

## COULD THE BILL OF RIGHTS HAVE CONSTRAINED THE USE OF THE ST ANDREWS VETO TO BLOCK AN EXTENSION TO PUBLIC HEALTH MEASURES TO CONTAIN COVID 19?

### SUMMARY

- In 2019, the Equality Coalition's [Manifesto for a Rights Based Return to Power Sharing](#) called for a new agreement to remove those political vetoes within the NI Executive that are not based on (and have conflicted with) equality and rights duties, and as such contributed to the destabilisation and collapse of the NI Executive in 2017.
- The issue returned to prominence last week with the DUP twice using the 'St Andrews Veto' to block the extension of public health measures proposed by the UUP Health Minister to contain the pandemic, which were supported by all other parties.
- The 'veto' in question is not the 'Petition of Concern', which is a GFA safeguard regarding legislation and other measures in the NI Assembly. As originally set out in the GFA, the Petition of Concern was to be linked to equality requirements (specifically scrutiny against the European Convention of Human Rights (ECHR) and the NI Bill of Rights), but it has never been implemented as was intended.
- The recent veto used by the DUP was introduced after the 2006 St Andrews Agreement and relates to decisions made within the NI Executive (i.e. cabinet of Stormont Ministers). This veto was grounded in two significant changes, which were as follows:
  - The veto changed how Executive decisions were taken by introducing a process where three ministers (without any criteria) can require a NI Executive decision to be taken on a 'cross community basis', rather than by a simple majority;
  - The veto significantly extended which decisions need to be taken by the NI Executive as a whole rather than individual ministers. It could be applied to any decisions that are 'significant' or 'controversial' and not in the Programme for Government.
- Ministerial decisions, including the use of the 'St Andrews Veto', are however already subject to constraints provided for by law, including the ECHR. Under the GFA this was also to include the safeguard of such decisions needing to be compatible with the provisions of the Bill of Rights, including the advised incorporation of the 'right to health'.
- Whilst the right to health in general includes broad programmatic duties, it can be breached by extreme government acts (e.g. refusing to provide for HIV treatment on ideological grounds). Regarding COVID-19, there have also been extreme ideological positions conflicting with the right of health, in particular by the Presidents of the USA and Brazil, the two countries which presently have the highest number of COVID deaths.
- The present NI situation is grave, with death rates four times those of the Republic of Ireland and the health service risking being overwhelmed. In such a context in order to comply with the 'right to health' it follows that there would need to be compelling reasons for Ministers to act against scientific and medical advice and block the extension of public health measures. Had the Bill of Rights been in place the use of the 'St Andrews Veto' in this context could have been unlawful, and hence overturned by the courts.

## **THE BELFAST / GOOD FRIDAY AGREEMENT (GFA) SAFEGUARDS AND THE PETITION OF CONCERN**

Strand 1 of the GFA provides for the NI Assembly with Executive and Legislative authority, “subject to safeguards to protect the rights and interests of all sides of the community”.<sup>1</sup>

A ‘Petition of Concern’ was a central safeguard in relation to legislation and other ‘key decisions’ of the NI Assembly. The Petition of Concern was linked to conformity with ‘equality requirements’ and specifically the European Convention on Human Rights (ECHR) and NI Bill of Rights. The provision is also linked to cross-community voting (either as parallel consent or weighted majority) for which there is a designation of ‘unionist’, ‘nationalist’ or ‘other’ identity. When more than 30 MLAs sign a Petition of Concern, this was to trigger a Special Procedure Committee (Ad Hoc Committee on Conformity with Equality Requirements), to ‘examine and report’ as to whether a ‘measure or proposal’ is in conformity with equality requirements, including the ECHR and Bill of Rights.<sup>2</sup>

In practice however, largely due to the way the Standing Orders of the Assembly have been drafted and applied, this process has not happened. No Petition of Concern had ever led to the establishment of the Ad Hoc Committee.

The Petition of Concern to date in practice has therefore not been linked, as intended, to compliance with the ECHR and Bill of Rights. In the absence of this it instead became a veto exercisable without criteria by unionist and nationalist designated MLAs, with votes of ‘others’ not counting.

