this point, are owed to the wife alone. He is concerned only with her interests.¹⁸⁶

Hence, by accepting the surety's retainer, the advisor offers the assurance to the surety that the advice is to be given impartially, fully and competently.¹⁸⁷

Finally, if the solicitor fails to advise the surety properly then the client can issue proceedings for breach of contract or under the law of negligence. Admittedly, this does

¹⁸² *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 469. He continued: "A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so."

¹⁸³ Absent certification, the lender cannot assume that the advice has been provided: *Bank of Ireland v Cox* (unreported) 19 July 1995.

¹⁸⁴ Per Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 471.

¹⁸⁵ *Banco Exterior International v Mann* [1995] 1 All ER 936.

¹⁸⁶ *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 472.

¹⁸⁷ *Bank of Scotland v Bennett* [1999] 1 FLR 1115.

little to maintain a roof over the surety's head because the lender will usually continue to be shielded behind the advisor's certification that the transaction had been explained. The general rule is that the bank can rely upon the professional integrity and competence of the solicitor and it is not for the bank to form a view as to whether the solicitor has a conflict of interest.¹⁸⁸ As Ogilvie puts it:

Subsequent solicitor–spouse issues would not invalidate the bank's security vis-à-vis the surety. A borrower would be free to exercise undue influence, actual or presumed, but with the certificate and the surety's signature, that conduct would be irrelevant to the bank's right to enforce the security. A largely formal legal test obviates the need to investigate any personal relational messiness.¹⁸⁹

A road less travelled concerns the circumstances in which the sins of the solicitor will be visited upon the lender. Broadly put, this will occur when the lender either knows or ought to know that appropriate advice has not been delivered. The overarching need is for the lender to have taken reasonable steps to ensure that the nature and risks of the transaction are brought home to the surety. As Blackburne J observed in *First National Bank plc v Achampong*:

[the bank] must have proper grounds for thinking that the solicitor has advised her on the risks she runs from entering into the transaction whether or not, in fact, the solicitor has properly discharged his duty to her.¹⁹⁰

It is to be remembered that such knowledge is not acquired merely because the advisor acts both for the lender and for the surety.¹⁹¹ As discussed earlier, in such circumstances the advisor is not to be regarded as acting as the agent of the former and, hence, knowledge of any deficiency in the advice given is not to be imputed to the lender.¹⁹² A different outcome might arise, however, where the surety visits the lender's solicitor (e.g. for a signature to be witnessed), but never retains the solicitor to provide advice on the transaction. According to Lord Scott, as the advisor would then be instructed by the lender alone, the bank would have imputed notice of the lack of advice if certification to the contrary was mistakenly issued by the advisor.¹⁹³ Similarly, the lender may be affixed with notice due to the onerous or strange nature of the transaction in hand.¹⁹⁴ In *Credit Lyonnais Bank v Burch*,¹⁹⁵ the transaction was regarded by Millett LJ as being so unduly onerous and extreme that the lender must have known that no competent solicitor could advise the

188 *Bank of Baroda v Rayarel* [1995] 2 FLR 376.

189 MH Ogilvie, "The reception of *Etridge* (No 2) in Canada" (2008) JBL 191, at 201. Of course, if there is no certification provided by the advisor, the lender proceeds at its own peril: *Cooke v National Westminster Bank plc* (1998) *The Times*, 27 July.

190 [2003] EWCA Civ 487 at [33].

191 *Barclays Bank plc v Thomson* (1997) 4 All ER 826.

192 As Lord Nicholls emphasised in *Royal Bank of Scotland plc v Etridge* (No 2) [2001] 4 All ER 449 at 472: "To impute to the bank knowledge of what passed between the solicitor and the wife would contradict the essential feature of the relationship. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice."

193 *Royal Bank of Scotland plc v Etridge* (No 2) [2001] 4 All ER 449 at 507. He repeated this view in *National Westminster Bank plc v Amin* [2002] 1 FLR 735 at 740, 741: "Who gave the solicitors the instructions under which he was acting? If the answer is 'the bank', then the bank, it seems to me, cannot rely on the solicitor's inaccurate confirmation."

194 See *Zamet v Hyman* [1961] 1 WLR 1442.

195 [1997] 1 All ER 144.

surety to enter it.¹⁹⁶ By way of *obiter*, he concluded that, even if the surety had received independent advice, the lender would have been bound by her equity.¹⁹⁷ In the *Etridge* case, Lord Hobhouse expressed a similar sentiment when, in the context of a wife shackled to an all monies, unlimited charge, questioned, “how can it be if the wife has in truth been independently advised?”¹⁹⁸ Knowledge can also be readily attributed in circumstances where the lender has not supplied the necessary information to the advisor, say, as to the principal debtor’s financial standing.¹⁹⁹ Due to this omission, the lender will either know or ought to know that, despite certification to the contrary, the advisor could not have fully explained the transaction to the surety.²⁰⁰ This possibility was accepted in *National Westminster Bank plc v Amin*²⁰¹ where the surety (Mrs Amin) did not speak English and the advisor provided the explanation without the assistance of an interpreter. The House of Lords felt that, if the lender had known that the surety spoke only Urdu, it should have informed the advisor of this special feature. A failure to alert the advisor to the surety’s vulnerability would prevent the lender from relying on the certification of the advisor that the transaction had been explained. This is because of the greater risk of undue influence and the danger that the surety might not comprehend the advice proffered. A further illustration emerges from *National Westminster Bank plc v Breeds*.²⁰² There the bank knew that the advisor was also the secretary of the company run by the husband and that the company was in desperate need of a cash injection. This insider knowledge entailed that it was not an ordinary type of case and alerted the bank to the strong probability of a real conflict of interest and prevented the lender from relying upon the advisor’s confirmation that the transaction had been fully explained.²⁰³

Conclusion

The overhaul of the law of undue influence is to be welcomed. The reform heralded by the House of Lords in the *Etridge* case is much more than a mere re-branding exercise. The fundamental rethinking promoted as to the burden of proof and, in particular, the abandonment of Class 2B was intended to underscore that the classification of influence as being undue turns upon factual inferences drawn from the evidence adduced. The change in language and emphasis does not disadvantage the surety. Indeed, the ambition is to enable the surety more effectively to establish that wrongdoing has occurred. Once it is established that there is a relationship of trust and confidence and that the transaction calls out for explanation, the burden of proof shifts from the surety to the wrongdoer. The latter must then establish that the transaction is untainted. It is, therefore, ironic that the perpetuation of old and discredited wisdoms continues to afford a barrier to the ready

196 The transaction gave rise to grave suspicion, shocked the conscience of the court and cried out for explanation. Indeed, Nourse LJ felt it was arguable that Ms Burch could have had the transaction set aside as an unconscionable bargain. For an account of the relationship between unconscionable bargains and undue influence, see Devenney and Chandler, “Unconscionability”, n. 57 above.

197 See also *Cloughton v Price* (1998) 30 HLR 396 where, admittedly in the context of a bilateral transaction, Nourse LJ viewed aspects of the contract as so irrational that no solicitor could have advised the victim to sign it.

198 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at 486.

199 An immaterial inaccuracy in the information provided to the advisor should not have this effect: *Leggatt v National Westminster Bank* (2001) P & CR 432.

200 *Bank of Scotland v Bennett* [1997] 1 FLR 801.

201 [2002] 1 FLR 735.

202 (2001) Lloyds Rep Bank 98.

203 In *Bank of Scotland v Bennett* [2002] 1 FLR 735, the lender knew that the transaction was of a special and peculiar nature and materially different in significant ways from what a surety would normally encounter.

understanding of the contemporary role and operation of these forensic aids.²⁰⁴ It appears that, despite the ambitious reformulation undertaken, the true import of *Etridge* is yet to be widely and fully understood.²⁰⁵

From the most obscure of origins, the jurisdiction to relieve sureties against the otherwise legitimate claims of creditors has been fashioned and refined incrementally by the courts. Its modern manifestation, which imposes responsibility on the lender to take steps to ensure that the surety is aware of the true nature of the transaction and associated legal perils, achieves a fair balance between the interests of the creditor and those of the surety. It is activated only in circumstances where the lender should be alert to the possibility of wrongdoing and where such misfeasance has, in fact, been perpetrated. The resultant emphasis lies with a series of warnings and explanations to be given by the lender and the surety's advisor. In this context, it must follow that if the prescribed steps are not taken, the lender will be affixed with constructive notice of the wrongdoing and the surety able to mount a successful defence to the lender's claims.²⁰⁶ If, however, the lender discharges its obligations to the surety then, in the normal course of events, it will be shielded from any future claims. Understandably, this protection is denied to a lender who either knew or should have known that the transaction has not been properly explained and understood. The ultimate safeguard for the surety is that, at the least, there will be transmitted a full explanation of the nature of the transaction and its consequences. Of course, while this should offer an antidote to misrepresentation, it can offer no guaranteed counterweight to undue influence. Indeed, as Lord Nicholls conceded: "Short of prohibiting this type of suretyship transaction altogether, there is no way of achieving that result, desirable although it is."²⁰⁷ Undeniably, the workings of the *O'Brien* compromise now represent sound principle and offer pragmatic solutions. Unfortunately, there will always be hard cases that lie at the boundaries and highlight inadequacies in whatever test is employed. Nevertheless, the judiciary has consistently demonstrated a preparedness to adapt and modify the law so as to reduce the possibility of injustice. It is too easily overlooked that, despite any imbalance of economic might, the lender is also a victim of the wrongdoing. While the bank and the surety have conflicting interests, they both share a common interest in ensuring that the surety does not enter the transaction without informed consent and subject to undue influence. There is, surely, nothing more that should be expected of the lender.

204 See, for example, MP Thompson, "Wives, sureties and banks" (2002) *Conv* 174, at 181 and 182.

205 See Ogilvie, "The reception of *Etridge* (No 2) in Canada", n. 189 above.

206 See *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch) where the lender shut its eyes to the risk that undue influence had been exerted.

207 *Royal Bank of Scotland plc v Etridge* (No 2) [2001] 4 All ER 449 at 464.

The politics of Pride: representing relegated sexual identities in Northern Ireland

DR MARIAN DUGGAN

Sheffield Hallam University

Introduction

Northern Ireland can be seen as a politically sensitive society where religion and politics often intersect to govern from a morally conservative standpoint. The vocal opposition to homosexuality demonstrated by Northern Irish politicians and annual picketers of the Gay Pride parade in Belfast demonstrates how the feminist mantra of “the personal is political” resonates for sexual minorities in Northern Ireland. As a result, Pride has become a political platform from which to illustrate the ongoing prejudice faced by lesbian, gay, bisexual and transgender (LGBT)¹ communities. In particular, several organisers of Pride have drawn attention to the harmful and inflammatory comments made by morally conservative Northern Irish Members of the Legislative Assembly (MLAs) and the fact that legislation enacted to protect LGBT people from persecution remains unused. Many hate-crime theorists claim that, in order to address the “everyday” or low-level forms of identity-based prejudice, such as homophobia, a clear indication needs to be given that such hostility is not tolerated.² If this is not the case, then prosecuting only the extreme levels of homophobic violence appears to condone other forms of victimisation, placing prejudice on a continuum of severity. This appears to be the case in Northern Ireland, where only the most serious cases of violence motivated by homophobic hatred have warranted recognition at the prosecution stage.³

However, taking the position that such forms of hatred are often situated, and tolerated, within a wider prejudicial culture, this article examines why similar displays of anti-homosexual sentiment which incur punishment in Great Britain evade disciplinary or criminal action against politicians in Northern Ireland. Citing examples of some of the disparaging claims made about homosexuality in Northern Ireland, the paper explores whether the religious exemptions designed to protect freedom of speech may be impacting on the efficacy of equality legislation truly to address homophobic hostility. In doing so, the

1 Although transgender identities are based upon gender differences as opposed to sexual identities, due to the minimal numbers of trans-identifying people in Northern Ireland, they are often conflated with lesbian, gay and bisexual groups.

2 See B Perry, *In the Name of Hate: Understanding hate crime* (New York: Routledge 2001); B Perry, “Accounting for hate crime: doing difference” in B Perry (ed.), *Hate and Bias Crime: A reader* (New York: Routledge 2003); P Iganski, *Hate Crime and the City* (Bristol: The Policy Press 2008).

3 Several of these cases are detailed later in the paper.

article assesses the wider remit of Northern Ireland's politically tenuous past and continuing sensitive present, challenging the true value of sexual orientation equality legislation in a culture where moral conservatism reigns supreme.

Northern Ireland's socio-political history proves important in contextualising freedoms and equalities in light of its troubled past. Issues surrounding identity and representations of difference in Northern Ireland have a long and somewhat contentious history, intensifying during a period of political instability known as the "Troubles". The Troubles dominated politics and society in Northern Ireland from the late 1960s to the late 1990s but, it is argued in this paper, can be seen as continuing subtly to inform contemporary political and social life. The signing of the Belfast (Good Friday) Agreement in 1998 signalled an end to the worst period of the conflict and the start of the ongoing and relatively successful peace process. The 1998 Agreement sought to address many of the inequality issues informing hostile relations between Protestant and Catholic community members in Northern Ireland, accounting not only for sectarian divisions but also differences inferred upon the basis of race, religion, sexual orientation and disability. Certainly, it can be argued, in the case of sexual orientation equality and anti-discrimination measures, Northern Ireland's commitment to equality has proved beneficial to obtaining legal protections that otherwise may have proved difficult to implement organically.⁴ Similarly, s. 75 of the Northern Ireland Act 1998, requires statutory bodies to have due regard for the need to promote equality of opportunity and good relations. LGBT communities were included as a minority group requiring legal recognition within this section.

Subsequent legislation relating to sexual orientation included freedom from workplace discrimination in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003; freedom to register partnerships in the Civil Partnership Act 2004; freedom from victimisation or discrimination in the Criminal Justice (No 2) (Northern Ireland) Act 2004; and recognition as warranting equal treatment under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. However, more morally conservative members of Christian organisations have used faith-based arguments to avoid wholly complying with several laws designed to protect sexual minorities from discrimination.⁵ For example, Christian adoption organisations in Northern Ireland were in extended negotiations with the British government about complying with the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 – whereby they would be required to accept lesbians and gay men as potential adopters – despite being given a lengthy amount of time to "adjust" to the new law. This need to account for religious wishes is indicative of the binary distinction drawn between sexuality and spirituality in Northern Ireland by political elites and members of the clergy which construct homosexuality as sinful deviance and therefore, for some, a viable target of prejudice and discrimination.

