PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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in the devolved domain without the consent of the relevant legislature; the Westminster Parliament may itself legislate on an ad hoc basis to expand or restrict the devolved legislative competence; a combination of political factors and (lack of) inter- governmental co-operation may impact upon the exercise of a Westminster reserve power which may become either a bludgeon or atrophied. The focus of this chapter, however, will be specifically on a consideration of the varying perceptions of the judicial role within the different patterns of devolution in Northern Ireland. Consideration will be given to those powers which directly, or indirectly (by conferring a power itself subject to judicial review), the Westminster Parliament has conferred upon the judges as well as to specific 'devolution issues'. Also, detailed consideration will be given to the decision in *Robinson v Secretary of State for Northern Ireland*, which at its heart involves the power of the Secretary of State for Northern Ireland (not) to bring forward the scheduled date for elections to the devolved Assembly in a significant exercise of power, not least in the context of ownership of the devolved constitution and its evolution.

DEVOLUTION AND THE JUDGES: EARLIER VERSIONS

From one point of view, the expectations and the reality of the judicial role were in general terms so different during the first six or seven decades of the last century that extrapolations from them or comparisons with judicial attitudes to devolution now are at best of limited value. The sea-change wrought by an active judicial review jurisdiction, the jurisprudence of the European Courts of Justice and of Human Rights, the presence of legal aid, the relaxation of the Kilmuir Rules and the higher media profile of the judiciary cannot be underestimated. As against that, to consider the two earlier schemes of devolution which operated in Northern Ireland, one for 50 years, one for four to five months, should serve to illustrate not only the range of possibilities open to the Westminster Parliament but also the consequences for the operation of devolution which flow from a limited judicial role, whether it be de facto or de jure.

The Government of Ireland Act 1920 incorporated a similar but not totally identical pattern of devolving powers to the Northern Ireland Parliament as was followed in the 1998 Acts for both Scotland and Northern Ireland. Certain matters were withheld from it and reserved to the Westminster Parliament but this was coupled with an otherwise general grant of legislative power to the Northern Ireland Parliament. Following the then colonial or imperial grant of power, the Northern Ireland Parliament was given the power to legislate for the 'peace, order and good government' of Northern Ireland subject to the matters excepted (and reserved) from it. That Parliament was also precluded from legislating in a way (initially) which had particular effects, for example, interfered with religious equality or entailed the taking of property without compensation. The 1920 Act provided no test to guide the courts with regard to any vires questions which might have arisen concerning the validity of Northern Ireland legislation,

although section 50 of the Act sought to ensure that such questions could be heard (after a court of first instance) by the Northern Ireland Court of Appeal. Under the 1920 Act, the main way in which such questions would arise was to be in inter partes legal proceedings after the enactment of the piece of legislation in question. Section 51 of the Act, however, did make special provision for—in the famous words of its side-note—'decision of constitutional questions'. In brief, where it appeared to the Governor or a (Westminster) Secretary of State 'to be expedient in the public interest that steps shall be taken for the speedy determination' of the validity of a (provision in a) Bill or Act of the Northern Ireland Parliament, or whether any service was a transferred service under the Act, the Governor or Secretary of State could request the Sovereign in Council to refer the question to the Judicial Committee of the Privy Council. This power was without prejudice to the power of the Sovereign in Council to refer questions to the Judicial Committee under section 4 of the Judicial Committee Act 1833, which provides that:

> it shall be lawful for His Majesty to refer to the ... Judicial Committee for hearing or consideration any such ... matters whatsoever as His Majesty shall think fit.[1]

Under section 51(2) of the 1920 Act, the Judicial Committee was empowered on the hearing of the question to permit 'such persons as appear [to it] to be interested' to appear and be heard as parties to the case.

It is essentially otiose to rehearse in this context the details of the two central cases from this era, *Gallagher v Lynn*[2] and (the sole case actually to be decided under section 51) *In re section 3 of the Finance Act (Northern Ireland) 1934*[3] (usually known as the *Education Levy* case). The two issues arising from these cases which are relevant to the theme of this chapter are: (1) the location of the power to make a reference to the Judicial Committee and (2) the principles, if any, articulated by the courts in their resolution of the *vires* questions at issue in these cases.

Section 51 specifically located the power to request a reference to the Judicial Committee in the Governor or a Secretary of State (effectively the Home Secretary) in a subjective grant of power which, at that time and in the context of the personnel empowered, would not have rendered it susceptible to judicial review. Section 51, however, was silent as to who, if anyone, could request the specified parties to make the requisite request to the Sovereign in Council and, more specifically, whether section 51 could be utilised with regard to inter partes proceedings capable of resolution by the Northern Ireland courts. Sir Arthur Quekett in his classic and invaluable commentary on the 1920 Act wrote:

> It may, however, be assumed that neither a Governor nor a Secretary of State would exercise his discretion of making a representation to His Majesty in Council in such a way as

[1] This power was exercised in two important NI cases, namely, *In the matter of the reference as to the [Boundary Commission] under Article 12 of the Schedule to the Irish Free State Agreement Act 1922* (provided in full in Sir Arthur Quekett, *The Constitution of Northern Ireland* (1933), vol 1, 170–75), and *In re MacManaway* [1951] AC 161 concerning the application of the House of Commons (Clergy Disqualification) Act 1801 to clergy in the (Anglican) Church of Ireland.

