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From an experiment to a new normal: Indirect Rule in Northern Ireland Dr Adam Evans

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Introduction

2021 marked the centenary of the partition of Ireland and the creation of Northern Ireland. Being formally established by the Government of Ireland Act 1920, Northern Ireland was born with a system of devolved government. This original model of devolution was extensive, featuring a bespoke Northern Ireland Civil Service, Privy Council, a separate legal jurisdiction, and control over vast swathes of domestic policy such as justice and home affairs (as well as the still nascent policy field of social security). While this dominion-esque (Northern Ireland also had a vice regal Governor who represented the Crown's interests in the territory) model of devolution collapsed in 1972, there were later devolution dispensations from 1973-74 (Sunningdale) and periodically from 1998 onwards (the Northern Ireland Act 1998).

For a majority of its existence, Northern Ireland has had some form of devolved government. However, for at least a third of the time since 1921, Northern Ireland has experienced direct rule from Whitehall and Westminster. While initially hoped to be a temporary set of arrangements, direct rule ran from 1972 to 1973 and then, after the collapse of the short lived Sunningdale powersharing Executive, from 1974 until 1998, and then again at various points between 1998 and 2000 and continuously from 2002 to 2007.

Direct rule saw the Secretary of State of Northern Ireland assume the powers of the Northern Ireland devolved government and oversee Northern Irish government departments and the Northern Ireland Civil Service (NICS). Westminster was responsible for legislating (primarily via secondary legislation) for policy fields which would normally be devolved to Stormont and for holding Northern Ireland Office Ministers to account for their policy decisions.² While not an ideal state of affairs, direct rule was an identifiable and established tool in Westminster's toolkit if a government could not be formed at Stormont³

¹ B. Hadfield, *The Constitution of Northern Ireland* (Belfast: SLS Legal Publications, 1989).

² D. Birrell, *Direct Rule and the Governance of Northern Ireland* (Manchester: Manchester University Press, 2009); D. Torrance, *Northern Ireland: Direct Rule* (House of Commons Library, 2019), House of Commons Library Briefing Paper, Number CBP 8638; B. Hadfield, "The Suspension of Devolution in Northern Ireland: New Story or Old Story?" (2003) 9(1) *European Public Law* 49.

³ A. Evans, 'Northern Ireland, 2017-2020: an experiment in indirect rule' [2021] PL 472, 479.

However, direct rule was overlooked in favour of what has been described by Evans as an "experiment in indirect rule" when the Northern Ireland Executive collapsed in 2017. When the Executive once again collapsed in February 2022, the UK Government again opted against direct rule. This paper explores the post-2022 collapse in power sharing and ponders whether indirect rule has now supplanted direct rule as the default alternative to a functioning Executive at Stormont.

2017-2020 Indirect Rule

After a decade of continuous devolved government at Stormont, in 2017 the Northern Ireland Executive collapsed. The reasons for the 2017 collapse in power-sharing have been covered elsewhere.⁴ However, what is notable was the approach taken to governing Northern Ireland during the three-year period that followed until an Executive was formed.

Unlike previous episodes of direct rule, Northern Ireland was instead governed by an approach that Evans has described as 'indirect rule'. The key features of indirect rule were:

- Governance by civil servants, with ad-hoc London intervention;
- This governance was strictly bounded in nature with civil servants restricted in their decision-making capacity;
- Organic development—indirect rule was not a static beast, it changed over time; and
- Constant cycles of 'negotiation' to restore power sharing.⁵

During this period, the day-to-day governance of Northern Ireland was left in the hands of the NICS. When Westminster and Whitehall did intervene it was in a reactive and ad-hoc manner – legislating (particularly briskly) to provide a legal budget and to extend the period in which an Executive could be formed without a fresh election being called.