The use of the Petition of Concern to block equality and rights initiatives, and for party political purposes, increasingly brought the mechanism into disrepute. The *New Decade New Approach* (NDNA) deal, committed to some limited reform of the Petition of Concern, with most parties having wished this to go further and return to the original intention of the GFA. NDNA has led to the establishment of a NI Assembly Committee to examine progressing the Bill of Rights. In addition to its role in the Petition of Concern process, the Bill of Rights was also to provide a constraining legal safeguard over acts of ministers and other public authorities in a similar manner to ECHR rights, by virtue of the Human Rights Act 1998.

## **THE ‘ST ANDREWS VETO’: IN THE NORTHERN IRELAND EXECUTIVE**

The GFA did not contain a similar safeguard to the Petition of Concern at the level of the NI Executive (i.e. the ‘cabinet’ of Stormont Ministers, led by the First and deputy First Ministers).<sup>3</sup>

The role of the NI Executive and the decisions it was empowered to take was quite limited. In summary the GFA (paragraphs 19-20 Strand 1) provides that the NI Executive is a forum:

- for discussion and agreement on issues which cut across the responsibilities of two or more Ministers (‘cross-cutting’ issues);
- for ‘prioritising’ executive and legislative proposals, and for a ‘recommending a common position where necessary (e.g. in dealing with external relationships)’;
- to agree, subject to Assembly approval, an annual Programme for Government (PfG) and budget.

The GFA implementation legislation, the original section 20 of the Northern Ireland Act 1998, reflected this limited role.<sup>4</sup> Para 24 (Strand 1) GFA also provided that Ministers would have full executive authority in their respective areas of responsibility (within the broad scope of the PfG).

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<sup>1</sup> GFA, strand 1 paragraph 1.

<sup>2</sup> For further information see: [Implementing the ‘Petition of Concern’, CAJ Briefing Note, January 2018;](#)

<sup>3</sup> The NI Executive is referred to as the Executive Committee in legislation. It is not to be confused with The Executive Office, the Stormont department, previously known as the Office for the First and deputy First Minister (OFMDFM).

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/1998/47/section/20/enacted>

Before taking the First Minister's office the DUP, however, successfully pressed for significant changes to this framework, that were implemented further to the 2006 St Andrews Agreement. There were two major changes.

The **first** led to a significant extension as to **which decisions** needed to be taken by the whole NI Executive, rather than being taken by individual Ministers. In addition to the NI Executive agreeing 'cross cutting' issues, Section 20 of NI Act<sup>5</sup> and Ministerial Code were amended to require the NI Executive as a whole to take decisions on any '**significant**' and '**controversial**' matters, which had not already been agreed in the PfG – or matters that were in the PfG, but which the First and deputy First Minister determine are nevertheless significant and controversial.

The **second** change related to **how decisions** are taken by the NI Executive. Specifically, a new provision was added that when the NI Executive had to vote any **three Ministers** could require the vote to be instead taken on a '**cross community**' basis.<sup>6</sup>

These changes were linked to making the Ministerial Code enforceable. Whilst the St Andrews Agreement framed such changes to the code as a requirement for safeguards to ensure "all sections of the community were protected"<sup>7</sup>, this was not reflected in the legislation which contains no constraining criteria for 'significant' or 'controversial' matters.

In practice, therefore, any NI Executive decision can be vetoed alone by any unionist or nationalist party that has three Ministers, with the votes of 'others' negated. This veto therefore can and, on occasions, has been invoked to block provision to further rights for LGBT persons, women, children, and minority language speakers on the grounds that they are 'significant' or 'controversial'.

There have been several Judicial Reviews over the operation of the St Andrews Veto, which have upheld its broad scope in current law.<sup>8</sup> This includes in 2016, the 'BMAP' JR over a planning decision relating to Sprucefield shopping centre. Reforms after NDNA led to exempting planning decisions from the scope of the St Andrews veto, and significantly limited what is considered 'cross cutting'. The 'significant' / 'controversial' provisions, however, remain intact.<sup>9</sup>

The actions of Stormont Ministers, including acts or omissions within the NI Executive, are subject to other requirements of the law (see for example successful judicial reviews relating to the victims payments scheme and legacy inquests).<sup>10</sup> This includes acting compatibly with ECHR rights, and would include acting compatibly with the Bill of Rights, once this is implemented.

The use of the St Andrews Veto is therefore already constrained by ECHR rights, but also would be constrained by the provisions of the Bill of Rights once it is in place.