[2] [1937] AC 863.

[3] [1936] AC 352.

> to conflict with, or oust, the jurisdiction of the Northern Ireland Courts in a litigation *inter partes*.[4]

Although other petitions were addressed to the Governor and Home Secretary to exercise their powers under section 51, all bar that in the *Education Levy* case were unsuccessful, including a request made in the course of the various proceedings resolved by the House of Lords in *Gallagher v Lynn*.[5] In the *Education Levy* case, Belfast Corporation asked the Governor who asked the Home Secretary who asked the King in Council to refer the validity of section 3 of the Finance Act (Northern Ireland) 1934 to the Judicial Committee. Given the silence of the 1920 Act on procedural matters, the Judicial Committee had first to resolve certain preliminary questions, including who would be regarded as the appellants (Belfast Corporation) and as the respondents (the Northern Ireland Government). The opinion of the Judicial Committee is brief. The issue was resolved in favour of the validity of the Act, for, as explained by Lord Thankerton:

> Such an examination as counsel for the Corporation invited their Lordships to enter upon would tend to narrow the legislative powers of taxation of the Parliament of Northern Ireland almost to vanishing point whereas (by section 21(1) of the 1920 Act) legislative powers are conferred in general terms, subject only to specified exceptions.[6]

Section 53 of the Act provided that decisions of the Judicial Committee (on which no specific provision was made for Northern Ireland judges to sit) on legislative vires and other questions referred to it under the Act 'shall be final and conclusive and binding on all courts.' Given the then jurisprudence, this included the Judicial Committee itself.

The decision in the *Education Levy* case was reinforced by the equally brief decision of the House of Lords in *Gallagher v Lynn*. The unsuccessful challenge to the validity of an Act of the Northern Ireland Parliament arose collaterally in the course of criminal proceedings taken under the Act. Equating the allocation of powers between Westminster and Northern Ireland under the 1920 Act with those in a federal constitution, Lord Atkin (giving the decision of the House) employed the Canadian 'pith and substance test'—(wrongly) upholding the validity of the Act.[7] Hence an Act which had impacted on the excepted domain of cross-border trade in milk was judicially saved because its pith and substance was ascertained solely from the provisions of the Act (and by counsel's concession) as being to regulate the health of the people of Northern Ireland by ensuring quality control over its milk supply. The pith and substance test was in fact more complex than it might at first sight appear (and would be rendered more so in the post *Pepper v Hart*[8] era). Its prime meaning is that incidental effects in a precluded domain do not

[4] See Sir Arthur Quekett, *The Constitution of Northern Ireland* (1946), vol 3, 53.
[5] *Ibid* at 52, n 1.
[6] [1936] AC 352 at 358–59.
[7] See H Calvert, 'Gallagher v Lynn Re-examined: A Legislative Fraud' [1972] *Public Law* 11.
[8] [1993] AC 593. See also Further Memorandum to the Joint Select Committee on Parliamentary Privilege by Professor Anthony Bradley (1998–99, HL 43-III, HC 214-III).

invalidate the Act if it otherwise in substance falls in the permitted area. Lord Atkin, however, somewhat unhelpfully went on to state:

> The legislation must not under the guise of dealing with one matter *in fact* encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object ... but may seek to achieve that object by invalid methods.[9]

The pith and substance test consequently is or becomes a test which is capable of expanding or contracting devolved legislative power depending on judicial choice. It is a test which, in the words of one eminent judge, 'lends itself to emphatic asseveration, but it provides but little illumination.'[10] The later case of *R (Hume) v Londonderry Justices*[11] has a bearing on this. The case was decided in February 1972, the start of the worst year of the Northern Ireland 'Troubles,' a month after Bloody Sunday and a month before the Northern Ireland Parliament was prorogued never to be restored. The issue in *Hume* concerned the validity of a piece of Northern Ireland delegated legislation extending certain law and order powers already (lawfully) vested in the police to certain members of the armed forces of the Crown. It was outside devolved power to make a law in respect of the armed forces. As Lowry LCJ held, the conferment of the power on the army was not an incidental effect of legislating for the peace and order of Northern Ireland but rather the achievement of a lawful object by unlawful methods. This he contrasted with the facts in *Gallagher* where the lawful object (health) was sought to be obtained by lawful methods (a licensed control of the milk supply) rather than unlawful (a direct ban on the cross-border trade in milk). That is, in *Hume* but not in *Gallagher* the impugned provision was expressly directed to the precluded power. The ruling of invalidity in *Hume* was immediately rectified by a retrospective Act of the Westminster Parliament—and later, as will be seen, had an impact on the provisions in the Northern Ireland Constitution Act 1973. In both *Gallagher* and *Hume*, however, it could be argued that the test of 'in fact encroaching', articulated in *Gallagher* itself, was satisfied, whatever the 'guise' of the legislation. On the other hand, the test of factual encroachment was itself somewhat unhelpful, not necessarily per se but certainly when placed in the amorphous pith and substance context. Interestingly, in a Canadian case (*Shannon*)[12] after *Gallagher* and involving the validity of a British Columbian Act, Lord Atkin adverted to this part of the test whilst at the same time (wrongly) seeking to lock the judicial approach to the Northern Ireland constitutional structures into the federal context. Lord Atkin said:

> The appellants did not dispute that there was a *bona fide* intention by the Province to confine itself to its own sphere, but they contended that, whatever the intention, the

[9] [1937] AC 863 at p. 870.