The invidious position facing Civil Servants tasked with keeping the wheels of government turning in the absence of an Executive or an Assembly was highlighted in the Buick cases. These cases focused on the decision of the Department for Infrastructure to grant planning permission to a large waste treatment facility and incinerator in Country Antrim and ended in the Northern Ireland Court of

⁴ See, for example: S. McBride, *Burned: The Inside Story of the 'Cash-for-Ash' Scandal and Northern Ireland's Secretive New Elite* (Newbridge: Merrion Press, 2019); D. Heenan and D. Birrell, 'Exploring Responses to the Collapse of Devolution in Northern Ireland 2017-2020 Through the Lens of Multi-Level Governance' (2022) 75(3) *Parliamentary Affairs* 596.

⁵ Evans, 'Northern Ireland, 2017-2020: an experiment in indirect rule' [2021] PL 472, 473.

⁶ Re Buick's Application for Judicial Review [2018] NIQB 43; Re Buick's Application for Judicial Review [2018] NICA 26.

Appeal. The appellate court found against the NICS, ruling that "any decision which as a matter of convention or otherwise would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister".

Following the Buick Court of Appeal judgment, the UK Government brought forward the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018. Section 3 of the 2018 Act provided that the NICS was not "prevented from exercising the functions of the department [in question] in the absence of an Executive, where it is in the public interest to do so". 8 It also provided for the Northern Ireland Office to provide guidance that would inform and underpin decisions taken by senior members of the NICS. This guidance, published by the NIO in November 2018, included a number of principles to guide decisions, including taking account of the policy decisions taken by the previous Executive. 9

Unsurprisingly, these arrangements prompted a number of criticisms. In 2018, the Northern Ireland Affairs Committee concluded that the arrangements were "a gross political failure, it cannot be sustained much longer without serious consequences for the people of Northern Ireland." The Court of Appeal similarly stated in the *JR80* case (which sought to oblige the Secretary of State to bring forward a historical institutional abuse inquiry in the absence of Stormont) that the arrangements did "not provide good governance for Northern Ireland, they are not democratic and have led to government by civil servants with only an attenuated degree of accountability." 11

Restoration or interruption – New Deal New Approach

In January 2020, after nearly three years of indirect rule and countless rounds of negotiations between the UK and Irish governments and the main political parties in Northern Ireland, the then Secretary of State for Northern Ireland (Julian Smith MP) and Tánaiste (Simon Coveney TD) took the unusual step of publishing the text of an agreement, named New Decade New Approach (NDNA), and then invited the local parties to endorse it as a means of restoring devolution. ¹² All five parties

⁷ Re Buick's Application for Judicial Review [2018] NICA 26 at [56].

⁸ Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s.3.

⁹ UK Government, Guidance on decision-making for Northern Ireland Departments during the period for Northern Ireland Executive formation, Cm 9725 (November 2018).

¹⁰ Northern Ireland Affairs Committee, Devolution and democracy in Northern Ireland – dealing with the deficit, 3rd Report, 2017 – 2019, HC 613, para.13.

¹¹ Re JR80's Application for Judicial Review [2019] NICA 58 at [109].

¹² Northern Ireland Office, *New Decade, New Approach_*(January 2020), available at: <u>2020-01-</u>08 a new decade a new approach.pdf (publishing.service.gov.uk).

eligible for seats in the Executive (the DUP, Sinn Fein, UUP, SDLP and Alliance) agreed to re-enter government and a new Executive was formed on 11 January 2020.

Among its many provisions, the NDNA package included a declaration that "a three-year absence of devolved government cannot happen again." Accordingly, NDNA included a series of proposals to provide for a more sustainable set of devolved institutions. One such proposal was that in the event that devolved government failed, Ministers would remain in a caretaker capacity for a maximum of 24 weeks since the last election or 48 weeks since an Executive last functioned (whichever is the shorter timeframe) before an Assembly election must be called. Caretaker Ministers would be able to make some decisions, but their freedom of action would be bounded akin to the purdah period in the run-up to UK or devolved general elections. ¹⁴ The time period for forming an Executive would similarly be extended to a maximum of 24 weeks (assuming that after the first six weeks following the resignation of a First or deputy First Minister or after the first meeting of the Assembly after an election, the Assembly hadn't resolved to dissolve itself and call a fresh election).