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<sup>5</sup> The current section 20 can be accessed here: <https://www.legislation.gov.uk/ukpga/1998/47/section/20>

<sup>6</sup> This was provided for under a new section 28A in the NI Act <https://www.legislation.gov.uk/ukpga/1998/47/section/28A>. The relevant paragraph of the Ministerial Code is 2.12. <https://www.northernireland.gov.uk/topics/your-executive/ministerial-code>

<sup>7</sup> St Andrews Agreement, Annex A, paragraph 2.

<sup>8</sup> *The Minister of Enterprise Trade and Investment's Application [2016] NIQB 26* (relating to the DoE BMAP- Belfast Area Metropolitan Plan concerning specifically a restriction on the expansion of Sprucefield Regional Shopping Centre as being for bulky goods only: considered as both cross cutting and significant/controversial. *Solinas' Application (Gerald Dorino) [2009] NIQB 43* (dealing with 'significant and controversial' limb quashing a decision by the DSD Minister to cut DSD funding to the Community Transformation Initiative). *Re Central Craigavon Limited [2010] NIQB 73*, dealing with a 'cross cutting' issue, namely the adoption of a draft planning policy (PP55 on Retailing, Town Centres and Commercial Leisure Developments) by DoE, in respect of the cross cutting responsibility of DRD.

<sup>9</sup> Under the [Executive Committee \(Functions\) Act \(Northern Ireland\) 2020](#). Which also made technical amendments. [Quasi-judicial decisions by the Justice Minister were also exempted when justice was devolved.](#)

<sup>10</sup> See respectively [McNern \(Jennifer\) and Turley's \(Brian\) Application \[2020\] NIQB 57](#) and [Hughes \(Brigid\) Application \[2018\] NIQB 30](#);

## THE EXERCISE OF THE 'ST ANDREWS VETO' OVER PUBLIC HEALTH MEASURES

In light of the deteriorating public health situation and rise of COVID 19 infections, the NI Executive on 16 October 2020 agreed to implement a package of restrictions as a 'circuit breaker'. This involved an additional week of school closures (prior to the existing half term week); restrictions over certain businesses, such as closing close contact services (e.g. hairdressers) and cafés, pubs and restaurants; as well as restrictions on gatherings and visiting other people's homes.

Whilst this was an NI Executive decision, DUP Agriculture Minister Edwin Poots MLA publicly expressed 'grave reservations' in relation to it. In media interviews on the matter, the Minister claimed there was a disparity between rates of COVID 19 in nationalist and unionist areas, with rates in nationalist areas being six times higher than unionist areas. It is not clear from the media reports what the statistical basis for this claim was. The Health Minister Robin Swann MLA subsequently told the Assembly there was no evidential basis for it.<sup>11</sup>

The DUP did not seek to exercise the St Andrews Veto at this stage to block the 'circuit breaker' measures. (The Veto had been invoked in the preceding months on other non-COVID issues).<sup>12</sup>

The four week restrictions on businesses were due to expire on Friday 13 November. On Tuesday 10 November 2020, the Health Minister Robin Swann MLA tabled a proposal to extend the 'circuit breaker' restrictions by *two weeks* based on the advice of the Chief Medical Officer and Chief Scientific Officer, who had reportedly advised there would be 'excess deaths' if the restrictions were not extended. The DUP used the St Andrews Veto to block this proposal. On Wednesday 11 November 2020, the Health Minister instead proposed the restrictions be extended for one week. This was again blocked by the DUP using the St Andrews Veto.<sup>13</sup>

On both occasions, all other parties (UUP, SF, SDLP, Alliance) had supported the measures. The DUP First Minister Arlene Foster MLA argued in the media for a balance to protect both hospitals and livelihoods, arguing that the economy needed to be considered as well as health advice claiming, "There will be excess deaths if we continue with the restrictions or if we take no decisions at all."<sup>14</sup>

Ultimately on Thursday 12 November 2020, a DUP proposal to allow close contact and (no alcohol) cafés to reopen on Friday 20 November 2020, coupled with a date of 27 November to reopen pubs, restaurants, and hotels, was passed by a majority of the NI Executive. This was not supported by the nationalist parties.<sup>15</sup>

