LADY CHIEF JUSTICE OF NORTHERN IRELAND

MICHAEL RYLE MEMORIAL LECTURE

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CONSTITUTIONAL GUARDIANSHIP IN NORTHERN IRELAND: LEGISLATURES, COURTS AND THE RULE OF LAW

It is both an honour and a pleasure to have been invited by the Study of Parliament Group to deliver this year's Michael Ryle Memorial Lecture.

This is the first time the lecture has been delivered in Belfast. It is especially fitting, therefore, that we should gather here in Parliament Buildings, at the heart of Northern Ireland's democratic life, to consider the relationship between the legislature, the courts and the rule of law.

Michael Ryle devoted his distinguished career to parliamentary democracy, both as Clerk of Committees at Westminster, and as an influential commentator on parliamentary procedure and constitutional affairs. His work reflected a conviction that constitutional structures matter because they shape the exercise of public power and the means by which it is scrutinised.

Those themes have a particular resonance here in Northern Ireland, where our constitutional arrangements have been shaped by conflict, political instability and profound change. Their success depends upon institutions that are not only democratically legitimate, but also effective, accountable and committed to acting within the law. Experience has shown us that constitutional structures cannot, by themselves, secure stable government. They must be sustained by a shared commitment to the principles and practices that give them life, foremost among them the rule of law.

A lecture bearing Michael Ryle's name therefore provides a particularly fitting occasion to examine the rule of law, the respective responsibilities of the legislature and the courts, and the contribution each makes to the constitutional guardianship of Northern Ireland.

THE RULE OF LAW AS THE FOUNDATION OF SOCIETY

Any examination of the respective responsibilities of the legislature and the courts must begin with the principle from which both derive their constitutional legitimacy: the rule of law. The legislature makes the law, the Executive exercises the powers conferred by law, and the courts interpret and apply the law. Each has a distinct constitutional role, but each operates within a system founded upon the requirement that public power must be exercised lawfully and remain subject to legal limits.

The rule of law is not merely an abstract legal principle. It is a practical foundation of democratic society. It protects rights, restrains public power, provides for the peaceful resolution of disputes and enables individuals and institutions to conduct their affairs with confidence. At its heart lies a simple but powerful proposition: everyone is subject to the law, and everyone is entitled to its protection. Lord Bingham famously expressed it in these terms:

> "[…] all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. "

The principle applies to those who govern as much as to those who are governed: to Ministers and citizens, public authorities and private individuals. No one is above the law, and no person or institution entrusted with public power may exercise it simply according to preference or arbitrary

whim. Power must have a lawful basis, be used for a proper purpose and remain open to scrutiny.

The value of the framework provided by the rule of law is especially apparent in Northern Ireland. Our recent history demonstrates both the human cost of unresolved conflict and the importance of institutions through which profound disagreement can be managed by peaceful, democratic and lawful means.

The Belfast or Good Friday Agreement marked a decisive commitment to that approach. It did not remove political disagreement and nor was it intended to do so. Instead, it created a constitutional framework within which different traditions and competing constitutional aspirations could be represented and accommodated. The Agreement established democratic institutions founded on power-sharing, consent, equality, and respect for rights, providing mechanisms through which disagreement could be addressed by dialogue and democratic participation rather than violence.

The stability of these arrangements depends not only on their formal legal structure, but also on respect for the principles that sustain them. Democratic mandates must be respected, public power must be exercised within its lawful limits, and the institutions established to share and scrutinise that power must be permitted to perform their proper functions.

The courts have an essential role within this constitutional framework. They interpret and apply the law, protect rights, resolve disputes and determine whether public authorities have acted within the powers entrusted to them. But the courts are only one part of the constitutional order. They do not govern Northern Ireland, make political choices or resolve questions that the constitutional settlement entrusts to elected representatives.