To remedy another of the concerns expressed during the three year period of indirect rule, the NDNA agreement outlined a continuing role for the Assembly in the event of a future collapse of the Executive.¹⁵ The Assembly was, at the very minimum, expected to meet every six weeks to consider progress on restoring an Executive during the 24 week Executive formation period and there was an expectation that both the Assembly and its Committees would continue to exercise their responsibilities (including scrutinising the decisions taken by caretaker Ministers) until the Assembly was dissolved.¹⁶

New Decade Same Old Story? The collapse of the Executive

The above commitments were given legal effect by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022.¹⁷ The Act concluded its legislative stages and received Royal Assent on 8 February 2022, a few days after Paul Givan MLA (who had been appointed as First Minister in June 2021) announced his resignation as First Minister, thus triggering the collapse of the Northern

¹³ New Decade New Approach, p.13.

¹⁴ New Decade New Approach, pp.13-14; for a description of purdah restrictions, see: N. Johnson, *Pre-election period of sensitivity* (House of Commons Library, 2023), House of Commons Library Briefing Paper, Number CBP 5262.

¹⁵ New Decade New Approach, pp 13-14.

¹⁶ New Decade New Approach, pp.24-25.

¹⁷ Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, ss.1-4.

Ireland Executive. Little over two years after the NDNA agreement was announced, Northern Ireland once again found itself without a properly functioning Executive.

As in 2017, the collapse of the Executive did not usher in direct rule, but nor did it automatically usher in a return to indirect rule along the lines which operated from 2017 to 2020. As a result of the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, caretaker ministers, rather than civil servants, were tasked with decision making and taking responsibility for the day-to-day governance of Northern Ireland until 28 October 2022.

While caretaker ministers fulfilled their role as envisaged by NDNA, the same could not be said for the Assembly. As mentioned earlier, NDNA had anticipated a continuing role for the Assembly in the event of future suspensions of power-sharing, a role that would have included the scrutiny of caretaker ministers and Northern Ireland government departments and deliberation of key policy issues: the very sort of scrutiny and deliberation which was missing during the 2017-20 episode of indirect rule.

Shortly after the collapse of the Executive in February 2022, the Assembly sat until 24 March when it was then dissolved ahead of the regularly scheduled devolved general election. The 5 May 2022

Northern Ireland Assembly elections saw, for the first time, Sinn Fein emerge as the largest party in the Assembly and Unionism lose its majority. Thus, under the terms of the St Andrews Agreement, Sinn Fein became eligible to nominate the First Minister despite the overall size of the nationalist bloc continuing to be smaller than the Unionist bloc. However, when the new Assembly met after the election, the DUP refused to provide the cross-community support necessary for a new Speaker to be elected. Without the election of the Speaker, the Assembly was unable to proceed to its routine business such as appointing scrutiny committees or hold plenary debates. At the time of writing, despite repeated attempts, the Assembly has been unable to elect a new Speaker (meaning that the outgoing Speaker, Alex Maskey who is no longer an elected Member, remains in post).

Even with the extensions provided for in the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, the final deadline for an Executive to be formed and for elections to be held in

¹⁸ J. Tonge, Voting into a Void? The 2022 Northern Ireland Assembly Elections, *Political Quarterly*, 93 (3) (2022) pp. 524-529.

¹⁹ Northern Ireland Act 1998, s.39. Cross-community support is defined by the Northern Ireland Act as "the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting" or "the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting" (Northern Ireland Act 1998, s.4(5)).

the absence of such an outcome was due to fall on 28 October 2022. Ahead of this deadline, on 18 October, the Secretary of State for Northern Ireland, Chris Heaton-Harris MP appeared before the Northern Ireland Affairs Committee. When asked about the deadline, Mr Heaton-Harris told MPs that he "cannot be clearer", "if we do not get a re-formed Executive by one minute past midnight on 28 October, I will be calling an election." 20

Writing as the deadline fell for an election to be held and for the caretaker ministers to cease holding office, the think tank Pivotal warned that, in the absence of a functioning Executive, "the least bad' option may be retaining caretaker ministers in post, to provide some leadership and accountability." According to Pivotal, such an arrangement would be "preferable to leaving civil servants in charge." However, should such a course not be adopted, Pivotal urged the introduction of legislation to allow civil servants to make more decisions. In any event, the think tank suggested that "guidance is needed about what civil servants can and cannot do in the absence of an Assembly, Executive and ministers."