Developing LGBT visibility

The recent spate of equality legislation to protect members of LGBT communities in Northern Ireland was enacted by Westminster to the devolved Northern Ireland Assembly. The Assembly has never freely designed laws which could be seen as aiding LGBT communities. The struggle for homosexual decriminalisation exemplifies this. Following the partial decriminalisation of homosexuality in England and Wales through the Sexual Offences Act 1967, a campaign was established by several Northern Irish Democratic Unionist Party (DUP) politicians and religious leaders to stop this legislation being extended

4 The case of *Dudgeon v UK*, detailed below, exemplifies this.

5 C Mitchell and J Tilley, "The moral minority: evangelical Protestants in Northern Ireland and their political behaviour" (2004) 52(3) *Political Studies* 585–602.

to Northern Ireland. This campaign, spearheaded by the Revered Ian Paisley, who at the time was head of both the DUP and the newly formed Free Presbyterian Church, garnered the support of Catholic Churches where possible, regardless of the ongoing sectarian division.⁶ Heavily invoking doctrinal ideologies of doom and destruction, primarily the destruction of Northern Ireland's "moral fabric", Dr Paisley's Campaign resulted in more than 70,000 Northern Irish residents (at that point 5% of the population) signing a petition opposing decriminalisation. Large advertisements in newspapers stated that enacting the law "can only bring God's curse down upon our people".⁷ Additional support was garnered through the distribution of pamphlets which focused heavily upon the fear that such a law would adversely impact on social values:

We oppose the legalising of Homosexuality as we believe the practice is contrary to the Word of God and the moral standards of the people of Northern Ireland. HOMOSEXUALITY DEMANDS NOT ACCEPTANCE BUT A CURE. The legalising of homosexuality would open the floodgates of immorality, with countless other vices demanding acceptance. The consequences of such a deluge would be grim . . .⁸

Invoking the key tenets of Northern Irish identity – faith and family – as well as the fear of chaos, DUP councillor Alan Kane ensured that his pamphlet left no doubt as to the potential destruction legalised homosexuality would bring:

Homosexuality should not be regarded as a disease but as a sin which debases individuals, degrades society and which is outrightly condemned in the Bible in the strongest possible terms . . . The demands for the legislation of homosexuality represent a serious threat to the social order and another attempt to undermine the basic tenets of morality which are held by the vast majority of decent people in Northern Ireland . . . The law must act as a deterrent otherwise a society totally devoid of any form of legal control would be created, where mass murder, rapes and incestuous relationships would take place.⁹

The success of this campaign meant that homosexuality remained criminalised under the Offences against the Person Act 1861 and the Criminal Law (Amendment) Act 1885, which added the "gross indecency" charge, effectively criminalising all sexual contact between men. Police raids on the homes of several known members of gay rights organisations – who had formed to campaign in favour of extending the 1967 Act to Northern Ireland – led to the arrest of Jeffrey Dudgeon. This proved pivotal in the campaign for decriminalisation. In 1980, Dudgeon took a discrimination case to the European Commission of Human Rights to be screened for admissibility and to see if his claims under various Articles had any merit. In 1978, the commission found his claim under Article 8 admissible, deciding by nine votes to one that the legal prohibition of homosexual acts between men over 21 years of age breached his right to respect for his private life. The commission referred the case to the European Court of Human Rights for clarification of the law, which in turn decided to take the decision in plenary as it does with important legal matters so it could have an authoritative decision. On 22 October 1981, the court in plenary

6 Northern Ireland Gay Rights Association (NIGRA), *Information Sheets and Memoranda Issued by Various Gay Rights Groups, Mainly NIGRA May 1974–October 1980* Ref No D/3762/1/4/2 (Belfast: Public Records Office Northern Ireland 1979).

7 D McKittrick, "Paisley's power switched off", *Irish Times*, 20 October 1977, available at www.irishtimes.com/newspaper/archive/1977/.

8 NIGRA, "Article from THES 14 May 1979", *Gays in Ulster: A report of recent developments* Ref No D/3762/1/1/5 (Belfast: Public Records Office Northern Ireland 1979).

9 NIGRA, *Information Sheets and Memoranda Issued by Various Gay Rights Groups, Mainly NIGRA May 1974–October 1980* Ref No D/3762/1/4/2 (Belfast: Public Records Office Northern Ireland 1979).

(19 judges) agreed with the commission's position by 15 votes to 4, ordering that decriminalisation be applied to homosexual acts in private in Northern Ireland, which it duly was in 1982.¹⁰

During this time, LGBT visibility in Northern Ireland was somewhat limited to particular venues in Belfast city centre which would otherwise have been empty due to the ongoing conflict. During the worst years of the Troubles, the development of "gay space" was aided by the curfews imposed within Belfast and people's fears of being in the city centre at night. Several proprietors of bars, clubs and hotels were driven by an economic need to capitalise on the LGBT population which ventured into the largely vacant city centre in the evenings. This allowed a flourishing LGBT community to develop, alongside the emerging punk subculture and several members of the deaf community, who also used these social spaces. This state of affairs continued until the Chariot Rooms, a gay-owned public house, became established as one of the first permanent gay spaces in Northern Ireland. Gradually, as paramilitary groups called ceasefires and the violence began to subside, this increasingly diverse LGBT community became more visible in Belfast. At the same time, an increasingly visible LGBT scene was also appearing in the Foyle area. However, for the most part, LGBT visibility in Northern Ireland remained limited to these two locations, or occasional nights in predominantly "heterosexual" bars in other towns. As a result, the emergence of the first Gay Pride parade was a monumental occurrence, putting Northern Ireland's growing LGBT community on the social and political map.

Parading and Gay Pride

The first ever Gay Pride parade was held in 1970 in America, following the three-day riot between police and LGBT patrons at the Stonewall Bar in New York in July 1969. This riot ensued as a result of perceived police harassment in routinely raiding the venue and exposing and vilifying many of the patrons in press reports afterwards. The resulting civil rights demonstrations and campaigns led to the recognition of social changes and perceptions towards homosexuality in developed Western societies. This was aided by homosexuality being removed from the list of psychiatric disorders outlined by the American Psychiatric Association and later the World Health Organisation. The implementation of legislation decriminalising homosexuality was testament to emerging research looking at the social construction of identity and the subsequent impact of this on prejudice and discrimination towards minority groups. In commemoration of this important turning point, Gay Pride parades in many Western societies have flourished, although in some religiously conservative cultures the issue of Gay Pride parades continues to be a contested site of struggle.¹¹ For communities where Gay Pride parades are more welcomed, they are important means of community interaction, often involving a series of events in which people of all sexual orientations are invited to join.

As part of the growing drive for visibility and acceptance in Northern Ireland, in 1990, several LGBT activists undertook to organise the first Gay Pride march in Belfast. Although small in comparison to contemporary parades, it has grown in size to become a staple feature in Northern Ireland's calendar of summer events. The geographical space used by the parade is an important part of the visibility debate. The Gay Pride parade proceeds through Belfast city centre, around the City Hall and back up to the Cathedral Quarter: this is an area which unofficially constitutes Belfast's "gay space" by virtue of its gay nightclub, handful of gay-owned and run bars, and two gay-themed saunas, all within close proximity

10 *Dudgeon v UK* (1982) 4 EHRR 149.

11 See, for example, P Jackson, "Gay Pride challenges Moscow", BBC News, 17 February 2006, available at <http://news.bbc.co.uk/2/hi/europe/4714818.stm>.

to one another. LGBT visibility in Belfast is not constrained to this area, but there are few other spaces or bars which cater to LGBT patrons in a specific manner. Once the Gay Pride parade exits the Cathedral Quarter, it leaves the safety of unofficially demarcated “gay space”, and proceeds through areas that are primarily, albeit invisibly, “heterosexual” as the majority of the people occupying these spaces “can take the street for granted as a ‘commonsense’ heterosexual space precisely because they take for granted their freedom to perform their own identities”.¹² This is an important factor in exposing the otherwise invisible heteronormativity which is predominate in Northern Irish societies. The heterosexing of space “is naturalized to the point where heterosexuals are not aware of the heterosexing of space in the same way that sexual dissidents are”.¹³ However, during this parade, representations of sexual dissidence dominate this otherwise naturalised heteronormative space. Corteen qualifies the “heterosexual street” as not needing overt actions or demonstrations to determine its sexuality, but where these are employed, they range from “heterosexual couples kissing and holding hands as they make their way down the street, to advertisements and window displays which present images of contented ‘nuclear’ families”.¹⁴ Marchers on the Gay Pride parade, advocating for their own families, partnerships and relationships, subvert these heterosexualised “norms”, evincing the binaries upon which they are routinely placed. However, rather than engage with this as a viable alternative, such demonstrations are used to further denigrate “false” representations of intimacy and the family. As Gail Mason outlines, even the language used to denote such representations illustrates this failure to recognise the validity of sexual difference:

We need look no further than the popular and longstanding refrain against those who “flaunt” their homosexuality to realise that the very suggestion that homosexuality *can* be flaunted is itself the product of the social and the political hush that has historically enveloped the subject of same-sex sexuality.¹⁵

Because Gay Pride utilises and subverts space in this way, those involved in the parade are often deemed to be “flaunting” their sexuality by those who have chosen to come and protest against the parade, despite the fact that the protestors have freely chosen to occupy this space at that particular time. As 2010 marks the 20th anniversary of Northern Ireland’s annual Gay Pride parade, the increased frequency and number of those opposing the parade has indicated the ever-increasing need for a platform from which to demonstrate the danger many members of the LGBT community still face as a result of harmful and often archaic ideologies which cast them as subcultural, sexual, predatory, diseased or dangerous individuals.¹⁶

CONTESTING THE PARADE

Parades in Northern Ireland occasionally attract a level of contention as a result of the historic socio-political divides drawn along national and religious identity lines.¹⁷ Although they date back to the eighteenth century, modern-day parades in Northern Ireland are symbols of remembrance of key historical events. The parade season in Northern Ireland

12 G Valentine, “(Re)negotiating the ‘heterosexual street’” in N Duncan (ed.), *Body Space: Destabilising geographies of gender and sexuality* (London: Routledge 1996), p. 149.

13 K Corteen, “Lesbian safety talk: problematizing definitions and experiences of violence, sexuality and space” (2002) 5(3) *Sexualities* 259–80, at 261.

14 Valentine, “(Re)negotiating”, n. 12 above, p. 146.

15 G Mason, “Body maps: envisaging homophobia, violence and safety” (2001) 10(1) *Social and Legal Studies* 23–44 at 24.

16 See L Moran, *The Homosexual(ity) of Law* (London: Routledge 1996).

17 D McKittrick and D McVea, *Making Sense of the Troubles* (Belfast: Blackstaff Press 2001).

runs from April to September, with almost 4000 parades held annually. The vast majority of these are hosted by members of Protestant/Unionist communities; one half of Northern Ireland's traditionally perceived "two-community divide". Historical sectarian divides are replicated through the problematic restructuring of parade routes designed to offset the violent clashes witnessed in previous years. Unionist marches through primarily Catholic/Nationalist areas (the other half of the divide) have contributed to the stereotypes of fear, violence and hostility that traditionally accompanied images of parades in Northern Ireland.¹⁸ Due to such disturbances, and the apparently contentious nature of some parades, a Parades Commission was established in 1997. This is an independent, quasi-judicial body which ensures the adherence to the rules and regulations governing the approval and undertaking of parades.¹⁹

Unlike many of the parades held in Northern Ireland, the Gay Pride parade is not exclusionary on the basis of identity politics. Many LGBT groups in Northern Ireland actively illustrate how the Gay Pride parade is among the few non-sectarian spaces in Northern Ireland, not marked by traditional political divisions. Nevertheless, those opposed to the annual Gay Pride parade routinely apply to this commission to ban it, albeit with little success. Their opposing arguments are largely rooted in a Christian moral discourse of homosexuality as a sinful practice. In 2005, several opponents organised to produce a Stop The Parade (STP) coalition which was active between 2005 and 2008. As part of its organising against the Gay Pride parade, STP produced a (now-defunct) website which outlined its objections and proposed bases for having the commission impose a ban:

lewd and offensive festival that promotes a sinful and immoral lifestyle . . . we want to reach out to sodomites taking part in the parade to show them that there is an alternative and that they can be delivered from the bondage of sodomy by repentance from sin and faith in Jesus Christ alone.²⁰

This assimilation of a homosexual identity with engagement in "deviant" sexual activities goes towards the legitimate construction of such identities as not natural or desirable. Additionally, the interchangeability of "homosexual" with "sodomite" omitted the recognition of women as anything other than heterosexual. STP's decision to single out Gay Pride over 4000 less peaceful, less inclusive and less cross-community parades was defended on the basis that more people living in Northern Ireland were offended by the Gay Pride parade than any other march, although no evidence was provided to support this claim. Despite describing the Gay Pride parade as "contentious", there are a greater number of far more contentious parades occurring each year which do not incur such opposition from this group of moral objectors. However, the use of this particular word by STP meant that the Parades Commission were compelled to investigate, as it was within its role to examine and potentially ban "contentious" parades in Northern Ireland. As a result, in 2005, representatives of STP and Gay Pride parade organisers were invited to meet with the Parades Commission ahead of the parade. In the meeting, several guidelines were outlined, including assurances that verbal abuse and harassment would be avoided by both parties towards the other.²¹ Whilst verbal abuse was ruled out, other forms of getting the moral message across were not. Therefore, innovative forms of "reaching out" to members of the

18 N Jarman and D Bryan, *Parade and Protest: A discussion of parading disputes in Northern Ireland* (Coleraine: University of Ulster 1996).

19 The Parades Commission's powers and duties can be found in the Public Processions (Northern Ireland) Act 1998.

20 The site was previously available at www.stoptheparade.com/ (last accessed 8 May 2008).

21 "Gay Pride protestors claim abuse", BBC News, 6 August 2005, available at: http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4128006.stm.

LGBT community involved STP hiring an advertising lorry emblazoned with pictures of same-sex couples accompanied with moral messages against homosexuality. They displayed the vehicle outside several popular gay venues in Belfast to “assist in conveying God’s message of repentance to Belfast’s sodomite community”.²² When challenged about their need to remonstrate against Pride, Jonathan Lerner from STP claimed that the group was being “pigeon-holed as hateful and homophobic” but chose to make its presence known as “the far greater hate would be shown by staying at home and doing nothing”.²³ This message appears to have resonated with similarly minded opponents, with increasing numbers of people protesting against the parade in recent years. There are now two identifiable sites of protest: the traditional spot outside the City Hall and more recently outside St Anne’s Cathedral. The protestors are largely silent and in most cases turn their backs on the Gay Pride marchers as they pass by. Many hold large placards emblazoned with biblical passages alluding to the wrongfulness of homosexuality (and, in some cases, other perceived sins such as adultery) and the implications of this for those who engage in homosexual practices, many of which feed into archaic ideologies surrounding homosexuality in Northern Ireland. Many of the banners and placards can be perceived as offensive in nature and likely to instil fear of hostility, yet are not dealt with in such a way. Displays such as “Homosexuality is Sin” and “The wages of Sin is Death” may also be interpreted by some LGBT people in attendance as also speaking to homophobic people, condoning their prejudice towards sexual minorities. Given the media attention garnered at the annual parade, the protestors’ decision to display their sentiments in written as opposed to oral format may also be tactical. Again, these passages relate mainly to male homosexuality as a result of less being written about female homosexuality in biblical passages.

However, it was the suggestion by one Pride participant in the 2007 parade that Jesus may have been homosexual that demonstrated the double standards held about claims which could or could not be made. In a matter which ended up being debated in the House of Commons, a placard reading “Jesus is a fag” incurred heavy criticism from many Northern Irish MLAs and clergy. North Belfast DUP MLA Nigel Dodds lambasted the claim as “offensive and blasphemous”.²⁴ East Belfast council member May Campbell also seized this opportunity to call for an end to future Gay Pride parades being held in Northern Ireland. She remarked that “Christians all over the province, and indeed, the world will be disgusted by this slur. If such provocative claims were made against Mohammad, Muslims would rightly be up in arms.”²⁵ However, it was chaplain Ian Hall who was perhaps the most vociferous, stating:

This event . . . was in fact a parade of perversion. The reality is that the behaviour of the sodomites is totally unacceptable. The Scriptures condemn the homosexual lifestyle in the most strident language. The Bible not only calls homosexual practices sinful but uses terms like “reprobate mind”, “vile affections” and “abominations” . . . Saturday’s parade brought shame and disgrace to the good name of our nation’s capital . . . The vast majority of Ulster

22 “Belfast Gay Pride: another successful year”, *Gay Belfast*, 7 August 2005, available at www.gaybelfast.net/fiveaug.htm.

23 P Jackson, “Gay Pride weathers Belfast storm”, BBC News, 6 August 2005. available at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4739815.stm

24 “Comments”, *News Letter*, available at www.newsletter.co.uk/news/Probe-into-39blasphemous39-Gay-Pride.3628719.jp.