[10] Latham CJ in *Bank of New South Wales v The Commonwealth* 76 CLR (1947–1948) 1 at 185. Quoted by Lowry LCJ in *R (Hume) v Londonderry Justices* [1972] NI 91 at 110.

[11] [1972] NI 91.

[12] *Shannon and others v Lower Mainland Dairy Products Board (A-G for British Columbia intervening)* [1938] AC 708 (JC). See Quekett, above n 4, at 37.

> Province had in fact encroached upon the [Federal] sphere. If they could have established that contention, they would have been in a stronger position. *In this respect* their Lordships desire to quote a passage from the opinion of Lord Atkin in the House of Lords in *Gallagher v Lynn* which ... *it will be convenient to bring into the line of authority on constitutional cases arising in the Dominions.*[13]

Lord Atkin then quoted his key passage from *Gallagher* addressed above and immediately concluded on the British Columbian Act:

> The pith and substance of this Act is that it is an Act to regulate businesses entirely within the Province and it is therefore *intra vires* of the Province.[14]

In terms of seeking to answer the question asked as the chapter title (and to extrapolate in part from this brief historical excursus), what evaluation may be made of the role of the judges under the Government of Ireland Act 1920? The obvious conclusion relates to the air of judicial detachment manifested not least in their failure to engage with the nature of devolved (cf federal) power. Of course, given that judges can only deal with cases actually brought before them, it is also true to state that this detachment was not their sole responsibility, except in so far as blame may be attached to them for the then quiescent era of what we now call judicial review. What it is important to note in this regard, however, is not solely that the courts failed to engage fully with devolved power but that they failed to engage at all with Westminster's reserve powers. The Westminster Parliament may be sovereign, the Westminster government is not, but the wording and the location of the referral power under section 51 made it (like other reserve powers) an effective dead letter. This, in turn, relates to other factors which impinge directly on the judicial role, for judicial attitudes are but one factor in any evaluation of the judicial contribution. In brief, successive Westminster governments regarded the devolved Northern Ireland as apart from, rather than a part of, the United Kingdom. There was relatively little intergovernmental political engagement and, like a province in a federation, the Northern Ireland Parliament was 'mistress in her own house.' Coupled with this external 'light touch' was the absence internally of patterns of accountability. Given the politico-religious balance of the Northern Ireland population, the voting patterns and the electoral system used, the Northern Ireland Parliament was not, in any politically real sense, answerable to the electorate, and the devolved government effectively had no opposition in the Parliament. Thus instead of patterns of political and judicial accountability—the triangle of power shared between the courts, the Westminster government and the devolved institutions, balanced on the doctrine of parliamentary sovereignty—there were patterns of detachment or disengagement. These patterns left as dominant, within and with regard to devolution in Northern Ireland, the Northern Ireland Parliament, particularly the government itself. There are two points to be made in this regard. One is the inevitable one peculiar to Northern Ireland and

[13] [1938] AC 708 at 719 (emphasis added).
[14] [1938] AC 708 at 720.

may be termed the arguments on abuse of a dominant position, involving the various political and civil libertarian critiques made of the exercise of its power in the absence of (any) countervailing factors. There is, however, a more general point to be made. The presence of one overdominant player in the field—whatever that player is—stymies the fulfilment of devolution's most basic rationale. That may be stated to be the preservation of the United Kingdom (whose constitution may itself, at least in time past, have been stunted by the unalloyed doctrine of parliamentary sovereignty) and the concomitant provision of elected regional-national control over regional-national affairs. It is also submitted that an inherent element of this must be that the responsibility for the evolution of devolution should lie primarily with the elected devolved institutions but only as operating within the matrix of the triangle of accountability. Northern Ireland well illustrates the reworded dictum of John Donne: 'No constitution is an island, entire of itself'. The need for the impetus for change to lie primarily with the devolved region or nation is reinforced by the extent to which the devolved constitution may be regarded as autochthonous. This may be indicated by the holding of a referendum or the resolutions of a constitutional convention but its absence to any significant extent will clearly enhance central government power.

