



Beyond trade: implementing the Ireland/ Northern Ireland Protocol's human rights and equalities provisions

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ABSTRACT

The protections for rights and equality might be placed at the forefront of the EU/UK Withdrawal Agreement's Protocol on Ireland/Northern Ireland, but they have been overshadowed by debates over the Protocol's trade provisions. This marginalisation of these elements of the Protocol is problematic. Rights and equalities protections have long been a contested aspect of Northern Ireland's constitutional arrangements, and there is thus every possibility that the limits of these new arrangements will be tested upon their entry into force. Moreover, unlike the aspects of the Protocol relating to trade, which can ultimately be terminated by the Northern Ireland Assembly, the rights and equalities aspects of the Protocol will continue in force independent of such a vote. As such, these provisions could even be said to provide the kernel of an (uncodified) Northern Ireland Bill of Rights.

Keywords: human rights; Brexit; oversight mechanisms; Northern Ireland Bill of Rights.

INTRODUCTION

Cross-border trade concerns have often dominated Northern Ireland's place in Brexit debates, to the virtual exclusion of the European Union (EU)/United Kingdom (UK) Withdrawal Agreement's protections for rights and equalities. These commitments are nonetheless significant. Article 2 of the Agreement's Protocol on Ireland/Northern Ireland (PINI) asserts that Brexit will result in 'no diminution of rights, safeguards or equality of opportunity' and obliges

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the UK to fulfil this obligation through ‘dedicated mechanisms’.¹ These protections were thus agreed with explicit regard to the Belfast/Good Friday Agreement’s provisions on ‘rights, safeguards and equality of opportunity’.² Indeed, from the early phases of the withdrawal negotiations, the UK Government had accepted that the Belfast/Good Friday Agreement committed it to ‘ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law’.³ Given how sensitive rights and equality issues remain within Northern Ireland’s political discourse, article 2 also provided an important platform upon which Northern Ireland’s politicians could agree to re-engage with power sharing in January 2020 and even to once again debate the prospect of a Northern Ireland Bill of Rights. Article 2 is nonetheless open to different political interpretations, and, although this might have contributed to making it less immediately contentious than trade aspects of the Protocol, it does not insulate it from disagreements once it comes to be relied upon in legal disputes.

This article addresses how the Withdrawal Agreement and its implementing legislation engage with and in important regards reshape some of the arrangements established under the Belfast/Good Friday Agreement. In doing so, we build upon a large body of work examining the 1998 Agreement’s rights and equality commitments⁴ and, more specifically, on the prospect of a Northern Ireland Bill of

1 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), PINI, art 2(1).

2 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 1.

3 *Joint Report from the Negotiators of the European Union and the United Kingdom Government on progress during phase 1 of Negotiations under article 50 TEU on the United Kingdom’s orderly Withdrawal from the European Union*, TF50 (2017) 19 (8 December 2017) para 53.

4 See, for example, C Harvey, ‘Building bridges – protecting human rights in Northern Ireland’ (2001) 1 *Human Rights Law Review* 243; C Bell, C Campbell and F Ní Aoláin, ‘Justice discourses in transition’ (2004) 13 *Social and Legal Studies* 305; L Mallinder, ‘Metaconflict and international human rights law in dealing with Northern Ireland’s past’ (2019) 8 *Cambridge International Law Journal* 5; C Murray, A O’Donoghue and B Warwick, ‘The implications of the Good Friday Agreement for UK human rights reform’ (2016–2017) 11–12 *Irish Yearbook of International Law* 71.

Rights.⁵ We detail how the Protocol and its implementing legislation impact upon the roles of the Northern Ireland Assembly, the UK Government and Westminster Parliament, especially in light of how fraught the implementation of other aspects of the Protocol became after the announcement of the UK Internal Market Bill in September 2020. We thereafter consider the enforcement of these terms and the transformation of the roles of the Equality Commission for Northern Ireland (ECNI) and Northern Ireland Human Rights Commission (NIHRC) under the terms of the Protocol. In light of this extensive overhaul of human rights and equality protections applicable to Northern Ireland, we conclude by considering whether, despite a Bill of Rights still appearing a distant prospect, the Protocol means that Northern Ireland will in practice operate an increasingly distinct human rights and equality regime to elsewhere in the UK.

THE PROTOCOL'S HUMAN RIGHTS AND EQUALITY CONSTRAINTS UPON LEGISLATIVE AND EXECUTIVE ACTION

Before Brexit: devolved competences and EU law

The complex and novel nature of power sharing envisaged by the 1998 Agreement is reflected in the manner in which competences for areas of law making were devolved to the Assembly under the Northern Ireland Act 1998. This framework was unique to Northern Ireland. In contrast to Senedd Cymru (which did not gain comparable powers until the enactment of the Wales Act 2017), the Northern Ireland Assembly enjoyed a range of primary law-making powers from the outset of devolution. By comparison to the Scottish Parliament, however, fewer areas of competence were transferred to Stormont under the 1998 legislation, and Scotland's powers and competences (for example, over income tax and the electoral system) have only increased in subsequent

5 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008). For commentary, see P Munce, 'Unionists as "court sceptics": exploring elite-level Unionist discourses about a Northern Ireland Bill of Rights' (2013) 15 *British Journal of Politics and International Relations* 647; A Smith and L Green, 'The processes of the "unfinished businesses" of the Good Friday/Belfast Agreement: an all-island Charter of Rights and the Northern Ireland Bill of Rights' (2016–2017) 11(2) *Irish Yearbook of International Law* 23; A Schwartz and C Harvey, 'Judicial empowerment in divided societies: the Northern Ireland Bill of Rights process in comparative perspective' in C Harvey and A Schwartz (eds), *Rights in Divided Societies* (Hart 2012) 148.