Before turning to the role of the courts, it is necessary to place that role within its constitutional context. As this is the first Michael Ryle Memorial Lecture to be delivered in Northern Ireland, it is appropriate to begin with the distinctive arrangements governing the respective responsibilities of the Northern Ireland Assembly, the Executive and the courts.

CONSTITUTIONAL ARRANGEMENTS IN NORTHERN IRELAND

The Government of Ireland Act 1920 created Northern Ireland as a separate jurisdiction within the United Kingdom. The Parliament of Northern Ireland was established in 1921 and continued until 1972, when, during the early years of the Troubles, it was suspended and direct rule from Westminster was introduced.

The Belfast or Good Friday Agreement of 1998 laid the foundations for the restoration of devolved government through a locally elected Northern Ireland Assembly. It encompassed a multi-party agreement between the Northern Ireland political parties and the UK and Irish Governments and an international agreement between the Governments of the United Kingdom and Ireland, which the courts have recognised as an important aid to interpreting the Northern Ireland Act 1998 which gave legislative effect to the devolution settlement.

The 1998 Act established a power-sharing Assembly, an Executive drawn from the principal parties, and a system of Assembly committees. Legislative and executive responsibility was transferred in relation to most areas of domestic policy. These are known as "transferred matters". Matters of national importance, including defence, foreign affairs and international relations, remain excepted from devolution, while certain other matters are reserved to Westminster.

The arrangements contain distinctive safeguards also, including the requirement for the elected members of the Assembly to declare their community designation, and procedures requiring cross-community support for specified decisions.

The Assembly first sat in 1998, but responsibility for policing and justice was not devolved until 2010. That delay reflected the particular sensitivity of those functions and the need to establish sufficient political confidence before transferring them to the devolved institutions. Their continuing constitutional significance is reflected in the appointment of the Minister of Justice by an Assembly resolution requiring cross-community support. To date, the office has not been held by a member of either of the two largest political traditions.

Ministers and the Executive

The system of executive government is unusual. Executive authority rests principally with individual Ministers and departments. The First Minister and deputy First Minister exercise their principal powers jointly, while the Executive Committee considers cross-cutting, significant and controversial matters. As was confirmed in the case of *Re Solinas*[1], the Executive does not possess a general executive power: statutory authority ordinarily remains with individual Ministers and departments, subject to the Ministerial Code and requirements for collective consideration.

Institutional Instability

The operation of devolution has not been continuous. Sir Paul Girvan captured that history in the introduction to his judgment in *Re Hughes*[2] stating:

> "The road to reconciliation, tolerance and mutual trust has been a rocky one and the outworking of the Belfast Agreement

[1] [2009] NIQB 43
[2] [2018] NIQB 30

> and the devolution that flowed from it has been marked by periodic breakdowns of trust leading to legal or de facto suspension of devolution."

Devolution has since been interrupted on several occasions, prompting legislative changes intended to promote continuity, allow more time for an Executive to be formed, and prevent an immediate governmental vacuum.

THE CONSTITUTIONAL ROLE OF THE COURTS

Complex constitutional arrangements inevitably give rise to questions about the lawful limits of institutional authority. Is proposed legislation within the competence of the Assembly? May a Minister act alone, or does the matter require consideration by the Executive? Has a department acted within the powers conferred upon it by statute? Such questions may arise in a politically contested context, but where their resolution depends upon the law, they are for the courts to determine.

In answering questions about the lawful limits of institutional authority, the courts do not assume responsibility for governing Northern Ireland. Their task is more limited and more fundamental: to interpret the constitutional framework, identify the legal boundaries of public power, and ensure that those boundaries are respected.

That task defines the constitutional role of the courts. They ensure that the law is applied fairly and impartially and that public power is exercised within lawful limits. An independent judiciary is a cornerstone of democratic government and the rule of law. In Northern Ireland, that role has particular importance because our constitutional arrangements distribute authority among Westminster, the Assembly, the Executive, and government departments.