The point above about the dangers to devolution of any one institution being or becoming dominant is further illustrated by the provisions of the Northern Ireland Constitution Act 1973 which provided for a system of legislative devolution which operated in Northern Ireland for the first five months of 1974. What is interesting about the 1973 Act is its often unremarked but remarkable desire significantly (if not completely) to oust the jurisdiction of the courts in all but anti-discrimination cases.[15] This was coupled with provisions in the Act establishing a crucial role for the (new office of) Secretary of State for Northern Ireland and what may be termed not widespread (and indeed diminishing) support within Northern Ireland for the devolved institutions (either per se or in the context of the projected Council of Ireland), a factor which, when conjoined with a very high incidence of civil unrest, was hardly conducive to the stability of the devolved institutions. Given, however, that the Westminster government at the least hoped that this form of devolution would last, what was the rationale of its attempt to exclude the courts—or, as it were, to regard all devolution issues (bar ones involving anti-discrimination) as ones to be resolved solely in the political and not in the judicial sphere? It should first be remembered that at this stage (1973–1974) the impact on the United Kingdom's legal system of the jurisprudence of the European Courts of Justice and of Human Rights was in its early stages. Certainly the classic cases of the 1960s had reactivated the substance of judicial review—and the 1973 Act's provisions must be read in their light—but the then procedures were restrictive of its availability.

[15] For a consideration of those cases which did arise under the anti-discrimination provisions of the Constitution Act (see now the Northern Ireland Act 1998, s 76), see B Hadfield, 'The Northern Ireland Constitution Act 1973: Lessons for Minority Rights' in P Cumper and S Wheatley, *Minority Rights in the 'New' Europe* (1999), 129–46.

In brief: the 1973 Act provided for a Northern Ireland Assembly (elected by proportional representation) and a power-sharing executive to which were to be devolved all legislative and executive power other than matters reserved to Westminster and also those permanently excepted from the Assembly's competence. Reserved matters, which included law and order, were potentially within the Assembly's legislative competence but only with the consent of the Secretary of State for Northern Ireland and of the Westminster Parliament. They otherwise remained the responsibility of the Westminster Parliament. Excepted matters (for example, those of national concern and those which when previously devolved had caused division in Northern Ireland) were absolutely withheld from the Assembly unless and only unless the legislative provision in question was ancillary to a devolved matter. Section 5(7) defined 'ancillary' narrowly (more narrowly arguably than its application in *Gallagher v Lynn*) as meaning

> necessary or expedient in making [the devolved provision] effective or which provides for the enforcement of those other provisions or which is otherwise incidental to, or consequential on, those provisions.

Sections 17 (and 19) of the Act provided that the Assembly could not legislate (nor the executive lawfully take any action) in a way that discriminated 'against any person or class of persons on the ground of religious belief or political opinion.'

Combined with a consent power with regard to reserved and indeed ancillary-excepted matters,[16] the Secretary of State by section 18 (the equivalent in some respects to section 51 of the 1920 Act) was empowered to refer the validity of an Assembly Measure, proposed or enacted, to the Judicial Committee of the Privy Council on the grounds of it being void under section 17 (and only under section 17). The key similarities between section 17 (1973 Act) and section 51 (1920 Act) are to be found in the terms of the grant of power—'appears', 'expedient in the public interest' and 'speedy' decision or determination—and in the location of the power in the political office of a Westminster Secretary of State. The key difference is that section 51 incorporated *any* vires question concerning the Northern Ireland Parliament under the 1920 Act. By contrast, section 4(5) of the 1973 Act expressly stated:

> It is hereby declared for the avoidance of doubt that a Measure is *not invalid* by reason of any failure to comply with the provisions of section 5, 6, 14 or 18(2), (5) or (6) ... and *no act or omission under any of those provisions shall be called in question in any legal proceedings* (emphasis added).

Section 5 related to the Secretary of State's consent for Assembly legislation on reserved and excepted-ancillary matters, section 6 to the requisite Parliamentary consent in these regards; section 14 related to the proceedings required in the Assembly on certain financial Measures; and section 18(2), (5) and (6) to aspects of the Judicial Committee referral procedure in the context of a provision in a *proposed* Assembly Measure.

[16] Constitution Act 1973, s 5.

The role of the courts under the 1973 Act was, thus, confined to its jurisdiction under section 18 (Judicial Committee only) and with regard to those anti-discrimination cases brought under sections 17 and 19 (any appropriate court). Cases like *Gallagher* and *Hume* were precluded by section 4(5), and an *Education Levy* type scenario was still possible only if involving anti-discrimination arguments. These provisions thus made not the courts but the Secretary of State on unarticulated criteria, other than with regard to excepted-ancillary matters, the custodian of the vires of Assembly Measures, a position assisted by the different ways of legislating on reserved matters. Review of any 'error' by the Secretary of State of substantive categorisation of a matter or of procedure was ousted by the wording of section 4(5). It is highly unlikely that the courts' triumphant approach in *Anisminic*[17] would have carried over to a challenge to the wording of section 4(5), not least given the intention of the 1973 Act and the surrounding political—and violent—context.