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<sup>11</sup> As to attributing the origin of the alleged disparity Mr Poots reportedly had argued that "a lot of the problems started" with behavioural changes within the nationalist community following the funeral of leading republican Bobby Storey in June, and also referenced certain sporting activities and post-match celebrations (seen by commentators as a possible reference to the GAA). Mr Poots also stated that "most people in my community" had abided by the COVID-19 regulations. Mr Poots subsequently insisted his comments were not sectarian and (in a bizarre misinterpretation of the scope and concept of sectarianism) told the *Irish News*, this could not be the case as most Sinn Féin leaders "don't attend the Catholic church on a regular basis." See:

<https://www.irishtimes.com/news/ireland/irish-news/north-covid-row-after-dup-minister-claims-virus-rates-higher-in-nationalist-than-unionist-areas-1.4384116>; <https://www.bbc.co.uk/news/uk-northern-ireland-54598528>; <https://www.breakingnews.ie/ireland/ni-health-minister-rejects-dup-claim-that-covid-rates-higher-in-nationalist-areas-1021305.html>

<sup>12</sup> Namely by the DUP to block an SDLP proposal for the NI Executive to request an extension to the Brexit transition period See <https://www.bbc.co.uk/news/uk-northern-ireland-54566225> It had also been raised at the same time in relation to legal obligations on the Health Minister to commission abortion services <https://www.bbc.co.uk/news/uk-northern-ireland-54621779>

<sup>13</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/coronavirus-northern-ireland-executive-adjourned-without-agreement-for-third-night-in-a-row-39733152.html> <https://www.irishtimes.com/news/politics/angry-scenes-at-stormont-as-dup-blocks-lockdown-extension-1.4405562>

<sup>14</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-54897748>

<sup>15</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-54924606>

## THE SCOPE OF THE RIGHT TO HEALTH IN THIS CONTEXT

The 'Right to Health' is found in a number of international standards, including under Article 12 of the UN Economic, Social and Cultural Rights Covenant (ICESCR), ratified by the UK and hence binding on NI public authorities as a matter of international law (but not, in the absence of the Bill of Rights, directly enforceable in NI courts).

The scope of the right to health includes matters such as freedom from torture, non-consensual medical treatment, etc, and the entitlement in general to a system of health protection. Among the core obligations of the ICESCR right of 'comparable priority' are the taking of 'measures to prevent, treat and control epidemic' diseases. In determining "which actions or omissions amount to a violation of the right to health", a distinction is made between the inability of a state to comply with its obligations from an unwillingness to do so. Violations can occur by the adoption of 'retrogressive measures' incompatible with any of the core obligations, and the failure to take appropriate steps to realise everyone's highest attainable standard of health. Violations can occur through state actions and policy decisions that are likely to result in unnecessary morbidity and preventable mortality, including misrepresentation of information vital to health protection.<sup>16</sup>

What follows is that extreme actions by ministers or other public authorities declining to take necessary health measures can therefore constitute violations of the right to health. The HIV/Aids epidemic can provide an example of where ideological positions can lead to a refusal to take necessary measures in conflict with the right to health<sup>17</sup> (i.e. HIV being viewed as a divine punishment against persons of minority sexual orientation and those who are 'promiscuous'). In relation to COVID-19, extreme ideological positions in conflict with scientific and medical advice have arisen. At times this is limited to fringe far right anti-lockdown/mask/vaccination movements. Such views have, however, emerged within executive power, most notably with President Donald Trump in the USA and President Jair Bolsonaro in Brazil, the two countries that have the worlds highest COVID 19 death tolls to date. In the case of Brazil, where the right to health is incorporated, a number of President Bolsonaro's actions were overturned by the courts.<sup>18</sup>

In specific reference to the present pandemic, the ICESCR Committee has advocated compliance with the 'right to health' through specific measures summarised in the LANCET as including:

Undertaking immediate and progressive steps to prevent the rising public health threat of COVID-19, states must additionally "take measures to prevent, or at least to mitigate" the impact of the disease, drawing these measures from "the best available scientific evidence to protect public health", as reflected in the guidance from WHO.<sup>19</sup>

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<sup>16</sup> ICESCR General Comment 14(2000) [right to the highest attainable standard of health](#), paragraphs 8, 44(c), 47-50.