The courts are regularly asked to decide where the authority of one institution ends and that of another begins. They may be required to determine whether legislation is valid, whether a Minister or department has exceeded their powers, or whether the procedures required by law have been followed. In doing so, the courts do not decide the political merits of the issue. Their concern is with legality.

Legislative competence of the Assembly

The Northern Ireland Assembly, unlike the sovereign Parliament at Westminster, is a devolved legislature established by statute. Its legislative authority is confined to the competence conferred by the Northern Ireland Act 1998. Assembly legislation must relate to devolved matters and comply with the constitutional and rights-based limits imposed by that Act. The courts may therefore be called upon to determine whether legislation falls within those limits.

In *Re Mediahuis*[3], the High Court held that provisions granting anonymity to suspects and restricting pre-charge reporting fell outside the Assembly's competence because they did not provide an adequate means of balancing the rights involved. By contrast, the Supreme Court held in the *Safe Access Zones*[4] case that restrictions on protests within designated areas surrounding abortion clinics pursued legitimate aims, were proportionate and therefore lay within legislative competence.

These cases demonstrate that, in reviewing Assembly legislation, the courts do not assert authority over the Assembly. They perform the constitutional function assigned to them within a constitutional settlement established by

[3] [2024] NIKB 45

[4] *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32

Parliament, which both confers and defines the limits of the Assembly's legislative authority. That analysis rests upon the Assembly's status as a legislature of limited competence. Different constitutional considerations arise when the courts are asked to review an Act of the sovereign Parliament at Westminster applying in Northern Ireland.

Acts of the Westminster Parliament

Re Dillon & Others[5] concerned the Westminster Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The issue was not whether Westminster possessed legislative competence but rather whether particular provisions of the Act were compatible with Convention rights and with Article 2(1) of the Windsor Framework.

Delivering the judgment of the Court of Appeal, I recognised that the case occupied both a legal and a political space and emphasised the limits of the court's role:

> "To be clear, our role is not to make policy. The courts are simply concerned with the legality of the legislation. This is a legitimate part of the judicial function reflective of adherence to the rule of law and the constitutional role of the courts as recognised both at common law and in legislation."

The Supreme Court accepted that EU law could have direct effect in some circumstances under Article 2(1) but held that the Victims Directive and the Charter of Fundamental Rights and Freedoms could not establish a breach of EU law under the Windsor Framework. The un-appealed declarations of incompatibility under the Human Rights Act remained in place.

[5] [2024] NICA 59

This was the first appeal concerning a decision to disapply primary legislation under Article 2(1) of the Windsor Framework. Ultimately, this was not debated in the Supreme Court, however, because the civil rights at issue were not sufficiently specific. I expect there will be further debate on this issue.

More broadly, the *Dillon* case illustrates how litigation may occupy politically contested territory while presenting a legal question that the courts are constitutionally required to answer.

Westminster intervention during political deadlock

Westminster has also legislated directly in devolved areas during times of political deadlock.

In *Ewart's Application*[6], which was a case dealing with abortion reform, the court paused to facilitate potential restoration of the Assembly and local decision-making but ultimately, as that did not happen, Westminster legislated.

Later, when the regulations concerning the provision of abortion services were challenged[7], the courts held that they fell within the broad authority that Parliament had conferred on the Secretary of State, illustrating both Westminster's continuing legislative capacity and the courts' role in determining the lawful limits of executive action.

Minsters, departments and the Executive

The same constitutional principle governs the exercise of executive power by Northern Ireland Ministers and departments: the source, scope and limits of their authority are determined by law.

[6] [2019] NIQB 88 & [2020] NIQB 33
[7] *In re SPUC* [2022] NIKB 9 & [2023] NICA 35

When reviewing the exercise of that authority, the courts do not determine whether a political or administrative decision was desirable. Their role is to decide whether the decision-maker acted within their legal powers, followed the procedures required by law and respected the rights of those affected.