25 www.metroeireann.com/index.php?option=com_content&task=view&id=542&Itemid=60.

people regard homosexual practices as depraved and disgusting and certainly would not give their approval to this tiny minority blighting their capital city with their monstrous march.²⁶

Interestingly, judgments made about the placard centred upon the perceived attack on religious morality and not as a personal opinion or one person's own religious perspective, effectively sidestepping the fact that the author's use of the verb "is", rather than "was", may infer that the holder is, himself, a religious person voicing a particular belief. Nevertheless, the row served to highlight the growing propensity for community and political leaders to comment with relative impunity against homosexuality in Northern Ireland.

The prevalence of political homophobia

In 2008, comments made by Iris Robinson MP caused a huge outcry from members of LGBT groups in Northern Ireland and beyond. Mrs Robinson, the wife of First Minister Peter Robinson, was the chair of the Stormont Health Committee until 2010, and therefore oversaw mental health initiatives, including those directed at helping lesbians and gay men overcome the homophobia they may be exposed to. In a live radio interview, Mrs Robinson stated that she felt homosexuality was an "abomination" and that it "nauseated" her.²⁷ She also suggested that homosexuals could be "cured" with psychiatric treatment and promoted the services of a "very nice" psychiatrist she knew who could help to "reorientate" homosexuals back to heterosexuality. She defended these statements by claiming that she believed it was the "duty of Government to uphold God's law".²⁸ It later emerged that Robinson had previously declared at Westminster that she believed "there can be no viler act, apart from homosexuality and sodomy, than sexually abusing innocent children".²⁹ She had also compared homosexuals to murderers in an effort to indicate how distasteful she found homosexuality. After an investigation lasting a year, the Police Service of Northern Ireland (PSNI) stated that no action would be taken against Robinson for these public statements as she had done nothing wrong.³⁰ Mrs Robinson remained in post for a further 18 months, only being removed from her positions of councillor, MLA and MP in 2010 following allegations of an affair with a 19-year-old family friend to whose business she granted a licence and invested £50,000 in without declaring any of the above to Parliament.³¹ As news of this scandal broke, it also emerged that Mrs Robinson's comments about homosexuality had occurred at the same time as the affair with her young lover was coming to an end.

This was not the first time Northern Ireland's political elites had conflated personal prejudice with political rhetoric. In 2005, Ian Paisley Jnr was censored by the Northern Ireland Policing Board – of which he was a member – for disparaging comments about the civil partnership of an adviser to former Ulster Unionist leader David Trimble. Mr Paisley denounced homosexual relationships as immoral, offensive and obnoxious, whilst ignoring

26 I Hall, "Offensive march should be banned", *Irish News*, 7 August 2007, available at www.irishnews.com.

27 D Young, "Gay lifestyle is 'abomination' not a mental disorder: Iris", *Belfast Telegraph*, 1 July 2008, available at www.belfasttelegraph.co.uk/news/.

28 "Iris Robinson: It's government's duty to uphold God's law", *Belfast Telegraph*, 18 July 2008, available at www.belfasttelegraph.co.uk/news/local-national/iris-robinson-itrsquos-governmentrsquos-duty-to-uphold-godrsquos-law-13912046.html.

29 "Iris: gays more vile than child abusers", *Belfast Telegraph*, 21 July 2008, available at www.belfasttelegraph.co.uk/news/.

30 D Gordon, "No Assembly sanctions over MP's gay remarks", *Belfast Telegraph*, 4 July 2009, available at www.belfasttelegraph.co.uk/news/.

31 D Batty, "Investigation launched into Iris Robinson's £50,000 loan to lover", *Guardian*, 22 January 2010, available at www.guardian.co.uk/politics/2010/jan/22/iris-robinson-investigation-launched.

PSNI statements about the rising level of homophobic attacks in Northern Ireland at the time.³² He did not stop there; when in post as a junior minister in 2007, he made the following comments in an interview with a Dublin-based music magazine:

I am, unsurprisingly, a straight person. I am pretty repulsed by gay and lesbianism. I think it is wrong. I think that those people harm themselves and – without caring about it – harm society. That doesn't mean to say that I hate them. I mean, I hate what they do.³³

Although he was investigated by the Assembly ombudsman as to whether or not he had breached Assembly protocol, Mr Paisley did not face any prosecution or disciplinary proceedings. He later defended his comments, and his right to say them, in a Radio 4 documentary prior to resigning from government in 2008 following allegations of improper links with property developers.³⁴ It appears that the sentiments garnered during the Reverend Dr Ian Paisley's "Save Ulster from Sodomy" crusade remain endemic within the DUP camp. Homosexuality has not only been denigrated, but LGBT communities cited as causes of harm to the immediate and wider society. Such a position was demonstrated in 2005 by DUP MLA Maurice Mills who blamed Gay Pride parades for Hurricane Katrina, which devastated New Orleans and killed over 1300 people. Claiming that it was a message from God, he stated:

The media failed to report that the hurricane occurred just two days prior to the annual homosexual event called the Southern Decadence Festival, which the previous year had attracted an estimated 125,000 people. Surely, this is a warning to nations where such wickedness is increasingly promoted and practised. This abominable and filthy practice and sodomy has resulted in the great continent of Africa being riddled with AIDS, all at great cost to the nations and innocent children.³⁵

Mr Mills is councillor for Ballymena which has a large Protestant population and a strong DUP majority. He was not reprimanded for his comments which could be seen as particularly insensitive given the devastation Hurricane Katrina inflicted on thousands of people's lives. Other politicians who have also waded in with publicly homophobic remarks include former Sports Minister Edwin Poots, an evangelical Protestant who criticised the Ulster Titans Rugby Football Club in 2007. The club specifically welcomes gay rugby players but does not exclude heterosexual players. Despite this, Mr Poots accused the team of being bigoted against heterosexuals. Mr Poots had previously voiced homophobic sentiments in a row over the use of a civil venue in Lisburn for civil partnership ceremonies. Mr Poots denounced the notion of civil partnerships, stating that they are not weddings whilst describing the civil partnership law as "wrong and immoral and sticks in the throat". At the same meeting, Cllr Ronnie Crawford of the Ulster Unionist Party (UUP) attacked homosexuality in general, quoting both the current Pope and his predecessor in stating that gay marriage was an "ideology of evil" and that homosexuality was "intrinsicly

32 "Paisley censured for homophobic comments", RTE News, 3 February 2005, available at www.rte.ie/news/2005/0203/paisleyi.html.

33 A Erwin, "Paisley Junior under attack for gay 'insult'", *Independent* (Irish edition), 31 May 2007, available at www.independent.ie/national-news/paisley-junior-under-attack-for-gay-insult-686918.html.

34 "Paisley Jnr resigns as minister", BBC News, 18 February 2008, available at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7250877.stm.

35 A Chrisafis, "Katrina 'sent by God to punish New Orleans gays'", *Guardian*, 19 November 2005, available at www.guardian.co.uk/uk/2005/nov/19/northernireland.hurricanes2005.

disordered”.³⁶ Cllr Crawford further stated that he “resented the gay lobby” trying to change everything, though strangely ended his comments by stating that he was tolerant of homosexual acts conducted in private. No action was taken against either of these public servants as a result of the evidently moral position they occupied and the language used in their defamation. This was also the case for DUP minister, Bert Johnston, in a comment opposing the now enacted equality laws:

I don't think God made a mistake when he made us male and female and these people who call themselves gays and the like are essentially perverts. I believe their problems exist only in their minds. It is not a biological or medical condition they suffer from. It is related – and I refer to Romans Chapter I – to the fact that the people who are most often this way inclined are mostly Godless people with reprobate minds.³⁷

Again, this comment was heavily influenced by biblical interpretation and utilised biblical terminology, meaning that prosecution was eluded. Not only is the existence of LGBT people and groups abhorred by many of these objectors, but the limited financial support they receive has also come under attack. Many of the LGBT groups in Northern Ireland rely upon piecemeal funding from various bodies and charitable organisations to continue working in and with the wider community, conducting research and providing valuable information. Since the reinstatement of the Northern Ireland Assembly in 2007, they have obtained some of their funding from the government, although the allocation of this funding has come under criticism. Whilst still in post as Northern Ireland Secretary, Peter Hain earmarked £180,000 to be given to LGBT groups over a period of two years. However, DUP MLA Jim Wells invoked negative imagery in his claims that UK taxpayers were unlikely to be supportive of this move:

I am appalled that this level of money was committed to homosexual support groups behind our backs before devolution. There is very little public support for these projects . . . The majority of taxpayers wants nothing to do with funding these groups. I would much prefer that any young person were not encouraged to seek advice from Government funded homosexuality groups. People in their early teens often go through a period of confusion but the vast majority come through these difficult periods, marry and have children.³⁸

Mr Wells appears to have based his opinions on conjecture as he gave no evidence to support his claims. Conversely, LGBT support groups in Northern Ireland have produced research which indicates the considerably high levels of self-harm and suicide attempts prevalent amongst such “confused” young people who are constantly presented with discourses of sin and immorality in relation to their sexuality.³⁹ A third of their respondents cited mental health problems occurring as a result of hiding their sexual identity or by continual exposure to negative ideologies about homosexuality. As this research demonstrated, it is not the sexuality which harms, but the hostile attitudes towards it displayed with relative impunity on a frequent basis.

36 Observations from a meeting held on Tuesday 26 July 2005 at Lisburn City Council. A more detailed transcript can be found at www.sluggeroole.com/archives/2005/07/jeff_dudgeon_wi.php.

37 “Transsexuals and gays are perverts, says DUP councillor”, *Impartial Reporter*, 19 February 2004, available at www.impartialreporter.com.

38 “MLA ‘appalled’ at gay support group funding”, *News Letter*, 30 November 2007, available at www.newsletter.co.uk/news/MLA-39appalled39-at-gay-support.3541045.jp.

39 H McNamee, *Out on your Own: An examination of the mental health of young same-sex attracted men* (Belfast: Rainbow Project 2006).

None of the articulators of the above comments faced disciplinary or criminal proceedings as a result of their remarks. A review of the laws available, but as yet unused, indicates that by comparison, prosecuting homophobic hatred in Northern Ireland ought to be easier than in England and Wales. However, the fact that no one has been prosecuted leads the discussion of homophobia into wider socio-political territory.

Legislating against homophobia: a redundant move in Northern Ireland?

Much debate surrounded the incitement to homophobic hatred legislation which was recently enacted in England and Wales. Section 74 and Schedule 16 of the Criminal Justice and Immigration Act 2008 amended the Public Order Act 1986, creating new offences of stirring up hatred on the grounds of sexual orientation. This covers conduct – namely words or behaviour – or material which is threatening in nature and which is intended to stir up hatred against a group of people who are defined by their sexual orientation. The requirement that the accused had the required intention to incite hatred is an issue which some LGBT support groups argue may prove impossible to enforce. The new laws differ from existing incitement to racial or religious hatred in that the words “abusive” and “insulting” have been removed, leaving just “threatening words and behaviour” to be considered in relation to inciting homophobic hostility. However, as the Bill was going through Parliament in 2008, Conservative peer Lord Waddington added a late amendment which cited that discussions or criticisms of homosexual conduct or practices, as well as encouraging people to refrain from or modify such conduct, is not enough to be considered threatening or intent to stir up hatred. As a result, voting ensued on “Clause 61”, which was designed to overturn this amendment, but was defeated in the House of Lords in 2009, keeping the religious exemptions in place.⁴⁰ Therefore, a person voicing temperate opposition to same-sex relationships or expressing an opinion on same-sex adoption within the remit of their religious beliefs would not risk prosecution under these incitement laws.⁴¹ Welcoming the legislation, Ben Summerskill, chief executive of LGBT pressure group Stonewall, said:

The newly-extended criminal offence of incitement to hatred will go some way towards addressing the hatred and violence directed towards lesbians, gay men and bisexuals in Britain at a time when homophobic attacks are on the increase. It sends a strong signal that such behaviour is unacceptable in a civilised society. Just like race, a person’s sexual orientation is an intrinsic characteristic for which no citizen should ever feel under threat of verbal or physical violence.⁴²

Whilst he is right that this legislation will only impact Great Britain, existing laws protecting public order have already been invoked prior to this specific legislation regarding hostility motivated by sexual orientation. In England, Conservative councillor Peter Willows was found guilty of breaching the Public Order Act 1986 for equating gay people with paedophiles.⁴³ In Bournemouth, evangelist Harry Hammond was charged under s. 5 of the Public Order Act 1986 for brandishing a large double-sided sign which read “Stop Immorality”, “Stop Homosexuality” and “Stop Lesbianism” on each side provoking an

40 As part of their election campaign, several senior Labour politicians had pledged to overturn the free speech clause if re-elected.

41 Those prosecuted under the “homophobic hatred” law face a maximum punishment of seven years in prison or a fine.

42 J Geen, “Law against homophobic hatred comes into effect”, *Pink News*, 23 March 2010, available at www.pinknews.co.uk/2010/03/23/law-against-homophobic-hatred-comes-into-effect/.

43 “Gay remark councillor convicted”, BBC News, 12 December 2006, available at http://news.bbc.co.uk/1/hi/england/southern_counties/6173969.stm.

angry reaction from some passers-by.⁴⁴ In Scotland, New York preacher Shawn Holes was charged with uttering homophobic and sectarian remarks and fined £1000 for stating that “Homosexuals are deserving of the wrath of God, and so are all other sinners, and they are going to a place called hell.”⁴⁵ Homophobia has been challenged in several cases in Europe too. In France, politician Christian Vanneste was the first person to be convicted under French anti-homophobia laws for his comments on the “endangerment” factor of homosexuals.⁴⁶ In Sweden, the legislation has been enforced on numerous occasions, including against a preacher who was considered to be denigrating homosexuality to an unacceptable level in sermons.⁴⁷ However, in Northern Ireland, legislation criminalising homophobic hatred, in place since 2004, remains unused in any prosecutions.

Section 3 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 amended the Public Order (Northern Ireland) Order 1987 to include incitement to hatred on the basis of sexual orientation. Section 9(1)(b) of the 2004 Order states that intent is not necessary if “having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby”.⁴⁸ Numerous complaints to the PSNI following Iris Robinson’s statements, coupled with outraged newspaper comments, letters pages and online discussion forums outlining people’s anger towards her statements resulted in no action being taken. Why, then, might this be the case? Highlighting the same issues which Stonewall was citing to enact the recent law – primarily homophobic lyrics from particular music artists – Liberal Democrat MP David Heath questioned the impact of Northern Ireland’s wider socio-political environment on the ability to see the homophobe, rather than the homosexual, at fault:

The slight concern that I have is that the legislation which is already in place in Northern Ireland hasn’t yet been used and there is an argument that is repeatedly raised by Stonewall and others about extreme homophobic lyrics. Why has that not been addressed in Northern Ireland? It may be something to do with the particular political situation in Northern Ireland. My worry is once it’s on the statute it just stays on the statute book rather than being used in the circumstances where it should properly be used.⁴⁹

Mr Heath’s allusion to the “particular political situation in Northern Ireland” somewhat glosses over a deeper problematic issue. The politically sensitive nature of Northern Ireland’s history (and present, considering the current debates around the devolving of criminal justice to the Northern Ireland Assembly) may be the central issue in this failure adequately to address homophobic hostility. A key issue may well be the geographical and social climate in which such discussions are occurring, but whether or not this should be a concessionary issue is open for debate. The intersectionality of religion and politics in Northern Ireland is so entrenched that routinely it dominates legal and political decision making. The fact that various changes made to sexual orientation equality legislation and the enhancing of LGBT rights purposefully occurred outside of Northern Ireland’s political

44 “Gay group supports campaign to clear homophobic preacher”, *Pink News*, 25 April 2006, available at www.pinknews.co.uk/news/articles/2005-1267.html/.