<sup>17</sup> The WHO/OHCHR 'Right to Health' factsheet in General references two cases on specific interventions relating to a failure to provide specific HIV interventions, that were overturned by the courts: The Office of the High Commissioner for Human Rights (OHCHR). WHO 'Right to Health' Factsheet Number 31, on specific HIV interventions references the *Minister of Health v. Treatment Action Campaign*: where the South African Government had chosen not to roll out a national programme to reduce the risk of mother-to-child transmission of HIV. Also referenced is Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez et al. v. El Salvador*, Report N° 29/11, Case 12.249, admissibility decision, 7 March 2001 regarding the provision of triple therapy. On both occasions the courts intervened to uphold the right to health and prompt a policy change.

<sup>18</sup> In the case of President Bolsonaro in March 2020 in addition to urging Brazilians not to comply with social distancing measures and other COVID 19 measures and referring to COVID as the 'cold' or a 'little flu', he had issued an Executive Order to strip states of authority to restrict peoples movements (overturned by courts), classified churches and lottery houses as essential services to allow people to congregate there (also overturned by courts), and sought to launch a publicity campaign '#Brasilcannotstop, stopped only by a Federal Judge on grounds it contradicted health Ministry recommendations. See Human Rights Watch, Brazil: Bolsonaro Sabotages Anti-Covid-19 Efforts, 10 April 2020. <https://www.hrw.org/news/2020/04/10/brazil-bolsonaro-sabotages-anti-covid-19-efforts>

<sup>19</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31255-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31255-1/fulltext)

Whilst the ICESCR right is not incorporated into domestic law, there is significant engagement with ECHR rights, which can be invoked directly in the domestic courts. This includes the obligations under Articles 8 (right to private and family life) and 14 (non-discrimination), as well as Articles 3 (freedom from inhuman and degrading treatment) and even Article 2 (right to life), which includes duties to take all reasonable steps to protect life and refrain from acts or omissions which place the health of individuals at grave risk.<sup>20</sup>

## THE BILL OF RIGHTS AND THE VETOES

In relation whether to the exercise of the St Andrews Veto on the 10 and 11 November 2020 would constitute a violation of the right to health, (and hence have been unlawful if the Bill of Rights was in place), this is tied to the reasoning for the decision and the context in which it was taken (both in terms of the public health situation and the efficacy and impact of restrictions).

At the time the decision was taken, NI remained in the grip of a second wave of the pandemic. Proportionately, the number of deaths in NI was running at four times that of the Republic of Ireland, where greater restrictions had been imposed.<sup>21</sup> The health service also risked being overwhelmed with, as set out by UNISON, thousands of health workers already COVID positive or self-isolating, some very sick, and some tragically having already lost their lives, the health union warning:

“The first duty of any Government is to protect lives and protect public health. The Executive must recognise this and make the decisions required in line with the public health advice it is receiving. It cannot set aside the fundamental human right to life.

“There is no place in a public health emergency for partisan politics. Health and social care workers and the wider public need clear and unified action. We need look no further than the United States’ experience of Covid-19 to see how taking politically partisan views on the pandemic is disastrous in protecting the public and health workers.

“If restrictions are eased too soon and the virus spreads again out of control, there will be more infections, more hospital admissions, more outbreaks in care homes, and more health and social care workers having to self-isolate. If our health service is overwhelmed the public will hold our politicians to account.”<sup>22</sup>

In this context, it would appear that the right to health would be breached unless there were compelling reasons to act against public health advice and veto the extension of restrictions.

Whilst some insight can be gathered from the public statements of DUP Ministers as to their reasoning for invoking the St Andrews Veto, their reasoning could be more fully probed and set out in the face of a ‘right to health’ challenge. Had the Bill of Rights been in place that could in itself have acted as a constraining factor in decision making (i.e. if Ministers were advised they would likely be acting unlawfully by exercising the Veto in this way).

Whilst there are other ‘livelihood’ considerations that engage rights, regarding work and preventing hardship and destitution, that are also legitimate considerations, there are positive actions the State can, should and in many cases have been taking to mitigate against such impacts rather than the alternative being to not take advised public health measures.

**18 November 2020**

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<sup>20</sup> For example, in *Brincat and Others v. Malta*, violations of Article 2 and 8 ECHR were found in the failure over many years by the authorities to take practical measures to protect ship-yard workers from the threat of asbestos.

<sup>21</sup> <https://www.irishtimes.com/news/ireland/irish-news/covid-19-north-s-death-rate-in-second-wave-four-times-that-of-republic-1.4405793>

<sup>22</sup> <https://www.unison-ni.org.uk/unison-says-ni-executive-must-listen-public-health-advice-and-not-put-further-lives-risk>