Despite the Secretary of State's assertions to the Northern Ireland Affairs Committee, a fresh election was not called. On 28 October, the caretaker ministers ceased to hold their offices and the situation reverted back to the system of indirect rule which governed Northern Ireland between 2017 and 2020. Once more the day-to-day governance of Northern Ireland was in the hands of the NICS, rather than Ministers. Once again, and despite the intentions of NDNA, Civil Servants were having to govern without any form of direct scrutiny by the Assembly.

Instead of elections, the Secretary of State announced in November 2022 that he would bring forward legislation to extend the period in which an Executive could be formed.²² This legislation, the Northern Ireland (Executive Formation) Act 2022 was fast tracked through the House of Commons on 29 November 2022.²³ The continuity of the post-28 October 2022 governance

²⁰ Northern Ireland Affairs Committee, *Oral evidence: Work of the Secretary of State for Northern Ireland* (House of Commons, 18 October 2022), HC 86 Q334.

²¹ Pivotal (17 October 2022), Governing Without Ministers – Northern Ireland after 28 October, https://www.pivotalppf.org/cmsfiles/Publications/20221014-what-happens-after-28-October-FINAL.pdf, p.8.

²² Northern Ireland Office (9 November 2022), Secretary of State for Northern Ireland - Statement on Executive Formation, https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-statement-on-executive-formation.

²³ For a helpful analysis of the 2022 Act, see: C. Murray, 'A New Period of "Indirect" Direct Rule – The Northern Ireland (Executive Formation etc) Bill', U.K. Const. L. Blog (29th November 2022) https://ukconstitutionallaw.org/2022/11/29/colin-murray-a-new-period-of-indirect-direct-rule-the-northern-ireland-executive-formation-etc-bill/.

arrangements with the previous period of 'indirect rule" can be seen clearly from the Secretary of State's comments during the legislation's Second Reading debate

According to Mr Heaton-Harris, the UK Government had considered extending the caretaker minister arrangement but had concluded "that it would not have been appropriate". Instead, the Government had opted to return to the arrangements of 2017-2020. Suggesting that precedent was "helpful" and would provide "certainty" for the NICS in taking a "limited set of decisions when it is in the public interest do so", Mr Heaton Harris explained that the arrangements formalised by the 2022 Act "broadly mirrored the approach [...] taken in by the previous administration but one in 2018, largely replicating the relevant provisions in the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018."²⁴ As a result, the NICS was once again given the legal cover to exercise departmental functions in the absence of a minister. As with the arrangements previously provided for with the 2018 Act, the decisions that the NICS could take would be subject to guidance provided by the Northern Ireland Office.

The guidance was published by the UK Government in December 2022. 25 As before, the guidance stresses the general principle that "some decisions should not be taken by civil servants without the direction of elected Ministers", most notably "the initiation of a new policy, programme or scheme", major changes to pre-existing policy commitments, or "new major public expenditure commitments". Again, as with the previous guidance, that overarching principle is balanced against the need for Civil Servants to consider whether inaction might result in a failure to comply with the Executive's legal obligations, result in "significant detriment to the provision of a public service or public safety", or result in "even greater budgetary pressures for the next financial year". The guidance also underlines "the principle that the policy direction of former Ministers should normally continue to be followed", unless it conflicts with the principles outlined elsewhere in the guidance, or there has been a "significant change in circumstance or new compelling objective evidence which undermines or changes the basis on which the original policy decision was based". 26

Further Westminster intervention, to provide ad-hoc legitimacy for the NICS, came in the form of the Northern Ireland (Budget) Act 2023 and the Northern Ireland (Executive Formation and Organ

²⁴ Hansard HC Deb 29 November 2022, c.823-4.

²⁵ Secretary of State for Northern Ireland, Guidance on decision-making for Northern Ireland Departments until an Executive is formed or for the six month period beginning with the day on which the Northern Ireland (Executive Formation etc) Act 2022 is passed (6 December), CP766 (December 2022).