45 M Hennessy, “Street preacher fined for ‘homosexuals going to hell’ remark”, *Irish Times*, 31 March 2010, available at www.irishtimes.com/.

46 P Belien, “Conservative MP fined for homophobia”, *Brussels Journal*, 27 January 2007, available at www.brusselsjournal.com/node/724.

47 Supreme Court of Sweden, ruling 29 November 2005 in case No B 1050-05.

48 Public Order (Northern Ireland) Order 1987 (NI 7), Article 9(1)(b), as amended by the Criminal Justice (No 2) (Northern Ireland) Order 2004, s. 3.

49 T Grew, “Interview: David Heath on incitement to homophobic hatred”, *Pink News*, 3 January 2008, available at www.pinknews.co.uk/news/articles/2005-6446.html.

remit illustrates this. So too does the ongoing campaign for women's right to choose following the failure to extend the 1967 Abortion Act to Northern Ireland.⁵⁰

As well as not engaging with this legislation due to perceived political sensitivity, there is also the issue that so many comments have been made which could be seen as stirring up fear that it could be problematic to start investigating them all. Commenting on this issue during debates on the English and Welsh legislation in 2007, Mr Don Horrocks, head of public affairs at the Evangelical Alliance, illustrated a potential problem of setting a precedent in this area:

My observation about Northern Ireland, why that has been the case and why the precedents are not necessarily compelling, is that there is a different religious and cultural situation over there. Northern Ireland and the mainland are very different. The police over there are very, very sensitive and concerned about protecting freedom of speech, precisely because of community tensions. The feeling that I get from over there, certainly from what I have been told, is that if any of those laws were used, floodgates could open. There has therefore been a keenness not to use those laws.⁵¹

Perhaps this comment goes to the heart of why the implementation of laws protecting and enhancing equality on the basis of sexual orientation remains tokenistic in Northern Ireland. Abatement of tensions is the sole focus in Northern Ireland politics, a place where economic prosperity is dependent upon such "community tensions" being kept to the peripheries of society. But this is a society with a deeply entrenched history of segregation, difference and a visible, opposed "other"; a position now being filled by LGBT communities, minority ethnic communities and, increasingly, people from the disabled community. If it is a choice between the lesser of two evils, these communities may find themselves up against memories of a 30-year political conflict to contend with before their claims of what incitement to hatred leads to for them.

The impact on homophobia and LGBT relations

Homophobic discrimination, victimisation and violence are founded upon seeing lesbians and gay men as different and therefore inviting prejudice. In Northern Ireland, research into the nature and prevalence of victimisation has indicated that lesbians and gay men may constitute acceptable targets of prejudice.⁵² There are few openly lesbian or gay media personalities and those who have "come out" and publicly stated their sexual identity have cited the hostility and victimisation their openness has incurred.⁵³ So prevalent were the levels of abuse directed at lesbians and gay men that the various Northern Irish LGBT groups in Belfast felt that the onus was on them rather than the police to take action to address this growing problem. Subsequent contact and collaborations with the PSNI, local education authorities and some faith organisations heralded a decreased level of reported homophobic incidents.⁵⁴ Many of these initiatives have been conceived, and their positive outcomes lauded, at the various Gay Pride events and parades since the enactment of "hate

50 E Fegan and R Rebouche, "Northern Ireland's abortion law: the morality of silence and the censure of agency" (2003) 11(3) *Feminist Legal Studies* 221–54.

51 Written evidence to be reported to the House, Criminal Justice and Immigration Bill, Public Bill Committees, 18 October 2007, available at www.parliament.the-stationery-office.com/pa/cm200607/cmpublic/criminal/071018/pm/71018s01.htm.

52 N Jarman and A Tennant, *An Acceptable Prejudice? Homophobic violence and harassment in Northern Ireland* (Belfast: Institute for Conflict Research 2003).

53 See N McCafferty, *Just Call Me Nell* (London: Penguin 2004).

54 www.psnipolice.uk/index/statistics_branch.htm.

crime” legislation in Northern Ireland. Members of the Gay Police Association of Northern Ireland also provide a visible presence at the event, citing a commitment to address victimisation and violence towards members of LGBT communities. As research into the violence of homophobic prejudice suggests, this is a necessary measure.

In 2003, the first and largest study into homophobic harassment and violence in Northern Ireland was conducted by the Institute for Conflict Research (ICR). It noted that, with up to 82 per cent of respondents having incurred some form of victimisation: “the percentage of people who have experienced violence and harassment was higher than indicated by comparable studies in Great Britain and Ireland”.⁵⁵ This finding supported previous research undertaken by Stonewall in 1996 as part of its UK study into homophobic victimisation and violence.⁵⁶ However, the ICR study also showed that the levels of violence used in assault were increasing, stating that: “there [is] now a greater use of violence and a greater propensity to use violence in such attacks”.⁵⁷ In almost half of all incidents the perpetrator was a person known to the victim.⁵⁸ The researchers also found that only 42 per cent of those who had experienced some form of prejudice had reported the incident to the police. One reason cited for this reluctance was the perceived homophobia of members of the PSNI, claims that were somewhat supported by a 2006 investigation into homophobia within the police force.⁵⁹

Both of these studies also highlighted participants’ fears of violent retributions from paramilitary group members who may disapprove of homosexuality.⁶⁰ This fear was particularly pertinent among respondents living in rural areas in Northern Ireland where paramilitary control was seen to be more ingrained than in urban areas. This issue was raised in the media by representatives of LGBT groups who warned of both the increasing frequency and ferocity of attacks, particularly on gay men.⁶¹ In some cases these attacks resulted in the death of victims. The murders of Shaun Fitzpatrick,⁶² Warren “Aaron” McCauley and Ian Flanagan involved a significant level of violence, especially to the face and head areas.⁶³ Other attacks on gay men in areas outside Belfast have attracted a similar level of media interest as a result of the violence involved. One gay male victim lost several teeth and required numerous stitches to his face after a particularly vicious attack.⁶⁴ Another young man sustained severe physical injuries and almost lost an eye in an attack involving an attempted gouging.⁶⁵ Whilst the homophobic “hate crime” legislation has been invoked in these cases, recognising the prejudicial element and sentencing the perpetrators

55 Jarman and Tennant, *An Acceptable Prejudice*, n. 52 above, p. 6.

56 G Mason and A Palmer, *Queer Bashing: A national survey of hate crimes against lesbians and gay men* (London: Stonewall 1996).

57 Jarman and Tennant, *An Acceptable Prejudice*, n. 52 above, p. 65.

58 *Ibid.*, p. 29.

59 K Radford, J Betts and M Ostermeyer, *Policing, Accountability and the Lesbian, Gay and Bisexual Community in Northern Ireland* (Belfast: ICR 2006).

60 Jarman and Tennant, *An Acceptable Prejudice*, n. 52 above; Radford et al., *Policing*, n. 59 above.

61 “Gay men targeted in attacks”, BBC News, 19 May 2004, available at http://news.bbc.co.uk/1/hi/northern_ireland/3728345.stm.

62 “Pair guilty of homophobic murder”, BBC News, 11 March 2010, available at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/foyle_and_west/8562900.stm.

63 “‘Gay-bashing’ killers jailed”, BBC News, 1 July 2004, available at http://news.bbc.co.uk/1/hi/northern_ireland/3856839.stm.

64 “Gay man bitten in attack”, BBC News, 20 July 2004, available at http://news.bbc.co.uk/1/hi/northern_ireland/3910109.stm.

65 “‘Gay attack’ victim may lose eye”, BBC News, 31 January 2006, available at http://news.bbc.co.uk/1/hi/northern_ireland/4664954.stm.

accordingly, these cases may illustrate the most severe end of a continuum of prejudice which is not being engaged with at the important “lower-level” end.

When prejudicial sentiments become fundamental to the ethos of a society, the criminalisation of that prejudice may be rendered difficult as the bias it is condemning appears “normal”. As Barbara Perry points out, perpetrators may be “doing difference”, or acting upon a socially sanctioned prejudice in society.⁶⁶ Interventions therefore need to focus on societal attitudes at large, not just on the perpetrator of the crime.⁶⁷ Examining how societies sustain prejudices which may manifest into violent acts, Gail Mason asserts that:

violence will fail to serve a function for the perpetrators if the prejudicial attitudes undergirding such violence are no longer supported by societal norms or by religious, legal and political doctrines

suggesting that the failure to condemn homophobic attitudes “promotes an atmosphere that condones violence against gay men and lesbians”.⁶⁸

Already in Northern Ireland, situations where homophobia is both condoned and condemned in the same political breath have indicated that for some members of LGBT communities, theory and practice are still two separate areas in relation to combating homophobia and violence. The impact of this knowledge may be as debilitating as the fear of homophobic violence itself.

Conclusion

The recent conference held in Belfast by Christian group Core Issues, whose leader Reverend Mario Bergner routinely states that he can convert homosexuals back to heterosexuality, attracted criticism for upholding misguided notions that homosexuality is a condition which can be reversed or changed. In a move which marked a turn of events, members of the Stop Conversion Therapy Taskforce (SCOTT) picketed the church where the conference was being held. However, their targets were not the therapists inside, but the lesbians and gay men in attendance who felt that their sexuality, and not the wider homophobic society, was the problem.⁶⁹ The notion that homosexuality is both curable and mutable is not limited to evangelical laypersons; more problematically, as demonstrated, it is a position taken by elected political elites, including those responsible for the mental health provisions available to lesbians and gay men in Northern Ireland.

This article has demonstrated the lengths people who are morally opposed to homosexuality can go to in expressing their objection with impunity in Northern Ireland. The oppositional arguments against the law being implemented in England and Wales are predicated on the infringement of freedoms of speech for religious preachers and people opposed to homosexuality on the basis of biblical interpretations. However, as has been evidenced in this discussion, it is unlikely that such opposition will face prosecution, especially if there is a need to show “intent” to threaten or incite hatred.

The objectives of Gay Pride parades are not to convert people, to tell them that they are going to hell or that their lifestyles are wrong, harmful and shameful. It would be incredulous to suggest that a group of LGBT people would start picketing a Christian place of worship with banners to this effect about Christianity, but would be no more than a re-

66 Perry, *In the Name of Hate*, n. 2 above.

67 See J Mouzos and S Thompson, “Gay-hate related homicides: an overview of major findings in NSW” in *Trends and Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, June 2000).

68 G Mason, *Violence Against Lesbians and Gay Men* (Sydney: Duncan Chappell 1993).

69 J Geen, “Anti-gay group to protest outside Christian convention”, *Pink News*, 17 February 2010, available at www.pinknews.co.uk/2010/02/17/anti-gay-cure-group-to-protest-outside-christian-convention/.

appropriation of the words and images used against themselves. As a result of the intensified debate about morality and sexuality in Northern Ireland, it appears that the Gay Pride parade has perhaps never been so vital for visibility, validity and vitality. In Northern Ireland, it will be interesting to see, whenever it happens, the inaugural prosecution under this offence, in order to clarify just *what* has to be said to be deemed unacceptable, or perhaps more importantly, *who* has to say it.

A temporary problem in Ireland

EDDIE KEANE

University of Limerick

Introduction

Professor Alain Supiot has argued that “the socio-economic regulatory model that had underpinned labour law since the beginning of the twentieth century is in the throes of a crisis”.¹ In Ireland, like most countries, this crisis can be attributed to the distinct “lack of fit” for traditional labour law to modern work relationships. Traditional tests used to determine employee status, and its concomitant protection, have been somewhat sidelined by modern hiring practices. There is little doubt that a change in hiring practices in Ireland is occurring at the time of writing and will continue to occur for some time to come. The incidence of Irish workers holding a contract of limited duration has risen from a low of 3.4 per cent of the total workforce in 2006 to 8.5 per cent in 2008.² Such a startling increase has led to a “dualisation” of the workforce between what are commonly referred to as “typical” workers, those working under a traditional work relationship, and “atypical” workers, those working in a type of work relationship that does not conform to the traditional model.³ The problem that arises is that traditional labour law does not apply easily to, and consequently serves to marginalise, temporary workers, leaving them vulnerable to exploitation.⁴ For reasons of expediency this paper does not address the European Union approach to modern labour markets. However, since the official launch of the “flexicurity” agenda in November 2006⁵ the concept of flexicurity is seen as the best response to changing global market conditions. Consequently, the European institutions are to the forefront in the “drive to make labour markets more flexible while at the same time

1 A Supiot et al., *Beyond Employment: Changes in work and the future of labour law in Europe* (Oxford: OUP 2001), p. 215.

2 Eurostat, Employees with a contract of limited duration [tps00073], available at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_ifs/data/main_tables (accessed 9 March 2010).

3 See R Fahlbeck, “Flexibility: potentials and challenges for labor law” (1998) 19 *Comparative Labour Law and Policy Journal* 515 at 531

4 See D McCann, *Regulating Flexible Work* (Oxford: OUP 2008), pp. 7, 41, 51; See also S Deakin and F Wilkinson, *The Law of the Labour Market* (Oxford: OUP 2005), p. 310.

5 See *Modernising Labour Law to Meet the Challenges of the 21st Century*, Green Paper COM 2006/708 (22 November 2006).

not jeopardising the security of workers".⁶ With an impetus such as this, we can expect temporary workers to be an integral part of the future Irish labour force. This paper will examine the current situation in relation to temporary workers by addressing three fundamental questions. Why is temporary work in focus now? What are the problems encountered by temporary workers? What is the current regulation and, of more importance, does it address these problems? It is hoped that by focusing on these questions some conclusions can be drawn as to the direction future regulation should take.

Why is temporary work in focus now?

To suggest that temporary work relationships are a new phenomenon is not strictly accurate. Temporary work relationships have existed, for example, in the US, for over 50 years.⁷ Even though it is not a new concept, the dramatic increase in prevalence in the later stages of the twentieth century has highlighted the area. Ireland has not been alone in this development. Surveys conducted at the end of the twentieth century identified that flexible employment had grown over the previous two decades in most countries.⁸ It is noted that in Australia full-time and part-time casual employment accounted for 25 per cent of the workforce in 1999.⁹ These figures relate only to "official" work relationships, not counting those involved in the grey area of illegal or unofficial work. Consequently, the numbers involved may be significantly greater than the statistics suggest.

THE ROLE OF EMPLOYMENT AGENCIES

One contributing factor is the increase in employment agencies. Some modern enterprises consider it prudent to outsource their recruitment process, especially for lower-paid jobs. To meet this demand, and the demand of workers unable to identify a potential hirer, employment agencies have blossomed. The Irish Department of Enterprise, Trade and Employment notes that, in 2003, there were 541 licensed employment agencies operating in Ireland, as distinct from only 329 in 1998.¹⁰ This figure does not include agencies based outside of Ireland but operating within the jurisdiction. The abundance of such agencies suggests that an increasing number of workers are now operating through agencies or under temporary work relationships.

THE ROLE OF CHANGING FAMILY STRUCTURES

Perhaps the main contributor to the increasing prevalence of temporary work relationships is the evolution of society's structure and expectations.¹¹ Modern society has seen a move away from the traditional family structure. Divorce, single-parent families and the return to work of married mothers have dramatically increased the female participation in the workforce. Such participation automatically creates a tension between the traditional role of caregiver to children and the role of worker outside the home. Most mothers try to balance

6 G Vermeylen and J Hurley, *Varieties of Flexicurity: Reflections on key elements of flexibility and security* (Dublin: European Foundation for the Improvement of Living and Working Conditions 2007), p. 1.