Further, judicial review of the Secretary of State's other powers under the 1973 Act was also unlikely: certainly in the 1970s, but also highly probably so even if the system had endured longer than it did. These powers included both the commencement and the discontinuation of the devolved scheme—and both were used. Under section 2(1)(b) no devolution of legislative power could take place until it appeared to the Secretary of State:

> that a Northern Ireland Executive could be formed, which having regard to the support it commands in the Assembly and to the electorate on which that support is based, is likely to be widely accepted throughout the community

and that, having had regard to those matters, there was 'a reasonable basis' for the establishment of a government by consent.[18]

By section 27(5) and (6) of the Act, the Secretary of State (in effect) could make an Order in Council for the dissolution, prorogation or further prorogation of the Assembly, if these power-sharing requirements could not be met 'and that it is in the public interest that the Assembly should be dissolved' or prorogued.[19] In addition the Secretary of State possessed the usual powers in the non-devolved areas and had a key role in the development of an all-Ireland dimension, which, unlike that 1998 model of devolution, was largely not contained (even referentially) in the 1973 Act.

The 1973–1974 Constitution, similar but by no means identical to the 1998 Act, ultimately lacked all but a relatively small amount of 'ownership' within Northern Ireland. Preceded by a border poll (but not a wider referendum on the devolved

[17] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

[18] Devolution under the 1973 Act commenced in Northern Ireland on 1 January 1974, with a power-sharing executive drawn from the UUP, SDLP and Alliance Party, which had won 24 seats (29.3 per cent of the poll), 19 seats (22.1 per cent) and 8 seats (9.2 per cent) respectively in the 78 member Assembly. See S Elliott and WD Flackes, *Northern Ireland: A Political Directory 1968–1999* (4th edn, rev'd 1999), 533.

[19] The Assembly was prorogued in May 1974 (initially for a period of four months, eventually for some 25 years) under s 27(6) when, during the Ulster Workers' Council strike, the UUP members resigned from the power-sharing executive.

proposals) the June 1973 elections to the Assembly were boycotted by republicans. The Democratic Unionist and other smaller Unionist parties opposed power-sharing and the later Council of Ireland, the emergence of which also led to further loss of support within the deeply divided Ulster Unionist Party. In the aftermath of the February 1974 UK General Election, in which 11 of the then 12 Northern Ireland Westminster seats were won by Unionists opposed to power-sharing and/or the Council of Ireland, the hostility deepened and the Ulster Workers' Council strike of May 1974 effectively terminated Devolution Mark II.

The courts had a very limited 'power' base in Northern Ireland in the early to mid 1970s: limited powers under the Act; limited availability of judicial review; limited exposure to European jurisprudence; limited by some public distrust as being 'too unionist'[20]—an element which in itself, when also generalised into 'political' shows that consideration of an enhanced judicial role (through devolution or otherwise) is likely to bring concomitant changes in the procedures and principles of their appointment. Against that background and that of one of the worst times during the Troubles (1972–74), it was hardly surprising that the Conservative Government through the 1973 Act placed the Secretary of State for Northern Ireland in such a dominant position. When the main issue is the continuance of devolution rather than its operation, the political mechanisms of decision-making are likely to be more effective than the judicial, even if this brings devolution closer to a 'delegated model'. Arguably, however, the pendulum went from too much Westminster disengagement to too much involvement. Presumably the 1973 Act was not intended to fail; indeed it was designed to take Northern Ireland away from the Troubles and into calmer waters. The Act, therefore, should have drawn a clearer distinction between 'continuity' and 'operational' questions and left vires issues in the hands of the judges and not the Secretary of State. The Act's flexibility or potential for growth was to be determined by the Secretary of State alone (albeit on occasions with some involvement of the Assembly and/or Westminster). As will be seen below, however, where a constitution is more autochthonous, even continuity questions should not be solely the responsibility of Westminster.

When Legislative Devolution Mark III appeared in the form of the Northern Ireland Act 1998, the judicial role, in contexts outside devolution, had developed out of all recognition. What impact is this expanded role likely to have on the operation of the provisions of the Northern Ireland Act itself? Will the minimalisation of the judicial role in the context of devolution continue?

NORTHERN IRELAND ACT 1998: NEW CENTURY DEVOLUTION?

When considering public law in a multi-layered UK constitution and the provision of formal devolved structures, one particularly pertinent factor is the ownership of the devolved constitution. Its point of anchorage needs to be identified. A

[20] See B Dickson, 'Northern Ireland's Troubles and the Judges', in B Hadfield (ed), *Northern Ireland: Politics and the Constitution* (1992), ch 9.

wide variety of devices was resorted to in Northern Ireland over three decades: talks between the Secretary of State and the parties individually, multi-party talks, a Constitutional Convention, a deliberative Assembly, a Forum, a referendum. In Northern Ireland, ownership of devolution has had (both intra and inter) communal dimensions. Ownership, however, has individual dimensions too (although these two aspects are not mutually exclusive): issues will arise which concern the extent of individual input into the legislative process or standing to bring judicial review proceedings in matters concerning the exercise of devolved power. The details of the Northern Ireland Act 1998 must be briefly examined before dealing with the four broad categories of legal proceedings possible under the Act.