This judicial role has particular significance in Northern Ireland, where Ministers ordinarily exercise authority individually, but the Ministerial Code requires specified matters to be brought before the Executive Committee. The courts have therefore been called upon to determine whether particular decisions were significant, controversial or cross-cutting and required collective consideration. Where such consideration was legally required but a Minister acted alone, the decision will ordinarily be unlawful, although the outcome will depend upon the statutory context and the nature of the breach. In *Re Central Craigavon*[8], a technical and inadvertent breach did not justify quashing the decision. In *Re Safe Electricity*[9], the Court of Appeal held that legislation expressly permitted the relevant planning decision to be made without referral to the Executive.

This body of case law reflects the distinctive consequences of mandatory power-sharing and individual ministerial responsibility, a constitutional arrangement which has resulted in Ministers bringing legal proceedings against other Ministers concerning the exercise of their respective functions, a phenomenon rarely, if ever, encountered elsewhere in the United Kingdom.

Government without Ministers

Interruptions to devolution and periods of institutional instability have also required the courts to determine the scope of departmental authority in the

[8] [2010] NIKB 73.
[9] [2022] NICA 61.

absence of Ministers. That issue assumed particular importance following the collapse of the devolved institutions in 2017.

In *Re Hughes*[10], which concerned delays in Troubles-related inquests, the court considered the scope of departmental authority in the absence of ministerial control. It held that the statutory requirement for departments to be under ministerial control "at all times" applied only when a Minister was in office. The court also confirmed that, during the statutory period for forming an Executive, responsibility for devolved matters did not automatically revert to the Secretary of State.

A more fundamental issue arose in *Re Buick*[11]. The Court of Appeal held that civil servants could not take major decisions requiring ministerial authority, exposing a significant gap in Northern Ireland's constitutional arrangements during periods when Ministers were absent.

Although the court could identify the constitutional gap, it could not rewrite the constitutional settlement to fill it. That was a matter for Parliament, which responded by legislating first to permit departments temporarily to exercise specified functions and later to allow Ministers to remain in office until their successors were appointed.

Buick illustrates an important lesson. Political deadlock does not suspend the rule of law. Public authorities must remain within their legal powers, and although the courts may identify the limits of those powers, only the legislature can provide a lasting solution. The rule of law therefore requires not only judicial intervention where legal limits have been exceeded, but also judicial restraint where the issue lies beyond the proper province of the courts.

[10] [2018] NIQB 30.
[11] [2018] NICA 26.

The limits of the judicial role

That restraint is particularly important where a dispute raises questions that are fundamentally political rather than legal. In *Re Allister & Others,* which concerned challenges arising from the United Kingdom's withdrawal from the European Union, Colton J reiterated,

> "It is the function of political and not judicial bodies to resolve intensely political questions."[12]

The court also observed,

> "… the making of treaties and the conduct of foreign affairs are matters of high level politics which are entirely unsuited to supervision by a court on a judicial review application."[13]

The challenge was ultimately dismissed by the Supreme Court.

Constitutional guardianship therefore demands both vigilance and discipline. The courts must enforce the legal limits upon legislative and executive authority, while recognising the political judgments that the constitution reserves to elected institutions.

The courts do not govern Northern Ireland. Their constitutional responsibility is to ensure that government remains within the law. In discharging that responsibility, they do not displace democratic authority; they uphold the legal framework from which that authority derives its legitimacy.

CLIMATE CHANGE LITIGATION & PUBLIC ACCOUNTABILITY

[12] [2021] NIQB 64, para [265].
[13] Ibid, para [67].

This boundary between the roles of government and the courts is not always easy to draw. Few areas demonstrate that more clearly than climate change. Decisions about roads, energy infrastructure and environmental protection require difficult choices between economic, social and environmental priorities. Those choices are for elected representatives and public authorities, not the courts. The courts' role is to ensure that they are made by the constitutionally appropriate decision-maker, through lawful processes, on the basis of adequate evidence and in accordance with the duties imposed by the legislature. Two recent cases illustrate how that form of constitutional guardianship operates in Northern Ireland.