7 MA Moore, "The temporary help service industry: historical development, operation and scope" (1964–1965) 18 *Industrial and Labour Relations Review* 554, at 555

8 M Ozaki (ed.), *Negotiating Flexibility: The role of the social partners and the state* (Geneva: International Labour Office 1999), p. 7.

9 *Ibid.*

10 Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act 1971*, p. 7, available at www.entemp.ie/publications/employment/2004/agencyactdiscussionpaper.pdf (accessed 15 March 2010).

11 K Rittich, "Feminization and contingency: regulating the stakes of work for women" in J Conaghan, RM Fischl and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative practices and possibilities* (Oxford: OUP 2000), p. 119.

these competing roles by streamlining their working hours or at least their hours spent away from the home. Consequently, temporary work relationships are more common amongst mothers or married women returning to the workforce.¹²

THE ROLE OF COMMERCIAL EVOLUTION

Commercial evolution has also brought the issue of temporary work into the limelight. Technological and managerial advances have significantly altered the organisation of production and employment.¹³ As educational standards improve, so does the level of skill and training that a worker receives both prior to joining the workplace and within it. The effect of this is that many workers are now highly skilled, and highly paid. Such highly skilled workers may be more inclined to exercise a level of autonomy and may not favour conforming to the traditional Fordist model of employment, eschewing one sole hirer in favour of working for many hirers in order to maximise the returns for their expensive training.

Linked to this is the fact that many lower-paid tasks, especially in manufacturing industries, are now performed mechanically. Thus, lowly skilled workers face the difficulty of obtaining long-term employment from a hirer, requiring them to offer their services to many hirers in order to gain work equalling a full working week. The combination of these factors has created an environment where modern workers utilise temporary work relationships as a means of maximising their earning potential.¹⁴

Evolution in the organisation of production has also had a significant impact on workers' working relationships.¹⁵ As technology develops, hirers are making more and more significant investments in plant and machinery, requiring prudent hirers to maximise the return from such investments. Twenty-four-hour production schedules, including weekend work, are becoming more prevalent. Consequently, hirers face a shortfall in the workforce to operate the plant and machinery outside of the "normal" working hours. This problem is exacerbated in Ireland by the impact of the Organisation of Working Time Act 1997.¹⁶ To meet this shortfall in personnel, hirers take on extra workers under temporary work relationships.

Prudent manufacturers have also adhered to the idea of not keeping finished goods on hand for delivery to customers. This practice is seen to have many advantages, such as manufacturing the product to match the individual customer's requirements and avoiding tying up money in used raw materials that have not yet been sold. This method of organisation has become known as a "just in time" manufacturing schedule. One of the ramifications of this system is that the product must be manufactured at short notice and the manufacturing schedule can be erratic with short bursts of frenetic production followed by periods of inactivity. Prudent manufacturers have developed the practice of also having their workforce employed on a "just in time" basis,¹⁷ thus avoiding the need to pay the worker during the periods of inactivity.

12 Supiot, *Beyond Employment*, n. 1 above, pp. 2 and 174

13 K Klare, "Horizons of transformative labour law" in J Conaghan et al., *Labour Law*, n. 11 above, p. 4.

14 Supiot, *Beyond Employment*, n. 1 above, pp. 2 and 184.

15 *Ibid.*, pp. 83-4.

16 No. 20 of 1997.

17 Fahlbeck, "Flexibility", n. 3 above, at 523.

THE CHANGING PERCEPTION BY REGULATORS

Perception by regulatory bodies of temporary work relationships has undergone a significant transformation in recent times. It has been argued that under the Fordist model temporary work was ancillary to the main work performed by the head of the household.¹⁸ As temporary work relationships were secondary, and not as prevalent, their importance was diminished to the level where regulatory bodies saw them as too insignificant to warrant attention. It is clear from the efforts of, in particular, the EU and its flexicurity agenda that modern thinking is not of the same opinion.

Under the traditional model, security for the worker was achieved through longevity of employment with the same hirer. However, as economies evolve, modern-day regulators, at both national and international level, see security being achieved through the employability of the worker. Consequently, the emphasis is placed on training workers and increasing their “employability”.¹⁹ The effect of this change in approach to gaining security for workers automatically creates a pool of workers aimed almost exclusively at working for short periods for different hirers.

THE ROLE OF GLOBALISATION

It is important to note that the changes outlined above are, like most things, a reaction to the modern economic climate. For this reason, some of these temporary work relationships are creatures of the modern global economy.

The evolution of the global economy has seen a dramatic liberalisation of capital. The breakdown of barriers between nations with the emergence of regional economic blocks, such as the European Union and the North American Free Trade Agreement, has allowed for easier movement of capital. One impact of this reformulation on employment conditions is that “capital has spread throughout the world, opening the way for mass delocalisation and relocation”.²⁰ This liberation allows those investing capital to be selective in their choice of investment locations. It also allows them to move location easily, or at least threaten to do so if their demands are not met. As a result, states wishing to entice inward investment must have a suitably attractive workforce and regulatory model.²¹ Driven by the intense pressure between states to make their economies more enticing it is easy to see why skilled temporary workers and a low regulatory burden on hirers may be desirable from the point of view of policy makers. It also comes as no surprise that in some states regulation of the labour market is being discredited.²²

THE ROLE OF UNION DENSITY

As well as influencing the regulatory model, these new pressures are also having a significant effect on the collective strength of workers. Union density is decreasing in Ireland, shrinking from 37.4 per cent in 2003 to 31.5 per cent in 2007.²³ There can be no doubt that the rising tide of temporary workers has had a significant impact on these figures. In general, trade unions tend to foster workers’ power within a particular institution by monitoring the pay and conditions on that individual site. Membership of a trade union and

18 McCann, *Regulating Flexible Work*, n. 4 above, p. 59.

19 Fahlbeck, “Flexibility”, n. 3 above, at 523.

20 Supiot, *Beyond Employment*, n. 1 above, p. 50.

21 Klare, “Horizons”, n. 13 above, p. 25.

22 Rittich, “Feminization”, n. 11 above, p. 121.

23 Central Statistics Office, Quarterly National Household Survey, available at www.cso.ie/releasespublications/documents/labour_market/current/qnhunionmembership.pdf (accessed 10 March 2010).

exercise of workers' power is related to being employed on that specific site over a lengthy period of time. Therefore, it is easy to see why most temporary workers are, more often than not, outside the ambit of collectivisation.²⁴ Such a situation leaves these workers especially vulnerable as they have no effective means of coordinating their strength in order to improve their working conditions.

When all of these factors are combined it is easy to see why the profile, and problems, of temporary work in Ireland are topical.

What are the problems encountered by temporary workers?

LACK OF PROMOTION AND TRAINING

Temporary work relationships can pose significant problems for workers. By its very nature the relationship between the worker and the hirer is transient or at best fractured by lack of continuity. In most enterprises, promotion to a senior position is on the basis of ability displayed over a period of time. Under these circumstances, it is difficult for a temporary worker to gain promotion.²⁵ There is also the issue of receiving training from a hirer. Training can be an expensive process for hirers and is therefore usually only provided where there is a realistic chance of reaping the benefits over a sustained period of time. As a result, most hirers do not invest significant sums in training workers that are transient.²⁶ The combination of these factors creates a situation where temporary workers are in a perennial cycle that condemns them to lower-paid and lower-skilled jobs.

INSECURITY OF INCOME

Another significant impact of a temporary work relationship is the loss of income protection in the event of illness or retirement. Contributions by the worker or hirer to cover such situations can only be made over a sustained period of time, again automatically operating against transient workers.²⁷ Research shows that temporary workers tend to be disadvantaged in relation to their working conditions as they are more likely to report medical problems caused by a poor workplace environment.²⁸ Perhaps the most important ramification for temporary workers is the unpredictability of wages. Not having security of employment means that there is no security of income. As the work is unpredictable, so is the pay.²⁹ This can have knock-on effects, such as the inability to raise a mortgage thus causing dependency on social housing. Other effects may be poorer standards of living and healthcare due to infrequent, lowly paid work.

THE INCLUSION PROBLEM

Klare describes the issues listed above as the "inclusion problem" in that many temporary workers are outside the ambit of traditional labour law protection.³⁰ In fact, the adherence to the Fordist model when imposing regulation serves to exclude many modern workers³¹

24 Klare, "Horizons", n. 13 above, p.13.

25 Supiot, *Beyond Employment*, n. 1 above, p. 185.

26 I Regalia, *Regulating New Forms of Employment* (Abingdon: Routledge 2006), p. 12.

27 P McGovern, D Smeaton and S Hill, "Bad jobs in Britain: non standard employment and job quality" (2004) 31 *Work and Occupations* 225 at 235.

28 European Foundation for the Improvement of Living and Working Conditions, *Employment Status and Health* (Luxembourg: Office of the Official Publications of the European Communities 1999).

29 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 12

30 Klare, "Horizons", n. 13 above, p. 7.

31 Supiot, *Beyond Employment*, n. 1 above, p. 181.

and may potentially lead to a situation where “small high-performance sectors will be surrounded by oceans of insecure, low-wage work and unemployment”.³² The provision of some form of security for temporary workers is therefore crucial as a means to combat poverty and promote social inclusion.³³

THE ‘DISPLACEMENT’ PROBLEM

In an ideal world the balance of power between capital (hirers) and labour (workers) would be even, as, clearly, each side requires the other. However, in most economies there is an imbalance between capital and labour. The liberalisation of capital, as mentioned above, coupled with the over-availability of labour means that capital holds the upper hand in any negotiation of pay and conditions for workers. Consequently, ameliorating and constraining domination by capital “is a necessary condition of establishing a democratic and tolerably egalitarian society”.³⁴ However, should one state take such a route, it would be anti-competitive in relation to other states. Such a position might well spark a “race to the bottom” described as the “displacement problem”³⁵ where capital moves to the most favourable location, i.e. the state that imposes the least burdens.³⁶ It is this credible threat that restricts the ability of any individual state to legislate for balance between labour and capital. It is obvious that for some such regulation to be introduced it would have to be on a global basis, or at least effective in any potential haven for capital.

GENDER EQUALITY ISSUES

The regulation of temporary work not only impacts on equality between capital and labour but also on equality between the genders. Under the traditional regulatory model, the worker operating in the Fordist system – in general, the male worker – had the benefit of whatever protection was available. As mentioned above, a high percentage of temporary workers are female,³⁷ attempting to balance their caregiver responsibilities with participation in the workforce. In fact, much of the work available for temporary workers seems to be designed specifically for females with these dual roles.³⁸ Considering that, due to their temporary status, female workers’ problems are compounded by lack of trade union membership,³⁹ the current regulation serves to exclude the majority of female workers and, as such, discriminates against them.

It is axiomatic that any attempts to create equality between the genders must create equality between the different types of work relationship. Any society that aspires to equality between the genders must address this imbalance as, without such effort, true equality between the genders is impossible. Central to the current inequality is the historic perception of the role of women, in particular mothers, in the workforce. Traditionally, a mother’s participation in the workforce was ancillary to the male breadwinner’s role and, as such, somewhat ignored by regulators. As the amount of working mothers increases, the scale of the problem has long passed the point where it can be ignored. Nor can temporary work performed by mothers be considered ancillary because, quite often, the working

32 Klare, “Horizons”, n. 13 above, p. 6.

33 J Conaghan, “Women, work and family: a British revolution?” in J Conaghan et al., *Labour Law*, n. 11 above, p. 53.

34 Klare, “Horizons”, n. 13 above, p. 13.

35 *Ibid.*, p. 7.

36 B Langille, “Seeking post-Seattle clarity-and inspiration” in J Conaghan et al., *Labour Law*, n. 11 above, p. 144.

37 McCann, *Regulating Flexible Work*, n. 4 above, pp. 10 and 56.

38 Rittich, “Feminization”, n. 11 above, p. 119.

39 Supiot, *Beyond Employment*, n. 1 above, p. 187.

mother is the only parent in the family. Thus, we see a changing demographic in the workforce reflecting the changing structure of the family in society. The regulatory changes that are occurring⁴⁰ in modern times are attempting to deal with the phenomenon of working mothers and the “feminisation” of the workforce.⁴¹ The pace and import of these changes must be increased if the regulatory authorities are to achieve the stated goal of equality between the genders. It is to be noted that such recognition of the role of mothers in the workforce may not necessarily be a burden on hirers. Walby argues “improving justice for women can go hand in hand with increasing economic efficiency, instead of their being a trade-off between the two”.⁴² A happier, more flexible workforce can be far more committed to the workplace, leading to increased productivity by a more settled group of people.⁴³ Such a workforce requires less training and is also far less likely to take any form of costly industrial action against the hirer. So it seems that all sides may benefit from regulating for the protection of female workers in temporary work relationships.

WORKER DEMAND FOR TEMPORARY WORK

Reading the preceding pages may have given the reader the impression that the growth of temporary work relationships is almost entirely driven by the demands of hirers or the global economic situation. However, data compiled by the Organization for Economic Cooperation and Development (OECD) suggests that the incidence of involuntary part-time work in Ireland represented only 0.9 per cent of the labour force in 2008.⁴⁴ This suggests that the prevalence of temporary work is also driven by worker demand as distinct from the lack of available full-time employment. Even if amongst temporary workers there are some who would prefer full-time employment if it were available,⁴⁵ some temporary workers hold that status through choice. The most obvious reason for this is the dual role performed by single parents in the workforce. Some willingly choose to spend more time in their caregiver role even if it means a reduction in wages or living standards⁴⁶ creating a workable marriage of economic necessity and social need.⁴⁷

Such a career choice fits well with the goal of creating a society where a true work/life balance can be achieved.⁴⁸ In modern times, more and more workers are seeking more varied and fulfilling working and personal lives.⁴⁹ More workers are seeing the benefits of increased time for personal interests while also maintaining a fulfilling career. As the Fordist model of employment did not cater as effectively for this desire, many workers see multiple temporary work relationships as being the best format for varying their working life while still having time to spend pursuing personal interests. Temporary work is also a popular choice with students who are trying to balance conducting their studies with the economic necessity of earning a means of paying for their education.⁵⁰ Finally, in times of high

40 Conaghan, “Women, work and family”, n. 33 above, p. 66.

41 G Standing, “Global feminisation through flexible labour” (1989) 17 *World Development* 1077.

42 S Walby, “Introduction” in S Walby (ed.), *New Agendas for Women* (London: Macmillan 1999), p. 3.

43 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 13.

44 OECD Stat Extracts, Incidence of Involuntary Part-time Workers available at <http://stats.oecd.org/Index.aspx> (accessed 15 March 2010).

45 Supiot, *Beyond Employment*, n. 1 above, p. 186.

46 M D’Antona, “Labour law at the century’s end: an identity crisis?” in J Conaghan et al., *Labour Law*, n. 11 above, p. 44.

47 Conaghan, “Women, work and family”, n. 33 above, p. 57.

48 DTI, *Full and Fulfilling Employment* (London: HMSO 2002), p. 41.

49 Fahlbeck, “Flexibility”, n. 3 above, at 522.

50 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 11.

unemployment, many workers will choose a temporary job rather than face unemployment, in the words of the old proverb “half a loaf is better than none”.

The combination of these factors means that there are both a demand side and a supply side impetus for temporary work relationships. Considering that workers, hirers and national economies can all benefit from regulation of this area, it seems to be imperative that such regulation should occur.

The current regulation in Ireland

While some Irish statutes tangentially impact on temporary workers, the two leading statutes are the Protection of Employees (Part-Time Work) Act 2001 and the Protection of Employees (Fixed-Term Work) Act 2003. The similarity between these statutes is noticeable to such a point that the Irish Labour Court has suggested that the 2003 Act should be construed *in pari materia* with the 2001 Act, “as they both form part of the same legislative scheme”.⁵¹ Thus, it is of no surprise that many of the provisions of the initial 2001 Act are replicated in the 2003 Act.