The multi-party Belfast Agreement, containing in outline only the key principles of the proposed new devolved Northern Ireland (with a strong all-Ireland dimension), was put before the people of Northern Ireland in a referendum in May 1998. On its acceptance by a clear majority taken over the whole of Northern Ireland (unlike the referendums in Scotland and Wales there was no separate constituency or area voting), the much fuller details were found in the implementing Northern Ireland Act 1998. The relationship between the Agreement and the Act will be considered below.

This Act, like those of 1920 and 1973, established three categories of legislative power: excepted matters (Westminster's), transferred or devolved matters (the Assembly's) and the intermediate reserved category on which three legislative procedures are possible: either by Act of the Westminster Parliament, (Westminster) Order in Council or the Assembly with Secretary of State's consent subject to Westminster's oversight.[21] To elaborate: under section 6(2)(b) excepted matters are in substance totally outside the Assembly's legislative competence. It is precluded from *dealing with* an excepted matter unless the provision concerned is *ancillary* to other provisions dealing with reserved or transferred matters. The definition of 'ancillary' is provided in section 6(3) and is identical (although slightly re-ordered) to section 5(7) of the 1973 Act quoted above. 'Deals with' is defined in section 98(2) as meaning dealing with 'the matter, or each of the matters, *which it affects otherwise than incidentally*' (emphasis added). Good-bye to *Gallagher v Lynn* and all that—presumably. Some consideration should be given to section 98(2)'s similarity or otherwise with the equivalent provision of the Scotland Act 1998, namely section 29(3). The latter places outside the legislative competence of the Scottish Parliament any provision which 'relates to' a non-devolved matter, a question which is to be determined by reference to the purpose of the provision 'having regard (among other things) to its effect in all the circumstances.' The relevant minister in the parliamentary debates on this provision in the Scotland Bill, Lord Sewel, (somewhat blithely) placed this form of wording in the context of *Gallagher v Lynn*: the Scottish courts will have to seek the provision's true nature and character, its pith and substance.[22] It should also be remembered that Lord

[21] Northern Ireland Act 1998, ss 8 and 85.

[22] HL Deb, vol 952, col 818. See CMG Himsworth and CR Munro, *The Scotland Act 1998* (Current Statutes Annotated), commentary on s 29(2)(b).

Atkin also regarded as ultra vires legislation which under the guise of 'dealing with' (*sic*) one matter 'in fact encroached upon the forbidden field.' He also indicated that it was not sufficient to consider the object alone; the object must not be sought by invalid methods. It would appear, however, that the Scottish courts may have rather more to do in this regard than their Northern Ireland counterparts. A Northern Ireland Office Summary Guide to the Northern Ireland Act, having provided the section 98(2) definition, elaborated:

> it is not necessary to identify any one predominant concern of the provision. So if it affects more than incidentally a reserved or excepted matter, even though it is mainly concerned with transferred matters, it will need the Secretary of State's consent.[23]

The last part of that phrase must not be taken to mean that the Secretary of State can consent to the Assembly legislating in substance on an excepted matter. He cannot do this. His consent, however, is required by section 8 for a provision which 'deals with' an excepted matter and is ancillary to other provisions, and also a provision which 'deals with' a reserved matter.

It is possible that the Northern Ireland courts may not take the narrower line adverted to in the *Northern Ireland Office Guide*, but the differences in the wording between the Scotland and Northern Ireland Acts (and Northern Ireland's recent legislative history) would seem to indicate that a line less expansive of the Assembly's power be taken in the courts, leaving the matter (in part) in the hands of the Secretary of State. That is, the preclusion of Assembly legislation on *excepted* matters is to be regarded strictly: the flexibility of the Assembly's competence over reserved matters (dependent on Secretary of State consent, but *possible*) reinforces this, leaving the expansion or constriction of its powers over reserved matters under political not judicial control. More generally, however, as will be considered further below, all those parties entrusted with pre-enactment scrutiny responsibilities will have to address the meaning of 'deals with'. This language is likely to be used in later statutes too; this is illustrated by the Justice (Northern Ireland) Act 2002 which, when it is brought into force, will by section 84, for example, require Assembly cross-community support for a Bill which contains any provision which 'deals with (otherwise than incidentally)' appointment to judicial office.

There is no general grant of power to the Northern Ireland Assembly; the Act itself leaves within the devolved legislative competence all that is not withheld from it. Sections 6 and 7 of the Act provide that it is outside its legislative competence not only to legislate on excepted matters, but also with extraterritorial effect, incompatibly with any rights under the European Convention on Human Rights and with Community Law, to discriminate against any person or class of person on the ground of religious belief or political opinion or to modify an entrenched enactment, for example, the European Communities Act 1972, the Human Rights Act 1998 and certain provisions of the Northern Ireland Act itself. These 'entrenched' provisions are either excepted or reserved matters.

[23] 22 July 1999 (www.nio.gov.uk/guidepub.htm).