Re Hassard[14] concerned the Department for Infrastructure's decision to proceed with the A5 Western Transport Corridor and its compatibility with the statutory climate duties imposed by the Climate Change Act (Northern Ireland) 2022.

I delivered the judgment of the Court of Appeal, which overturned the High Court's decision to quash the Department's approval of the scheme. One of the principal grounds of challenge concerned section 52(1) of the Climate Change Act (Northern Ireland) 2022.

The Court of Appeal held that section 52 imposes a mandatory obligation on departments to exercise their functions, so far as possible, consistently with Northern Ireland's statutory emissions targets. It does not, however, prescribe the outcome of every individual decision. A department must make adequate inquiry and reach a rational and properly informed conclusion, but the choice between lawful policy options remains for government.

[14] [2026] NICA 42

Applying that test, the court held that the Department had sufficiently considered the project's emissions within the wider statutory framework. The absence of finalised climate and sectoral plans did not itself render the decision irrational, nor did the legislation require every project approved before 2050 to be plotted along a single quantified pathway.

The judgment recognised that responsibility for addressing climate change cannot be understood on a department-by-department basis alone. The emissions targets apply to Northern Ireland as a whole and require coordinated action across government. The Department for Infrastructure was responsible for transport and infrastructure, but not for every sector affected by the project. Its obligation was to ensure that the project's emissions were identified and properly taken into account within the wider, cross-government effort to meet the statutory targets.

The Court of Appeal concluded therefore that the High Court had applied an unduly restrictive approach to the statutory scheme.

The constitutional significance of the decision lies in the balance it draws. The courts must ensure that statutory climate duties are treated as real legal obligations rather than aspirational statements, but they must also respect the responsibility of elected representatives and public authorities to choose between competing policy options. Judicial review requires departments to investigate, reason and explain. It does not transfer responsibility for transport, infrastructure or climate policy from government to the courts.

The second case is *No Gas Caverns*[15] in which the Court of Appeal quashed licences for a major gas-storage project beneath Larne Lough. The Minister had failed to refer the matter to the Executive despite its significant,

[15] [2024] NICA 50.

controversial and cross-cutting character. Although that assessment was primarily for ministerial judgment, the court held that the intensity of review must reflect the constitutional importance of collective government. No adequate explanation had been given for proceeding without Executive consideration.

The court held also that it was unlawful to take account of a proposed community fund offered by the developers. Planning and environmental decisions must be based on relevant statutory considerations, not collateral benefits. The case therefore illustrates that ministerial authority must be exercised within both the substantive and institutional limits imposed by law.

Taken together, the cases illustrate constitutional guardianship in practice. The courts do not decide whether a road should be built or whether gas-storage caverns represent sound energy policy. They ensure that statutory duties are respected, relevant evidence is considered, reasons are adequate and decisions are taken by the constitutionally appropriate body. Climate litigation is, in that sense, also litigation about democratic accountability.

JUDICIAL INDEPENDENCE, PUBLIC CONFIDENCE & INSTITUTIONAL DIALOGUE

The cases I have discussed demonstrate the constitutional role of the courts in practice. The legitimacy of that role depends both upon the quality of judicial decisions and upon public understanding of why courts intervene in some cases, exercise restraint in others and remain independent of political influence.

Public confidence is essential to the administration of justice. It cannot simply be assumed, nor should it depend upon unquestioning deference. It must be

sustained through independence, impartiality, transparency and a proper understanding of the judicial role.

The law belongs to everyone, not only to judges and lawyers. Those who work within the justice system therefore have a responsibility to explain its principles and decisions in language that is accessible, accurate and meaningful. Accessibility and intelligibility are themselves elements of the rule of law. If citizens are expected to obey the law, organise their affairs in accordance with it and hold public authorities to account under it, they must be able to discover what the law requires and understand how it is applied.