The 2001 statute was enacted in order to transpose Directive 97/81/EC and consequently “is concerned with preventing unfavourable treatment of part-time workers”.⁵² Interestingly, the Act has a reasonably broad scope of application. It applies to any employee whose normal hours of work are less than a comparable employee.⁵³ Even though it refers only to “employees” the Labour Court has been quite progressive in its interpretation of the application of the Act, including such categories as seasonal workers⁵⁴ and agency workers where the end user exercises sufficient control over the worker.⁵⁵ The definition of a comparator is also quite broad, allowing for a person involved in the same industry or sector of employment to suffice.⁵⁶ Consequently, the problems faced by an employee where all of their co-workers are also part-time workers are avoided by reference to employees in another enterprise in the same industry.

A definition for casual workers can be found in s. 11 of the Act where:

he or she has been in the continuous service of the employer for a period of less than 13 weeks, and that period of service and any previous period of service by him or her with the employer are not of such a nature as could reasonably be regarded as regular or seasonal employment, or if he or she fulfils, at that time, the conditions specified in an approved collective agreement (as defined in section 11(5) of the Act) that has effect in relation to him or her, and regards him or her for the purposes of that agreement as working on a casual basis.⁵⁷

This definition seems broad enough to cover quite a lot of workers when one considers what may be meant by “reasonably be regarded as regular”. Pro rata workers with irregular hours and no guarantee of future work could well be considered casual workers. Significantly, s. 11(2) of the Act allows “less favourable treatment” of these workers where it can be justified on objective grounds. The limits of these objective grounds are a matter for interpretation but, considering the 2003 Act is to be considered *in pari materia* with the 2001 Act, the Labour Court definition of objective grounds in relation to the 2003 Act may

51 *ESB v McDonnell*, PTD 081 (6 March 2008).

52 D Ryan, “Part time work” in M Regan (ed.), *Employment Law* (Dublin: Tottel Publishing Ltd 2009), p. 283.

53 S. 7(1).

54 *ESB v McDonnell*, PTD 081 (6 March 2008).

55 *Diageo Global Supply v Rooney* [2004] ELR 133.

56 S. 7(3).

57 S. 11(4)(a) & (b).

prove instructive.⁵⁸ Essentially, the grounds as approved by the Labour Court are derived from the European Court of Justice (ECJ) ruling in the *Bilka-Kaufhaus* case:⁵⁹ that there is a real need on the part of the hirer and the measures are appropriate and necessary. Of more fundamental importance in the European ruling was that “promoting full-time work” was seen as a suitable ground for discriminating against part-time workers. The ramifications of such a low threshold cannot be underestimated.

In relation to pensions, s. 9(4) of the 2001 Act allows for discrimination if the employee works less than 20 per cent of the normal hours of the comparator. When combined, these derogations can significantly impact on the application of the equality dimension of the Act.

Following in the footsteps of its progenitor, the Act operates on the principle of *pro rata temporis* where benefits are concerned.⁶⁰ With one interesting exception, s. 10(2) provides that the *pro rata temporis* approach is only to be used for benefits that are directly linked with hours worked, e.g. pay or holiday entitlements. Benefits such as maternity leave or parental leave may not necessarily be subject to the same approach. However, it is important to note that these benefits are the subject of separate legislation.

As mentioned above, the Fixed-Term Employees Act 2003 is somewhat similar in approach to the 2001 Act. Based on Directive 99/70/EC, the statute has the same primary objectives, i.e. the prohibition of discrimination and the excessive use of successive fixed term contracts. Section 2 of the Act provides that it applies to any holder of a contract of employment where such a contract is determined by an objective event, for example, the completion of a task or a specific date. This may prove problematic for a temporary worker where their contract is not determined by a specific event. If the contract is constructed to be deliberately open-ended but not of a full-time or permanent nature, then an unscrupulous hirer can avoid the legislation by merely being vague about the determination of the contract.

Similar to its progenitor, the Act specifically excludes agency workers and employees on training or apprenticeship contracts.⁶¹ However, the Act (like the 2001 Act) provides a broad interpretation for comparators in s. 5, allowing employees in the same industry to suffice where the conditions specified in s. 5(2) are met. Essentially, these conditions are the same as those describing the concept of “like work” under the Employment Equality Act 1998 to 2004. It is therefore not that difficult for an employee to identify a suitable comparator.

Protection from discrimination for fixed-term employees is dealt with by s. 6 which provides that fixed-term employees cannot be treated less favourably than their permanent comparators. However, there are some significant exceptions to this blanket rule. Discrimination can occur in relation to pensions where the normal hours worked by the employee in question are less than 20 per cent of the hours worked by a permanent comparator.⁶² Significant also are the provisions of sub-ss 6(6) and (7) that apply the *pro rata temporis* principle to benefits. That is that a fixed-term employee is only entitled to benefits in direct proportion to the hours worked.

Derogation is also allowed where objective reasons are proposed for the discrimination.⁶³ In interpreting the application of this derogation the Irish Labour

58 *Health Service Executive v Prasad*, FTD 062 (7 April 2006).

59 [1986] ECR 1607.

60 S. 10(1).

61 S. 2.

62 S. 6(5).

63 S. 7.

Court⁶⁴ has followed the ECJ ruling in the *Bilka-Kaufhaus* case,⁶⁵ as discussed above. So, if discrimination is found, the burden of proof is placed on the employer to show that the measure is permissible.

Section 8 of the Act places the onus on employers to provide information in writing to the employees of the event that will determine the contract but only where that date/event is predictable and envisaged by the employer. Just as significant is the onus on the employer, where renewal of a fixed-term contract is concerned, to provide the employee with a written copy of the reasons for not offering permanent employment.⁶⁶

The second aim of Directive 99/70/EC, the prohibition of overuse of successive fixed-term contracts, is addressed in s. 9 of the Act. Essentially, sub-ss 9(1) and (2) provide that the aggregate duration of one or more fixed-term contracts cannot exceed four years of continuous work for the same employer. If an employer exceeds this four-year time limit then the relationship between the employer and employee is deemed as a contract of indefinite duration.⁶⁷ However, there is an important caveat to this provision. Where the employer can show that objective grounds exist for extending the term beyond the four-year limit then such an extension is permitted. Unfortunately, the Act does not suggest what may constitute objective grounds. The Labour Court has attempted to clarify this situation, suggesting that a restructuring programme for economic viability may suffice.⁶⁸

Of equal importance in relation to successive renewals is the meaning of “continuous employment”. Once again, in *Department of Foreign Affairs v Group of Workers*,⁶⁹ the Irish Labour Court took a broad approach to the impact of breaks in service on the interpretation of continuity. The court held that where the employee had a genuine expectation of returning to work the interim period between contracts would not serve to break the continuity of employment. It is submitted that this test may raise more questions than it answers, such as whether it is a genuine expectation if viewed from a subjective or objective view. Nevertheless, the approach of the Labour Court suggests a willingness to extend the application of the Act as far as possible.

The Act also provides two other basic rights for fixed-term employees in s. 10. Fixed-term employees must have equal access to training and developmental opportunities as their permanent comparators and they must be made aware of any opportunities for permanent employment with the enterprise.

In general, both of the statutes are essentially the means of implementing the European Directives. Unfortunately, the ramification of this is that the protection of workers at state level in Ireland suffers the same shortcomings as its European progenitor. Such an approach can be viewed as indicative of Ireland’s policy on temporary workers. When it comes to imposing burdens on hirers for the benefit of temporary workers, Ireland has sternly refused to go beyond the basic requirements of the European Directives. The underlying motives for this may also serve to illustrate the current tensions in this area at state level.

64 *Health Service Executive v Prasad*, FTD 062 (7 April 2006).

65 [1986] ECR 1607.

66 S. 8(2).

67 S. 9(3).

68 *Aer Lingus v Group of Workers* [2005] ELR 261.

69 [2007] ELR 332.

Conclusions

It is clear from the foregoing that Ireland is a bleak environment for temporary workers. The legislation that does exist for their protection is scarce and somewhat easily circumvented. A situation that reflects the International Labour Organisation suggestion that there seems to be a “loss of focus” in legislation aimed at protecting workers.⁷⁰ As a result, it behoves labour lawyers to find a way of protecting vulnerable members of the workforce.

One clear point is that the approach adopted in Ireland seems to be to identify specific categories of vulnerable workers and attempt to raise the standard of their protection to a level equivalent to “typical” workers. While this approach is to be commended for extending protection to formerly vulnerable workers, it unfortunately inevitably falls short of reaching all such people. As soon as a definition is coined, a means of circumventing it will spring from the imagination of the unscrupulous. As has been suggested:

every time the law manages to regulate an employment relationship, another atypical employment relationship immediately comes into being, frustrating the restraints envisaged by the regulations and thus maintaining the condition of obscurity in which they currently exist.⁷¹

Therefore it is submitted that a different approach must be contemplated.

One potential avenue of dealing with this problem may lie in providing strong social welfare security for those who do not have job security, thus following the Danish example of flexicurity.⁷² However, there are two basic problems with this approach. First, it is an expensive process and one that, in the opinion of the OECD, should not be undertaken in times of high unemployment.⁷³ Secondly, it may well provide income security but does not, by itself, address the fundamental “inclusion” problem exemplified in issues such as working conditions or gender imbalance.

What is required is a fundamental readjustment of how we regulate our labour force. That such an overhaul is necessary seems clear when one considers the current circumstances. Regalia goes so far as to say “the changes currently in progress are so fundamentally different with respect to the past that it is difficult or even almost impossible to envisage solutions or remedies”.⁷⁴

In the opinion of this author, one element can be borrowed from the Danish system, the “governance without much government as to labour law and regulation”.⁷⁵ If Irish labour law is ever going to be all inclusive then it must be based on an attribute of the worker that is unrelated to their employment status. An obvious suggestion is membership of a trade union. If union density were to be as high in Ireland as it is, for example, in

70 ILO, *Report of the Meeting of Experts on Workers in Situations Needing Protection* (Geneva: ILO, 15–19 May 2000), p. 4.

71 Y Kravaritou-Manatakis, *New Forms of Work: Labour law and social security aspects in the European Community* (Dublin: European Foundation for the Improvement of Living and Working Conditions 1988), p. 23.

72 For further information, see T Bredgaard, F Larsen, P Kongshoj Madsen and S Rasmussen, “Flexicurity and atypical employment in Denmark”, CARMA Research Paper 2009:01, p. 4, available at www.epa.aau.dk/fileadmin/user_upload/conniek/Dansk/Research_papers/2009-1-Kongshoej_m-fl.pdf (accessed 15 March 2010).

73 OECD, *Employment Outlook 2009 – How does Ireland compare?*, available at www.oecd.org/dataoecd/61/55/43707134.pdf (accessed on 16 March 2010).

74 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 5.

75 H Jorgensen and P Kongshoj Madsen, “Flexicurity and beyond – reflections on the nature and future of a political celebrity” in H Jorgensen and P Kongshoj Madsen (eds), *Flexicurity and Beyond: Finding a new agenda for the European social model* (Copenhagen: DJOF Publishing 2007), p. 14.

Denmark (estimated at 68 per cent in 2007)⁷⁶ then it would significantly strengthen the negotiating power of the workers' representatives. Direct negotiations at all levels of the market could see progressive regulation developed that would be suitable to both sides of industrial relations. Problems, at local and national level could be remedied through negotiation between the stakeholders at that level and, as a result, an era of industrial peace could be achieved through acceptable compromise.

One of the fundamental pre-requisites for this model, based on negotiation and compromise, is a strong sense of trust between the social partners, and between the members and their representatives. Whether sufficient trust exists in Ireland in times of economic hardship is, unfortunately, difficult to say with any degree of confidence. This may well prove to be our Achilles heel when it comes to rethinking how we structure our labour market regulation.

⁷⁶ Worker-participation.eu, available at www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark (accessed on 16 February 2010).

Dependency: an inhibitor to the Irish case for corporate social responsibility

CIARA HACKETT¹

Queen's University Belfast

Abstract

This paper addresses the potential resurgence of the post-imperial “dependency theory” of the 1960s and 1970s. Suggesting that the initial premise of the theory was just, the article proposes the reworking of the theory in order to incorporate globalisation processes, namely the importance of global capital generated by multi national corporations. Considering that capital is now at the “core”, leads to the idea of a much wider catchment of states “dependent” on global capital. Using Ireland as an example, this article pursues the idea that a dependent state’s ability to implement corporate social responsibility legislation is inhibited by the constraints of capital.

Introduction

Dependency theory was briefly fashionable in the 1960s and 1970s as an alternative theory of development. Problems associated with the theory, such as its failure to provide a solution for “dependence”, have meant that it lost its prominence in recent times. This paper applies a modified dependency theory – a “new” dependency – in an effort to provide an alternative assessment of the global order and to question the power of the nation state to control or regulate transnational capital. This paper focuses on Ireland, a relatively wealthy state, which falls within new dependency. Dependence is reflected in the failure of the Irish government to act independently on issues pertaining to regulation which therefore means that the Irish government cannot influence an effective corporate social responsibility (CSR) policy for Ireland due to its dependence on foreign capital. CSR is the deliberate inclusion of public interest into decision making within corporations in a manner which befits the “triple bottom line” approach to business self-regulation – people, planet and profits. Or, perhaps on a wider interpretation, CSR includes the broader regulatory framework, a set of mechanisms for aligning corporate behaviour with the

1 PhD student at Queen’s University Belfast. Email: chackett04@qub.ac.uk or ciarahackett@hotmail.com.

interests of society in reducing externalities and promoting a sustainable corporate sector.² The first section addresses traditional dependency. Then, the article goes on, in the second section, to consider the emergence of “new” dependence – that of dependence on foreign capital generated by multi-national corporations (MNCs). In the third section, Ireland is discussed, reflecting on past examples of how dependence on capital has influenced government decisions and policy. The final part considers the unlikelihood of a mandatory CSR policy in Ireland as a result of said dependence.

Dependency theory

Dependence is best described by Dos Santos as “a conditioning situation in which the economies of one group of countries are conditioned by the development and expansion of others”.³ Relationships of dependence exist:

when some countries can expand through self impulsion, while others being in a dependent position, can only expand as a reflection of the expansion of the dominant countries, which may have positive or negative effects on their immediate development.⁴

Therefore, a dependent state is one where economic development, policies and, to a certain extent, social policy are dependent on the input, investment and interest of others.⁵

Dependency theory emerged following the failure of Keynesian economics in accounting for the effects of imperialism on social structures and patterns of economic development in countries of the Third World⁶ and as a reaction against neoclassical theories of development, such as modernisation.⁷ Dependency theorists criticised modernisation for ignoring the historical nuances particular to the country which, they believed, cemented its underdevelopment.⁸

A number of key beliefs exist in dependency literature. Dependency advocates a centre of wealthy “developed” states relying on the appropriation of profit from a periphery of

2 J Elkington, *Cannibals with Forks: The triple bottom line of 21st century business* (Oxford: Capstone 1998). For an in-depth history of CSR evolution, please refer to: C Vurro, “The evolutionary path of the concept of CSR” in F Perrini, S Pogutz and A Tencati (eds), *Developing CSR* (Cheltenham: Edward Elgar Publishing 2006), p. 54; AB Carroll, “Corporate social responsibility – evolution of a definitional construct” (1999) 38(3) *Business and Society* 268; SF Deakin and R Hobbs, “False dawn for CSR? Shifts in regulatory policy and the regulatory policy response of the corporate and financial sectors in Britain” (2007) 15(1) *Corporate Governance: An international review* 68–76, available at SSRN: <http://ssrn.com/abstract=954817> or DOI: 10.1111/j.1467-8683.2007.00543.x.