The guardians of the Assembly's legislative competence are at least six in number. The powers of the Secretary of State for Northern Ireland in this regard—he has other reserve powers too—have been referred to. Secondly, the Presiding Officer/Speaker of the Northern Ireland Assembly must scrutinise every Bill and if he decides that any of its provisions are outside the Assembly's legislative competence the Bill may not be introduced or continued with.[24] Thirdly, under section 9 of the Northern Ireland Act, the Sponsoring Minister of a Bill must make a written statement that in his or her opinion the Bill is within the Assembly's legislative competence. Fourthly, paragraph 27 of the (inter-governmental) Memorandum of Understanding states that 'the devolved administrations will notify legislative measures to the relevant *UK Departments and Law Officers* both when they are proposed and when they are adopted.'[25] This ties in, fifthly, with section 11 of the Northern Ireland Act to be considered further below which currently empowers the Attorney General for Northern Ireland to refer the question of whether a provision in an Assembly Bill is within its legislative competence to the Judicial Committee. It should be noted that at the present time—and since 1973[26]—the Attorney General for England and Wales is also the Attorney General for Northern Ireland. Section 22 of the Justice (Northern Ireland) Act 2002, which is not yet in force, however, provides for the Attorney General for England and Wales to be no longer Attorney General for Northern Ireland. When that provision comes into force, however, the Westminster government's 'legal oversight' of devolution will continue because under section 27 of the 2002 Act the Attorney General for England and Wales will, by virtue of that office, become Advocate General for Northern Ireland. Section 11 of the Northern Ireland Act 1998 will then be amended to confer the power to refer to the Judicial Committee on both the Advocate General and the Attorney General for Northern Ireland. The sixth body having oversight over the legislative competence of, inter alia, the Northern Ireland Assembly is the Northern Ireland Human Rights Commission which has the duty of advising the Assembly of the compatibility of the proposed legislation with 'human rights.'[27] This duty covers much wider ground than the European Convention on Human Rights[28] but does not encompass the full range of vires questions to be considered by the other 'guardians'.

In addition to the powers vested in the Secretary of State already mentioned, he also possesses various 'reserve' powers, three of which may be mentioned as particularly significant. Under section 14 it is the Secretary of State who submits an Assembly Bill for Royal Assent. Under subsection (5), the Secretary of State may decide not to submit for Royal Assent a Bill which contains a provision which *he considers* '(a) would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or

[24] Northern Ireland Act 1998, s 10.
[25] Cm 5240, December 2001, (emphasis added).
[26] Constitution Act 1973, s 10(1), not repealed by the Northern Ireland Act 1998.
[27] Northern Ireland Act 1998, ss 13(4) and 69(4).
[28] *Ibid* s 69(11)(b).

public order' or (b) would have an adverse effect on the operation of the single market in goods and services in the United Kingdom. It may be relevant (for judicial review purposes) to note that section 35(1) of the Scotland Act (which makes no reference to the protection of public safety or public order) uses the more objective 'has reasonable grounds to believe'.

The second power vested in the Secretary of State by section 80 of the Northern Ireland Act (the key wording being the same under section 107 of the Scotland Act) is, by order, 'to make such provision as *he considers necessary or expedient* in consequence of any provision of an Act (not Bill) of the Assembly 'which is not, or may not be', within the Assembly's legislative competence. Such an order (which is an affirmative resolution Westminster statutory instrument under section 96(2) of the Northern Ireland Act) may, inter alia, make provision having retrospective effect. The third power, which will be considered in detail below as it has now been addressed by the House of Lords, is to be found in section 32(3), which requires the Secretary of State to propose (to the Queen in Council) a date for an (extraordinary) Assembly General Election in the absence of an election by the Assembly within the requisite period of a First and Deputy First Minister.

Against that general background, it is possible to identify four broad types of legal proceedings which may arise under the Northern Ireland Act.

First, there is the pre-enactment reference power under section 11 to the Judicial Committee whose decisions, under section 82, are binding in all legal proceedings other than proceedings before the Committee itself. This is not the same as the power found in section 51 of the 1920 Act and section 18 of the 1973 Act. First, it relates only to the pre-Royal Assent stage, that is, only to Bills. Secondly, the power is vested *not* in a Secretary of State but in the Westminster government's (and in due course too the devolved government's) law officer. Paragraph 26 of the Memorandum of Understanding indicates that the Westminster government regards such a power as a 'matter of last resort', hoping to avoid any difficulties through discussion 'so as to avoid any action or omission by the devolved administration having an adverse impact on non-devolved matters'—although this is not a rewording of the vires tests.

The second way in which the courts may be called upon to resolve vires questions concerns (mainly post-enactment) *devolution issues*, which phrase has a technical definition which does not include all questions which may arise in connection with the operation of devolution. Schedule 10 of the Northern Ireland Act (which will in due course be amended by Schedule 7 to the Justice Act 2002 inserting in various places references to the Advocate General for Northern Ireland) lays down the various procedures which may be invoked: by the governments' law officers, by the First Minister and Deputy First Minister of Northern Ireland and by any individual with standing directly through judicial review or, indeed, collaterally as occurred in both *Gallagher* and *Hume*. For our purposes, the definition of devolution issue includes 'a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly' and also the rather broadly phrased 'any question arising under this Act about excepted or reserved

matters'. It is not immediately clear what this means, although section 96(1) (the definition section) refers both 'excepted matters' and 'reserved matters' back to section 4(1). There 'excepted matter' and 'reserved matter' mean 'any matter falling within a description specified' in respectively Schedules 2 and 3, which thus constitute broad headings of subjects not definitive lists. It may be, therefore, that the inclusion of this phrase under the heading of 'devolution issue' is intended to be confined to a consideration of, for example, what 'matters' fall within the description of, for example, 'human genetics,' 'civil defence' or 'the subject-matter of the Human Fertilisation and Embryology Act 1990.' It may be, however, that the phrase in Schedule 10 will not be as narrowly confined.