For that reason, I regard public engagement as an important aspect of my role as Lady Chief Justice. Through engagement with educational institutions, community organisations and the media, and through the publication of judgments, summaries and court information on the Judiciary NI website, the judiciary can contribute to a better understanding of how the courts operate and why judicial independence matters. Wider contributions from journalists, politicians and commentators are also important. The rule of law is too important to be discussed only within the legal profession. It should form part of a continuing civic conversation about how we are governed and how public power is controlled.

That understanding is especially important when courts review decisions made by Ministers, departments or the legislature. A finding that a public authority has acted unlawfully is not an assertion of judicial superiority over the democratic process. It is the application of the legal framework within which democratic authority is exercised. Equally, a finding that a question is properly one for elected representatives is not judicial avoidance. It reflects respect for the limits of the courts' own constitutional authority.

The responsibility to promote understanding extends to constructive engagement with those who make and scrutinise the laws that the courts interpret and apply. I have appeared before the Northern Ireland Assembly's Committee for Justice on matters falling within my responsibilities as Lady Chief Justice and have welcomed Committee members to the Royal Courts of Justice. Such engagement provides an opportunity to explain the work of the courts, the practical pressures facing the justice system and what is required for the effective administration of justice. It also enables elected representatives to understand more fully the consequences of legislative, policy and funding decisions.

That dialogue may properly include questions of court administration, sustainable funding and measures to improve public access to justice, including my aspiration for the broadcasting of appropriate court proceedings. Greater access can strengthen public understanding of how evidence and legal argument are considered and how judicial decisions are reached.

There are, however, clear constitutional limits. Judges cannot answer for the merits of individual decisions, enter political debate or become accountable to elected representatives for the exercise of their judicial functions. Cases must be decided impartially, according to law and without political influence.

Those boundaries do not inhibit constructive dialogue. They make it possible. A mature constitutional democracy depends upon each institution understanding the responsibilities of the others and recognising the limits of its own authority. Proper engagement between the judiciary, the Assembly and the wider public can strengthen that mutual understanding while preserving the independence upon which confidence in the courts depends.

CONCLUSION

As I conclude, let me return to where I began. The rule of law is not an abstract theory. It is the practical guarantee that public power will remain within lawful limits, rights will be protected and disputes will be resolved peacefully. It sustains democratic institutions and provides a framework within which profound disagreement can be accommodated.

In Northern Ireland, we have experienced both the fragility of constitutional institutions and their capacity for resilience. Periods of political instability have exposed weaknesses in our arrangements, but they have also demonstrated the enduring importance of the principles upon which those arrangements rest.

Constitutional guardianship is not the responsibility of any one institution. The Assembly makes laws within the authority entrusted to it. Ministers and departments put those laws into effect and remain accountable for the exercise of their powers. The courts interpret and apply the law, protect rights and ensure that public authorities remain within their legal boundaries. Each has a distinct role. Each must respect the responsibilities of the others. And each depends upon a shared commitment to the rule of law.

The courts cannot resolve political disagreement, nor should they attempt to do so. They can, however, ensure that political power is exercised lawfully. Equally, democratic legitimacy does not place elected institutions beyond legal scrutiny. It is strengthened when power is exercised transparently, rationally and within the constitutional framework from which it derives.

The strength of that framework ultimately depends upon public confidence, and public confidence depends upon understanding. A society that understands the law is better equipped to defend it. A society that values the

rule of law is better equipped to preserve democracy. And a society in which public institutions respect both the authority and the limits of their constitutional roles is better equipped to secure justice, prosperity and peace for future generations.

Those are principles to which Michael Ryle devoted his distinguished career. They are values worthy of his memory, and they remain as necessary to the future of democratic government in Northern Ireland as they have ever been.

Thank you.