3 T Dos Santos, “The crisis of development theory and the problem of dependence in Latin America” in H Bernstein (ed.), *Underdevelopment and Development* (Harmondsworth: Penguin 1973).

4 Ibid.

5 Dependency traditionally operated on the premise that there exists a core of wealthy “developed” states and a periphery or satellite of poorer “underdeveloped” states. In order to bolster economic growth in the core, resources were extracted from the periphery to sustain growth in the centre. It suggests that peripheral regions were exploited to a certain extent by the core so as to sustain core development. When addressing new dependency in the next section, I suggest that all nation states today are peripheral to the “core” of transnational capital.

6 I Roxborough, *Theories of Underdevelopment* (London: Macmillan 1979).

7 Modernisation theory believed that capital invested in a nation (through technological advances) could develop a nation socially and economically. It became the way in which the USA addressed the transformation of the colonies of Britain and France and how they could survive on the world market.

8 AG Frank, “The underdevelopment of development” (1991) 10(3) *Scandinavian Journal of Development Alternatives* 133–50.

poorer “underdeveloped” states in order to increase the centre states’ capital accumulation.⁹ There is a focus on historical aspects of “development” and/or “underdevelopment”¹⁰ with theorists arguing for the interrelation of economic, political and social aspects within a development theory.¹¹

Criticism of dependency focuses on the failure to provide expert knowledge of Marxist theories – particularly exploitation;¹² concrete typologies of “cores” and “peripheries”;¹³ a solution to dependence;¹⁴ and its existence as a critique of modernisation.¹⁵ To these, I add a further criticism: that dependency is concerned with the nation state and instances of dependence between individual states. Given the systematic shift towards globalisation, it is no longer viable to consider only nation state transactions. The next section of this paper suggests the need to consider dependency on a transnational level and, particularly, dependence on foreign capital generated through the MNC, as well as the impact of globalisation and the rise of the transnational capitalist class (TCC).

New dependency

Given the criticisms outlined above, how ought we to imagine dependency? In this section, I set out a conception of dependency rooted in the patterns of capitalist globalisation that have emerged since traditional dependency theory’s heyday.

New dependency suggests that peripheral countries are no longer dependent on core countries for economic growth. Instead, it suggests that transnational capital is the “core” with the majority of nation states being considered “peripheral” in the extent to which they depend on foreign capital through MNC investment for “wealth”.¹⁶ By reclassifying dependency in this way, I address criticisms of the theory¹⁷ as well as incorporating developments such as increasing globalisation and the dominance of the TCC.¹⁸

9 R Prebisch, *The Economic Development of Latin America and its Principal Problems* (New York: United Nations 1950); AG Frank, “Sociology of underdevelopment and underdevelopment of sociology” (1967) 3 *Catalyst* 20–73.

10 Frank, “The underdevelopment of development”, n. 8 above.

11 Frank, “Sociology of underdevelopment”, n. 9 above.

12 G Kay, *Development and Underdevelopment: A Marxist analysis* (London: Macmillan 1975).

13 C Leys, “Underdevelopment and dependency: critical notes” (1977) 7(1) *Journal of Contemporary Asia* 92–107; D Booth and AG Frank, “An introduction and an appreciation” in I Oxaal, T Barnett and D Booth (eds), *Beyond the Sociology of Development* (London: Routledge & Kegan Paul 1975).

14 D Booth, “Marxism and development: sociology interpreting the impasse” (1985) 13(7) *World Development* 76–87; J Toye, *Dilemmas of Development: Reflections on the counter revolution in development economics* 2nd edn (Oxford: Blackwell 1993); F Schurmann, *Beyond the Impasse: New directions in development theory* (London: Zed Books 1993). I don’t believe that the failure to provide a solution is a major issue. It is sufficient that the theory can be used as a means of describing certain phenomena. For example, it is enough to apply to the theory to a country or region and thereby provide an alternative unit of analysis in an assessment of that region’s development. Ireland’s development and economic advancement is generally measured using traditional economic theory. However, by a re-reading of Ireland’s success through the lens of dependency, previous “successes” can be reappraised.

15 Leys, “Underdevelopment and dependency”, n. 13 above; A Cueva, “Crisis del capitalismo y perspectivas del nacionalismo en América Latina (análisis del caso ecuatoriano)” (1976) 38(4) *Revista Mexicana de Sociología* 825–41, cited in RH Chilcote, “A question of dependency” (1978) 13(2) *Latin American Research Review* 55–68.

16 Issues of exploitation of the periphery by the core manifest in peripheral approaches to regulation etc. as considered in the next section.

17 Leys, “Underdevelopment and dependency”, n. 13 above; Booth and Frank, “An introduction and an appreciation”, n. 13 above.

18 L Sklair, *Transnational Capitalist Class* (Oxford: Blackwell 2001).

The relationship between dependency and the MNC has been discussed before.¹⁹ The difference with new dependency, however, is that whereas traditional dependency suggested that the MNC was a powerful agent of a core country²⁰ – usually the USA – new dependency suggests that the MNC *is* the core or at least an agent of the TCC.²¹

This approach provides an alternative assessment of the situation in small, open, globalised economies today, like Ireland. The role of MNCs and the corresponding TCC questions some issues of governance. How can the borderless MNC, and in turn global capital, be regulated by an – inferior by comparison – domestic state which is dependent on global capital for prosperity? This is the dilemma which globalisation, viewed via dependency, poses. Global capital's answer to this dilemma are methods of self-regulation, such as CSR, as means of regulating companies, whilst ensuring return to the people in the countries where they are based. As ensuing sections illustrate, dependence on foreign capital makes it unlikely that nation states will be able to influence the direction of said CSR policies in ways best fitting their specific requirements.

Ireland, prior to the Celtic Tiger era, fulfilled all conditions of traditional dependence, with a 1988 *Economist* article identifying Ireland as having all the hallmarks of a dependent state; the colonial past, the weak industrial sector, the peasant class and the peripheral nation status.²² In addition, much literature exists describing the incidence of this dependence.²³ However, with the coming of the Celtic Tiger, Ireland went from a despondent, stagnant economy to “Europe's shining light”,²⁴ at least while it lasted. Is it the case that modernisation methods of capital infusion²⁵ worked for Ireland? Modernisation methods of capital infusion did *not* work for Ireland. The boom that was the Celtic Tiger is over.²⁶ Of note for this paper is the fact that, even when the economy was performing in Ireland's favour, it was still at the mercy of global capital and was, therefore, severely affected by global downturns, as the recent liquidity crisis has illustrated.²⁷ Has the Irish case, then, provided a solution to dependency, or has dependency today merely adapted to globalisation and, in doing so, manifested itself accordingly? The latter is the case – as the global economy has developed, so too have the theories used to describe it. This

19 R Müller, “The multinational corporation and the underdevelopment of the Third World” in CK Wilber (ed.), *The Political Economy of Development and Underdevelopment* (New York: Random House 1973), pp. 124–51; T Biersteker, *Multinationals, the State and the Control of the Nigerian Economy* (Princeton NJ: Princeton UP 1987); RW Jackman, “Dependence on foreign investment and economic growth in the Third World” (1987) 34(2) *World Politics* 175–96.

20 PJ O'Brien, “A critique of Latin American theories of dependence” in Oxaal et al., n. 13 above.

21 Sklair, *Transnational Capitalist Class*, n. 18 above.

22 F Cairncross, “Poorest of the rich”, *The Economist*, 16 January 1988, p. 3.

23 JK Jacobsen, *Chasing Progress in the Irish Republic – Ideology, democracy and dependent development* (Cambridge: Cambridge UP 1994); L Gibbons, “Coming out of hibernation? The myth of modernity in Irish culture” in R Kearney (ed.), *Across the Frontiers: Ireland in the 1990s* (Dublin: Wolfhound Press 1988); R Crotty, *Ireland in Crisis – A study in capitalist colonial underdevelopment* (Dublin: Brandon Press 1986); P Breathnach, “Uneven development and capitalist peripheralisation: the case of Ireland” (1988) 20(2) *Antipode* 122–41.

24 “The Celtic Tiger: Europe's shining light”, *The Economist*, 17 June 1997.

25 H Bernstein, “Modernization theory and the sociological study of development” (1971) 7(2) *Journal of Development Studies* 141–60; JS Valenzuela and A Valenzuela, “Modernization and dependency: alternative perspectives in the study of Latin American underdevelopment” (1978) 10(4) *Comparative Politics* 535–57.

26 M Cassidy and D O'Brien, “Export performance and competitiveness of the Irish economy” (2005) 3 *Central Bank of Ireland Quarterly Bulletin* 75–95; see also M Kelly, “The Irish property bubble: causes and consequences” (paper presented at Irish Economy Conference, Dublin, January 2009).

27 Ireland's boom lasted from around 1995–2002 and was fuelled by the growth of the dot.com industry. Its collapse signified the beginning of the end for the Irish success story and serves to emphasise the level of dependence on foreign capital in the Irish economy.

incorporates dependence, which, rather than being removed by global change, has become more ingrained.

Globalisation enabled Ireland to move from the periphery towards the centre of the new global economy.²⁸ Murphy describes how “a predominately pre-industrialised economy” like Ireland, managed to “leapfro[g] to a post industrial high tech economy” in a very short space of time.²⁹ He suggests that the absence of an industrial sector was beneficial to Ireland, initially, as, it allowed the government to introduce a significant number of tax breaks which would have been difficult, if not impossible, had there been a large industrial base. This in turn attracted companies from Silicon Valley to use Ireland as a European base for their production.³⁰ Part attracted by fiscal and tax breaks and the activities of the Industrial Development Authority,³¹ as well as the benefits of an English-speaking workforce and geographical benefits around time zones, MNCs began to set up bases in and around the east and south-west of the island, providing indirect and direct employment to the Irish people.³²

Deeper integration with Europe also aided Ireland’s transformation from a stagnant economy to a vibrant cosmopolitan trading region. Ireland, with its full commitment to Europe, and the only English-speaking nation fully committed to European monetary union, was “ideally positioned to act as the pontoon linking US companies to the EU”.³³ Ireland was indeed in the right place at the right time and, under traditional measures of economic growth, benefited enormously as a result from MNCs, in their attempts to have a foothold in Europe.

But, Ireland is still dependent. Despite the fact that the limited indigenous industrial sector facilitated MNC investment on such a large scale, it is the absence of said sector which highlights Irish dependence.³⁴ Therefore, those conditions which helped attract investment are the very conditions which secure Irish dependence. This in turn leaves Ireland

28 AE Murphy, *The “Celtic Tiger”: An analysis of Ireland’s economic growth performance* RSC No 2000/16 EUI Working Paper (San Dominico de Fiesole: Robert Schuman Centre for Advanced Studies 2000).

29 Ibid.

30 Ibid., p. 15, particularly high-tech industries such as computers, computer software, pharmaceuticals and chemicals. MNCs are beginning to relocate elsewhere, e.g. Q Fortell and J Scheck, “Dell moving its Irish operations to Poland” (2009) *Wall Street Journal*, available at <http://online.wsj.com/article/SB123141025524864021.html> (visited 30 June 2009).

31 KP Thomas, “Investment incentives; growing use, uncertain benefits, uneven controls” (2007), available at www.globalsubsidies.org/files/assets/GSI_Investment_Incentives.pdf (visited 1 July 2009). In the late 1950s, Ireland’s economic development strategy revolved around attracting foreign MNCs, the main attraction being export sales relief (ESR) which exempted all export profits from corporation tax. In 1973, the European Commission insisted that ESR be terminated because it was an export subsidy and “state aid law does not permit export subsidies on intra-Community trade” (ibid.). To provide a similar incentive to encourage investment, the European Commission allowed a 10 % manufacturing corporate income tax rate. Therefore, the Competition Directorate, in drawing up its original “Surveys” on state aid in the late 1980s, deemed this tax rate to be part of the “general macroeconomic framework” of the country and not state aid. However, “in 1998 the Commission reversed its position, ruling that not only was the manufacturing tax rate a state aid, it was an ‘operating aid’ and, as such, had to be terminated. Competition Directorate policy has long deemed operating aid to be far more likely to distort competition than investment aid, and much harder to justify under the provisions of the Treaty of Rome.” (ibid.) Corporate tax was increased to 12.5%.

32 Murphy, *Celtic Tiger*, n. 28 above; H Gorg and F Ruane, “European integration and peripherality: lessons from the Irish experience” (2000) 23(3) *The World Economy* 405–21.

33 Murphy, *Celtic Tiger*, n. 28 above.

34 Irish dependence is for the most part attributable to its size and the nature of a small, open economy. However, desires to retain competitiveness means that Ireland is increasingly having to adapt policy to ensure that capital remains, which in turn is further compromising Ireland’s ability to alleviate some of the trappings of dependency.

susceptible to fiscal dumping, transfer pricing³⁵ and the need to retain its comparatively low tax rate in order to avoid capital flight. Faced with the prospect of capital flight, the Irish government adheres to MNC-friendly policy decisions at all times. In other words, policy follows from dependency, not from social need and such like. The next section addresses how the case of the director's compliance statement (DCS) illustrates the unlikelihood of a government-influenced CSR policy in Ireland – due to fears of capital flight.

Dependency and regulation

Focusing on Ireland, and how Ireland falls within “new” dependency, the previous section noted how, in being dependent, Ireland could be constrained in regulating the MNC effectively. I will, in this section, look at one instance of corporate regulation and discuss the implications for CSR. The proposed DCS in Ireland is a good example of the systematic limitations that prevail in the Irish politico-economic landscape. Although not related to CSR, the DCS presents an interesting aside on how Irish dependence is manifest in the inability of the government to legislate freely. It emphasises how Irish dependence on foreign capital leads to compromises in the regulation and governance of said capital. It has become increasingly difficult for the government to legislate and regulate in an uninhibited manner. Instead, fear of business retaliation looms in the face of innovation, preventing the government from initiating measures to expedite a higher degree of independence from foreign capital. This can best be understood by focusing on the government-initiated proposed DCS. By 1999, Ireland was suffering a series of banking scandals.³⁶ Lack of effective regulation and enforcement meant that those “tempted to make serious breaches of company law ha[d] little reason to fear detection or prosecution”.³⁷

The DCS arose from a specific recommendation of the Review Group on Auditing,³⁸ requiring directors of major companies to make public statements of compliance with respect to their tax, company law and any other relevant enactments that could affect the company's financial statements which in turn would be assessed by a group of auditors.³⁹ The DCS marked a change in direction for Irish regulation as, under the Anglo system of governance, regulation in Ireland was limited. Despite Irish attempts to innovate, however, the ensuing paragraphs show how capital prevented this innovation.

Business reaction to s. 45 was predictable. Senior figures at the International Financial Services Centre said that “Ireland may lose out on future foreign investment if the government does not water down plans to make directors personally responsible for

35 Transfer pricing is the pricing of contributions transferred within an organisation to areas of the organisation where gains can be most profitable. Ireland has a very low tax regime. Therefore, corporations with bases in Ireland may use “creative accounting” procedures in order to attribute more profits to Ireland than was actually the case.

36 D Knights and M O'Leary, “Reflecting on corporate scandals: the failure of ethical leadership” (2005) 14(4) *Business Ethics: A European review* 359–66; P Appleby, “Corporate regulation in Ireland” in J O'Brien, (ed.), *Governing the Corporation: Regulation and corporate governance in an age of scandal and global markets* (Dublin: J Wiley & Sons 2005). This ranged from issues regarding improper conduct between government officials and the banking community, banks overcharging customers on foreign exchange transactions and the use of bogus non-resident accounts in order to reap tax benefits for a few of a bank's customers.