The third category of case—and as it falls outside Schedule 10, the various procedures there may not be utilised—concerns cases arising out of the operation of devolution but which do not fall under the definition of devolution issue. As Professor Noreen Burrows points out,[29] these cases include procedural matters and the issues involved in cases such as *Whaley v Watson*[30] in Scotland, and also the intragovernmental issue in *In re Campbell and Morrow*[31] in Northern Ireland.

The fourth category of case relates to judicial review of the Secretary of State's 'reserve' powers. As far as members of the public are concerned, with regard to this category of case (and also to a greater or lesser extent categories 2 and 3 also) standing could still be problematic. The Northern Ireland Act 1998 introduces a system of devolution which is to a considerable degree, if not totally, autochthonous and consociational or inter-communal. It also has a far wider or multi-layered context within which to operate as compared with its predecessors: it operates in a more widely devolved United Kingdom; there is a series of Irish dimensions; there is the context of the widening, and deepening, European Community/European Union; there is the evolutive jurisprudence of the European Court of Human Rights; there is the British-Irish Council. Judicial review, as will be considered elsewhere in this book, has changed beyond recognition since 1973. This question for devolution, however, remains: what will the response of the courts be to what may be termed 'political questions' in the devolved domain. This is a specific question in the context of, for example, the level of judicial scrutiny that is appropriate (or the degree of deference due) to the decisions of elected bodies in the Human Rights Act jurisprudence. Here it will be considered in the context of the one devolution case to reach the House of Lords, namely *Robinson v Secretary of State for Northern Ireland.*[32] The issues at stake in it were particularly acute, involving a decision of the Secretary of State not to call an early Assembly General Election in Northern Ireland. In the light of the June 2001 General Election results, the Democratic Unionist Party and Sinn Fein could be expected at the next Assembly Election to make inroads on the Ulster (Official) Unionist Party and the SDLP respectively. It needs little imagination to state that a DUP/Sinn Fein

[29] N Burrows, *Devolution* (2000), 144.
[30] *Whaley v Lord Watson* 2000 SC 125.
[31] 16 January 2002.
[32] [2002] UKHL 32, 25 July 2002.

First Minister and deputy First Minister (or even vice versa?) is an unlikely partnership in Northern Ireland. Hence in *Robinson* the future of devolution was potentially at issue—not for the first time in Northern Ireland.

It is not being suggested at least initially that this case is of general application throughout the devolved United Kingdom. Some Scottish cases might not be either—not in the same way at least as human rights and European Community law devolution cases. Such cases will not be considered here, however, as in one crucial regard they cast little light on the operation of devolution *qua* devolution. The principles of the supremacy of EC law apply to all law in the United Kingdom, including that enacted by the Westminster Parliament and although under the Human Rights Act 1998 that Parliament retains its supremacy with regard to Convention rights, they are nonetheless scrutinised for their compatibility with them. Further, as already mentioned, courts considering both Westminster and devolved legislation have to engage with the doctrine of due deference to elected power. *Robinson*, however, specifically raises questions directly pertinent to the nature of devolution in Northern Ireland, not least in terms of the areas of the devolved 'settlement' subject to central control. Consequently, the case is, in that light alone, of importance for an understanding of the multi-layered constitution, and of judicial understanding of the nature of the 'new settlement' and of its 'custodians.'

ROBINSON V SECRETARY OF STATE FOR NORTHERN IRELAND

The issues involved in *Robinson* may be briefly stated. Under section 16(8) of the Northern Ireland Act:

> When the offices of the First Minister and the deputy First Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time.

Under section 32(3), if the period mentioned in section 16(8) ends without such an election 'the Secretary of State shall propose a date for the poll for the election of the next Assembly.' Such an election would be an 'extraordinary' general election as opposed to the ones scheduled to be held once every four years. The next scheduled ordinary election would have been 1 May 2003.

The First Minister, David Trimble resigned on 1 July 2001, that automatically meaning that the then Deputy First Minister (Seamus Mallon) also ceased to hold office. When the first period of six weeks had run its course and with the likelihood of a successful section 16(8) election being non-existent, the Secretary of State acting under his powers contained in the Northern Ireland Act 2000 suspended the Assembly for a day (an action which in itself seemed to be an acknowledgement of his need otherwise to exercise his section 32(3) powers). A further six week period commenced, ran and was concluded with another one-day suspension of the Assembly, the Secretary of State indicating that he would not resort to the one-day suspension device again. The next six week period expired on Sunday