²⁶ Secretary of State for Northern Ireland, *Guidance on decision-making for Northern Ireland Departments* .

Donation) Act 2023. The latter Act extended the period for an Executive to be formed without an election being called until 18 January 2024. ²⁷ In the debate on the Executive Formation Act 2023, the Secretary of State argued that in the absence of Stormont Government, the UK Government had "stepped in to protect the interests of the people of Northern Ireland. We have set a budget, delivered vital energy support finding and legislated to provide clarity on the decision making powers of Northern Ireland Civil Servants to enable them to maintain public service provision". Nonetheless, and despite this attempt to advertise the work of his department, the Secretary of State expressed his "profound disappointment" at the absence of devolution, and acknowledged that the "current governance arrangements were not a sustainable long term solution". Indeed, he suggested that he was keeping these arrangements "under review". ²⁸

Indirect rule: from an experiment to the new default alternative to devolution?

While the Secretary of State has said he is keeping the current indirect rule arrangements 'under review', it appears clear that the Government's room for manoeuvre is limited. Indeed, these constraints have been outlined by the Northern Ireland Office themselves. Responding to a question from the Chair of the Northern Ireland Affairs Select Committee, Simon Hoare MP, the Secretary of State confirmed, during the 2023 Executive Formation Act's Second Reading that direct rule and Joint Authority, were "100%" not on his agenda. During the Second Reading of the Northern Ireland Budget Act 2023, the Northern Ireland Office Minister, Steve Baker MP also acknowledged that it was "very difficult today to see a Government moving into direct rule". 30

As I noted in a previous article exploring indirect rule, direct rule was resisted between 2017 and 2020 for a number of reasons. Those reasons included:

"a fear that once imposed it [direct rule] would be difficult to escape, a hope that a political vacuum could add useful leverage for the UK Government in successfully negotiating a return to power sharing and a reflection of the changed, and charged, political landscape that had materialised as a result of both the 2016 EU referendum and the supply and confidence arrangement between the Conservative Party and the DUP in Westminster following the 2017 UK general election."³¹

²⁷ Northern Ireland (Executive Formation and Organ Donation) Act 2023, s.1(2).

²⁸ Hansard HC Deb 22 February 2023, c.234.

²⁹ Hansard HC Deb 22 February 2023, c.234.

³⁰ Hansard HC Deb 23 January 2023, c.778.

³¹ Evans, 'Northern Ireland, 2017-2020: an experiment in indirect rule' [2021] PL 472, 478-479.

Politics has, of course, moved on since the end of the last period of indirect rule. However, it is clear that direct rule is no more palatable to the nationalist community than it was during 2017-2020. Both Sinn Fein and the SDLP have argued that there should not be a return to the direct rule arrangements used in the past. Their position has gained added strength as a result of the 2022 Stormont elections: principally Sinn Fein's success and the loss of a Unionist majority of MLAs. The Irish Government, the co-guarantor of the Belfast/Good Friday Agreement, publicly opposed any suggestion of a return to direct rule during the last period of indirect rule and the Fianna Fail/Fine Gael grand coalition has reiterated that position since 2022.

The preference of the nationalist community has instead been for "Joint Authority", with Northern Ireland governed, in the absence of Stormont, by some form of shared administration by the UK and Irish governments. The concept of Joint Authority emerged in 1984 with the report of the New Ireland Forum. According to the Forum's report, Joint Authority would "involve shared rule by the British and Irish Governments", this, they argued, would ensure "a stable and secure system of government" by according "equal validity" to the two political traditions in Northern Ireland.³⁴ The suggestion, as along with the Forum's other proposals, was swiftly dismissed by Margaret Thatcher.³⁵

While Joint Authority is by no means a new idea, it has, according to Michael McKernan (a former SDLP Special Adviser), "yet to be properly developed or even clearly defined". As he acknowledges, the New Ireland Forum's report only briefly discusses the idea, noting that "in hundreds of pages of proceedings published there was little more than one page describing joint authority". There continues to be a lack of clarity about the proposal today, particularly how it would intersect with the UK Parliament's ultimate legal sovereignty for the governance of Northern Ireland and section 1