37 J Suiter, “Compliance rules could hit foreign investment”, *The Times*, 2000.

38 Review Group on Auditing, *The Report of the Review Group on Auditing* (Dublin: Stationery Office 2000).

39 Appleby, “Corporate regulation in Ireland”, n. 36 above. Proposals for DCSs were contained in s. 45 of the Companies (Auditing and Accounting) Act 2003 (Act No. 44 of 2003, *Tithe an Oireachtais*), available at www.oireachtas.ie/viewdoc.aspx?fn=/documents/bills28/acts/2003/a4403.pdf (visited 27 February 2009).

ensuring companies comply with all forthcoming legislation.”⁴⁰ In the same report, it was suggested that:

the US can afford to lead in this type of legislation but Ireland cannot. We are an acceptor of standards. We should be looking to benchmark what we do rather than going out on a limb.

Another report stated that:

reaction from the business community to the Bill . . . has been quite negative . . . As breach of the proposed provisions of the Bill, in most instances, will result in an offence being committed, emphasis will shift from one of concern over corporate compliance and personal exposure rather than promoting and developing competitive business.⁴¹

A Company Law Review Group (CLRG) designed to address the contentious issues of the DCS stated that:

[a] clear majority of the CLRG considered that it was simply not feasible to commence 45/2003 because of the additional unnecessary costs it causes for companies and the negative and disproportionate effect on national competitiveness and the likelihood of dysfunctional behaviour that would see companies registering outside of Ireland and so unaccountable to the Irish authorities.⁴²

Reversing their decision was necessary if the Irish government was to avoid capital flight. Ireland is faced with the choice of relative prosperity or an impressive regulatory regime. Dependence forbids their co-existence. Ireland’s dependence is now so ingrained that compromises in the field of regulation are being made in order to retain capital in the ever-increasing race to the bottom by MNCs: government cannot dictate the direction of compliance. Article X replaced the DCS but:

will no longer require auditors to opine if the DCS is fair and reasonable. Overall, the provision represents in aggregate a reduction in its scope and effect compared with the original DCS.⁴³

By considering the case of the DCS in Ireland, assumptions can be made with regard to the potential for an effective CSR policy and other regulatory style controls designed to govern capital. These assumptions would suggest that, as per the DCS issue in Ireland, the Irish government does not have the freedom to legislate effectively on issues concerning foreign capital, due to Irish dependence on this capital. They also illustrate how, as opposed to regulating on foreign capital, the Irish government is constrained in its ability to regulate,

40 Suiter, “Compliance rules”, n. 37 above.

41 “Dispatch” (2003) EFC, available at www.efc.ie/publications/dispatch/pdfs/efc_dispatch_14.pdf (visited 16 April 2009).

42 CLRG, Report on the DCS (2005), available at: <http://www.entemp.ie/publications/commerce/2005/clrgreport.pdf> (visited 12 April 2009); D Nolan, “Revised directors’ compliance statements are a step in the right direction”, available at: http://www.finance-magazine.com/display_article.php?i=5997&pi=222 (visited 11 March 2009). A Lambe. “Directors’ compliance statement – section 45 – CLRG shows common sense”, available at: http://www.accountancyireland.ie/dsp_articles.cfm/goto/1187/page/CLRG_Directors_Compliance_Statement_-_Section_45_-_CLRG_Shows_Common_Sense.htm (visited 11 March 09).

43 Office of the Director of Corporate Enforcement, Consultation Notice, available at http://www.odce.ie/en/media_consultation_notices_article.aspx? (visited 16 February 2009). Also, see B Conroy, “Revolutionising Irish company law – the proposed new Companies Consolidation and Reform Act” in A O’Neil and R Keane (eds), *Corporate Governance: An Irish perspective* (Dublin: Roundhall 2009) who looks at how the proposed watered-down Article X has even further been compromised in order to apply to even fewer companies.

and, indeed, may be more inclined to compromise on regulatory authority in order to ensure the retention of capital. This in turn suggests that for dependent countries like Ireland, CSR will be limited to the design of the MNC as forcibly to regulate in the area of CSR could have the same effect as the DCS example above illustrates. The next section will consider this in depth and, in doing so, pose the premise that, countries as dependent on foreign capital as Ireland are unlikely ever to enforce a mandatory CSR policy.

What are the implications of dependence on CSR?

Ireland, along with the UK, is an advocate of the Business in the Community (BitC) approach to CSR. Whereas the UK complements this model with the centralisation of CSR, a minister for CSR and discretionary legislation, Ireland does not.⁴⁴ This section aims to discuss the reasons for this, believing that Irish dependence on foreign capital means that innovation is limited to the retention of capital as opposed to fostering social development beyond the requirements of legislation. Furthermore, evidence from the DCS suggests that facing the prospect of capital relocation, the Irish government will back down rather than lose capital. The section will consider whether the Irish government can ever implement CSR legislation under the current status quo. It acknowledges the system that is in place – the BitC model – and questions whether or not this meets the needs and requirements of an Irish approach to CSR.

Ireland's dependence indicates that Ireland cannot systematically implement CSR legislation. The manner in which the Irish government, in the past, has attempted to legislate upon business regulation, for example, the DCS, illustrates the systematic failures of the Irish case.⁴⁵ The response to the introduction of the DCS exemplifies how dependence on capital can prevent positive development, such as CSR legislation, for Irish communities. The government's volte-face, which has called into question its ability not only to regulate the corporation, but also to shape MNC modes of self-regulation via CSR policy (which could help alleviate some of the implications of dependency), has been the legacy of the DCS. What this case has illustrated is not that the Irish government does not *want* to innovate, but that it systematically can't. Ireland's innovation is limited to the design of MNCs operating in Ireland. Irish concerns are limited to strategically "keeping" capital without exposing said capital to other requirements, intense regulation and so on. The systematic nature of Irish dependence is so severe that the government cannot dictate the direction of compliance.

Will the government always back down in the face of adversity from the business community? It seems yes, as, for the government, there is no alternative. The governance structure in Ireland could theoretically become significantly weaker and looser in the coming years, as the government attempts to retain its tenuous hold over foreign investment to the detriment of other sections of the community.

Can CSR be promoted in Ireland if dependence inhibits CSR legislation? The beginning of this section stated how Ireland, along with the UK, is an advocate of the BitC model. The concept of BitC refers to the way governments and societies understand the role of enterprise in society with regard to the resolution of social challenges and the part played by business in community development.⁴⁶ Lozano et al. acknowledge nine key elements of

44 JM Lozano, L Albareda, and T Ysa, *Governments and Corporate Social Responsibility* (Basingstoke: Palgrave Macmillan 2008).

45 The DCS illustrates systematic failures in Ireland. If Ireland is unable to regulate on issues pertaining to governance, it can be assumed therefore that it will be unable to instigate procedures for mandatory CSR policy.

46 Lozano et al., *Governments and Corporate Social Responsibility*, n. 44 above.

this model ranging from the use of CSR to solve the problems of social governance to support for social action initiatives by enterprise through employee volunteering and secondment of staff.⁴⁷

Of significant relevance to this paper is the fact that BitC allows for the “voluntary” approach to CSR. However, as recent advances in the UK system illustrate, the UK government is moulding the BitC model and supplementing it with advances in soft and more direct legislation together with the establishment of a ministerial office for CSR.⁴⁸ This, in total, is augmenting the benefits of the BitC system to the point where the UK model is considered to have “comparatively well developed and institutionalised CSR” standards.⁴⁹ However, Ireland has not displayed the same enthusiasm for complementing the pre-existing BitC model with legislation, centralisation of services and the like. Within the Irish model, this organised approach to CSR is absent. In its place is the Department of Enterprise, Trade and Employment which has the lead responsibility for coordinating policy in CSR.⁵⁰ However, it is the Department of Community, Rural and Gaeltacht Affairs which “contributes to the development of CSR in a community and local development context”.⁵¹ Furthermore, the Irish government “especially welcomes the voluntary approach” to CSR⁵² and, has not “been so active in developing a national CSR framework”.⁵³ This again can be attributed to the systematic failures within the Irish case. Irish dependence has inhibited, or perhaps even prohibited, the potential for CSR legislation.

Is it the case that CSR in Ireland is restricted to the design of those MNCs operating within its borders? The BitC model advocates the corporate community involvement approach to CSR in Ireland. This approach could be potentially ideal for the Irish case, but not without legislation promoting this process. The UK has been more effective in this area.⁵⁴ However, it may be the case that the UK has merely been effective in implementing the infrastructure which supplements CSR – the institutionalisation of CSR in a ministerial capacity, the drive from discretionary regulation toward more direct regulation in the shape of Article 176, etc.⁵⁵ – but that the UK government’s designs on CSR are cosmetic. The UK has advanced considerably since the advent of the Bullock Report⁵⁶ culminating today in the ministerial post on CSR and Article 176. Yet, whether or not the UK government’s commitment to CSR is cosmetic or a committed attempt to foster CSR within its borders is unclear. In considering the Cadbury Report and, specifically, that “[t]he country’s economy depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines Britain’s competitive position”, we can see how the UK government’s approach to CSR within corporate

47 Lozano et al., *Governments and Corporate Social Responsibility*, n. 44 above.

48 Ibid., pp. 93–114.

49 Ibid.

50 Oifig and Aire Fiontair, Trádála agus Fostaíochta (Department of Enterprise, Trade and Employment), available at www.entemp.ie/ (visited on 2 February 2009).

51 An Roinn Gnóthaí Pobail, Tuaithe agus Gaeltachta (Department of Community, Rural and Gaeltacht Affairs) available at www.pobail.ie/en/CommunityVoluntarySupports/ (visited 2 February 2009).

52 Lozano et al., *Governments and Corporate Social Responsibility*, n. 44 above.

53 Ibid.

54 J Moon, *Government as a Driver of CSR*, Research Paper No 20 (Nottingham: ICCSR 2004), ISSN 1479–5124.

55 Article 176, Companies Act 2006.

56 Lord Bullock, *Report of the Committee of Inquiry on Industrial Democracy* (London: HMSO 1977). See also, Lord Carr, *Industrial Democracy: Bullock Report* HL Deb, 23 February 1977, vol. 380 cc. 179–355, available at <http://hansard.millbanksystems.com/lords/1977/feb/23/industrial-democracy-bullock-report> (visited 11 March 2009); and T Conlon, “Industrial democracy and EEC company law: a review of the draft Fifth Directive” (1975) 24 *International and Comparative Law Quarterly* 348–59.

governance may be an attempt to accommodate capital whilst retaining competitiveness – the price of low regulation.⁵⁷ This has implications for this paper as the UK, a traditional core country (and considered less dependent than small, open, globalised economies like Ireland under new dependence), is still bound by the demands of capital when legislating upon issues such as CSR. Is CSR therefore merely a way to avoid intense regulation of business behaviour which would thwart UK competitiveness globally?⁵⁸ This could be the cost for a low regulation, competitive model of governance. CSR may be nothing more than a concession – a window-dressing exercise hiding the inadequacies of the UK corporate governance regime.

Despite this, the UK has developed legislation in order to supplement the BitC model. Ireland has not. But, if CSR is designed to be of long-term benefit to the corporation as well as the community, why is there not a more committed desire for it in corporations investing in Ireland? Why is it reliant on goodwill from business as opposed to the realisation of the potential benefits of CSR? The business case for CSR is considered by McBarnet who suggests that:

even the very poor of the world add up in aggregate to a significant market, and new markets are being found in meeting needs in developing countries while simultaneously doing profitable business.⁵⁹

Why has this idea of an eye-catching, low-cost intervention as discussed by McBarnet not been realised in Ireland? The answer lies in the concept of the small, open, globalised economy. A small economy is disadvantaged by the manner it attracts capital. Investing in the US or the UK – with a large potential product consumption base – suggests the need to interrelate business with socially responsible acts. Competing for a slice of the larger economy would theoretically instigate a need for embracing local needs and requirements and incorporating these needs and requirements into company policy. The UK, for example, has an estimated population of 61m⁶⁰ compared to Ireland's estimated 4m.⁶¹ This difference corresponds to the potential consumer base in each nation. It is understandable that an MNC operating in both the UK and Ireland would hypothetically be more inclined to foster a vibrant CSR policy in the UK due to the potential benefits in brand recognition in accordance with the larger population. Ireland is once again at a disadvantage. What this suggests is that businesses seek to operate in states for different reasons. With small economies like Ireland, short-term profit maximisation could be the main goal due to the small potential consumer base. With larger economies, such as the UK, endeavouring to establish a niche in the market – and in doing so to compete in a much larger potential consumer base – could mean a more committed desire to incorporate community demands within company policy via CSR. Ireland is destined to dependence on capital without gain because the size of the country's consumer base is another potential disadvantage in the prospect of ever emerging as an "equal" with regards CSR policy.

57 Report of the Committee on the Financial Aspects of Corporate Governance (1992), available at www.ecgi.org/codes/documents/cadbury.pdf (visited 11 March 2009).

58 See also S Wheeler, "Ethics in the workplace" (2007) 18 *Law Critique* 1–28.

59 D McBarnet, "Corporate social responsibility and the law" in D McBarnet, A Voiculescu and T Campbell, (eds), *The New Corporate Accountability – Corporate social responsibility and the law* (Cambridge: Cambridge UP 2007), pp. 9–59.

60 www.cia.gov/library/publications/the-world-factbook/print/uk.html (visited 11 March 2009).

61 www.cia.gov/library/publications/the-world-factbook/print/ei.html (visited 11 March 2009).

Conclusions

Ireland's inability to develop CSR legislation lies not in an unwillingness to engage in CSR practice but is due to the systematic limitations that prevail in its economic landscape. Ireland cannot implement domestic CSR legislation because of dependence on foreign capital and history suggests that, in Ireland, innovation is punished with the threat of capital flight.

In order for states classified as dependent to have any hope of effective domestic CSR policies, legislation is necessary. But the example of Ireland illustrates that domestic legislation is implausible. Fear of capital relocation is always going to outweigh the potential benefits of any mandatory domestic CSR legislation. However, for Ireland, CSR legislation at a supranational level (the European Union) could be the answer. The EU is becoming the "dynamic" and "competitive" trading bloc.⁶² The likelihood of MNC investment ceasing in the event of EU legislation seems unlikely. Ireland could benefit more than most in this scenario as the only English-speaking member of the Eurozone and the implications this has for MNC investment. A mandatory requirement for CSR could then serve to develop Ireland – for example, the indigenous industrial sector – in a way which may help foster long-term development and even alleviate some of the trappings of Irish dependence.

This paper has considered the disadvantage, for Ireland, of the size of its potential consumer base. Estimated at having a population of approximately 4m, can Ireland realistically compete with nations such as China with an estimated population of 1313m,⁶³ or even the UK at 61m? Probably not. The EU does not have this problem. The potential size of an EU economy would be a more effective bargaining tool with globalised capital. However, as the UK case has shown, all regions are dependent to some extent and it may be that a mandatory CSR policy is simply one step too far and perhaps could compromise EU competitive potential.

In conclusion, there is a possible solution for Ireland with regard to effective CSR policy but the likelihood of its being put into effect is improbable due to the demands of capitalism. Furthermore, any supranational legislative proposal on CSR would have to challenge the voluntary ethos of CSR policy in the European Union. The question becomes whether or not competitiveness or CSR is more important to the development of the EU as a leading trading bloc. For now, it seems as though the desire to be a competitive bloc supersedes designs on CSR.

62 Report of the Presidency Conclusions of the Lisbon European Council 23 and 24 March 2000, available at www.europarl.europa.eu/summits/lis1_en.htm#b (visited 26 February 2009).

63 www.intercultures.ca/cil-cai/country_overview-en.asp?ISO=CN (visited 11 March 2009).