³² UTV (7 February 2023), View From Stormont: SDLP MP Claire Hanna say no comfort of 'one sided direct rule', https://www.itv.com/news/utv/2023-02-06/no-comfort-of-one-sided-direct-rule-says-sdlp-mp; BBC News (26 October 2022), Stormont: Sinn Féin says there can be no return to direct rule,

https://www.bbc.co.uk/news/uk-northern-ireland-63391254. The previous legislative provision for direct rule, the Northern Ireland Act 2000, was repealed at the request of the nationalist parties as part of the St Andrews Agreement talks (Northern Ireland (St Andrews Agreement) Act 2006, Sch.4).

³³ M. O'Halloran (26 October 2022), Direct rule from London not an option if NI Executive not restored — Taoiseach, The Irish Times https://www.irishtimes.com/politics/oireachtas/2022/10/26/direct-rule-from-london-not-an-option-if-northern-ireland-executive-not-restored-taoiseach/.

³⁴ New Ireland Forum (2 May 1984), Report, available via CAIN (Northern Ireland Troubles Archive) https://cain.ulster.ac.uk/issues/politics/nifr.htm#joint.

³⁵ Belfast Telegraph (21 August 2015), Thatcher no to joint rule, https://www.belfasttelegraph.co.uk/news/northern-ireland/thatcher-no-to-joint-rule/31466892.html.

³⁶ McKernan (October 2017), Joint authority: a way forward?, AgendaNi, https://www.agendani.com/joint-authority-way-forward/.

of the Northern Ireland Act 1998 which sets out Northern Ireland's continuing status within the UK (until such a time as a border poll has been held and won by those advocating Irish unification).³⁷ However, even if there was greater detail about Joint Authority it seems unlikely that it would render the idea any more attractive to the Unionist community. If direct rule is unpalatable for the nationalist community, then Joint Authority is inedible for Unionists in Northern Ireland. As noted above, the UK Government has ruled out Joint Authority.

While indirect rule may have been initially viewed as an experiment when first trialled between 2017-20 it could well be the new default governing model for Northern Ireland in periods where Stormont cannot function. Direct rule, once the default constitutional model for governing in the absence of a devolved executive, now appears to be consigned to the history books — a model that seems ill-suited to the changed realities of a Northern Ireland where Unionism is just one of a multitude of minorities. While the threat of Joint Authority might occasionally be dangled as an incentive for Unionism to negotiate, there are equally powerful political reasons that would dissuade most (but perhaps not all) UK Governments from seriously contemplating it.

The task facing those concerned about the governance of Northern Ireland is how to shape a form of indirect rule that mitigates some of its most constitutionally problematic aspects. Caretaker Ministers, as initially operated from February to October 2022, are one area where, at least initially, the current collapse of Stormont represented an improvement from 2017-20. However, they are at best a stop gap measure and pose their own questions about democratic legitimacy. The Assembly, the other supposed piece in the remedial jigsaw, has failed to function as intended by NDNA. The manner of electing the Speaker is prescribed by the Northern Ireland Act 1998 and any attempt to amend the cross-community super majority required may risk a significant political reaction that further destabilises the political debate in Northern Ireland. As a least-worst alternative, could a means be found of separating the plenary and corporate nature of the Assembly from the committee system. For example, on occasions where a Speaker had not been elected prior to a failure to form an Executive, enabling the Assembly, as an emergency measure, to bypass the election of a Speaker election and go straight to using D'Hondt to determine which party secures which committee chair and to populate the committees? Such an approach may trigger its own political recriminations, but these may be of a secondary nature to those triggered by lowering the cross-community threshold for a Speaker election. With committees functioning, at least the scrutiny gap would be slightly bridged. In 2021 I concluded that the experiment of indirect rule "may

³⁷ Northern Ireland Act 1998, s.1.

prove more than a footnote in Northern Ireland's constitutional development". That footnote now looks like a chapter in its own right.

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