rounds of devolution.⁶ The Northern Ireland Act 1998 details two sets of competences that the Northern Ireland Assembly cannot exercise: those relating to excepted and reserved matters. Under this schema, all areas of competence which were not expressly reserved or excepted amounted to transferred competences.⁷

Excepted matters, listed in schedule 2 of the Northern Ireland Act 1998, amount to issues of national importance to the UK as a country. As with the arrangements for Scotland and Wales, it is not envisaged that such issues (including the Crown, defence and national security, honours, nationality law and currency) will ever fall within the remit of devolved institutions. Schedule 3's reserved matters, by contrast, provide an intermediate category comprised of those areas of competence which could potentially be devolved but for sensitivities over the Northern Ireland context. Under the 1998 scheme, it was envisaged that these competences (including consumer protection, telecommunications and broadcasting, and civil aviation) would continue to be managed by Westminster until Northern Ireland's power-sharing institutions had shown themselves to be effective.⁸

The movement of areas of competence was therefore clearly envisaged in the 1998 devolution scheme. The 2007 restoration of power sharing paved the way for new powers to be transferred to the Assembly which had hitherto been reserved to Westminster. The Northern Ireland Assembly passed legislation establishing a Department of Justice, and in April 2010 powers over policing, prisons and criminal law were transferred to the competence of the Assembly.⁹ Legislation in 2014 reclassified the composition of the Assembly from an excepted to a reserved matter (allowing for the subsequent reduction in the number of Assembly seats).¹⁰ The Corporation Tax (Northern Ireland) Act 2015 also made provision, not yet in force, for the transfer of powers over Northern Ireland's corporation tax rate to Stormont.

6 The powers and competences provided under the Scotland Act 1998 were extended under the Scotland Act 2012 and, to give effect to the promises of 'Devo Max' made during the 2014 independence referendum campaign, in the Scotland Act 2016. See N McEwen, 'A constitution in flux: the dynamics of constitutional change after the referendum' in A McHarg, T Mullen, A Page and N Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 225.

7 B Dickson, *Law in Northern Ireland* 3rd edn (Hart 2018) 32–34.

8 For example, the 1998 Agreement foreshadowed the eventual devolution of justice and policing to Northern Ireland, 'as appropriate'; Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Policing and Justice, para 7.

9 Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977). See G Anthony, 'The devolution of policing and criminal justice' (2011) 17 *European Public Law* 197.

10 Northern Ireland (Miscellaneous Provisions) Act 2014, s 6.

EU law affected many aspects of competences transferred to Northern Ireland's institutions, on issues from the environment to agriculture, to rights and equality. For as long as the UK was part of the EU, devolution required that Stormont carry into effect EU law which required transposition, such as EU directives, insofar as they fell within areas of devolved competence. These arrangements meant that there could be four different sets of measures implementing EU law within the UK, providing for a high degree of regulatory diversity.¹¹ Through this embrace of diversity, the EU order started 'catching up with the realities of the rise of devolution and decentralisation taking place across many parts of Europe'.¹²

Even when devolution has been misfiring in Northern Ireland, rights and equality obligations, including those derived from EU law, have never been far from leading the agenda. Where the Northern Ireland Assembly has failed to legislate to provide for rights and equality protections as required by EU law, the UK Government has stepped in to fulfil its obligations even when the Assembly was functioning.¹³ In periods when the Assembly has been suspended, moreover, Westminster has granted the Northern Ireland Secretary specific competences to legislate for same-sex marriage and reproductive rights.¹⁴

Before Brexit, the Northern Ireland Assembly had no competence to make law that was incompatible with EU law.¹⁵ Ministers of the Northern Ireland Executive are also bound by EU law in the exercise of their functions.¹⁶ The European Union (Withdrawal) Act 2018 altered these strictures, changing the restriction on the Assembly's law-making powers to the extent that 'EU law' would only cover retained laws (measures translated into domestic law by Westminster) once Brexit took effect. This enactment, however, was very much a holding statement; it could not account for how Northern Ireland's institutions would have to continue to engage with EU law because negotiations remained ongoing over the special arrangements which would apply to Northern Ireland upon Brexit.

11 See Case C-428/07 R (*Horvath*) v *Secretary of State for the Environment, Food and Rural Affairs* (2009) ECLI:EU:C:2009:458.

12 J Hunt, 'Devolution and differentiation: regional variation in EU law' (2010) 30 *Legal Studies* 421, 423.

13 The Sex Discrimination (Amendment of Legislation) Regulations 2008, SI 2008/963. See A Smith, M McWilliams and P Yarnell, 'Does every cloud have a silver lining?: Brexit, repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) 40 *Fordham International Law Journal* 79, 126.

14 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 4.

15 Northern Ireland Act 1998, s 6(2)(d).

16 *Ibid* s 24(1).

At this point, devolution existed in a half-life, following the Assembly's suspension in January 2017. The Northern Ireland Executive's departments continued to function without ministerial direction. Notwithstanding the additional powers provided to the Northern Ireland Secretary and civil servants under legislation passed in 2018¹⁷ and 2019,¹⁸ the UK Government remained concerned that there was not the capacity for civil servants to take the 'proactive decisions that are needed on public services or the economy'.¹⁹ The extraordinary decision-making capacity which was being vested in civil servants had made little impact in practice, not least because of their concerns over the probity of taking decisions without ministerial authorisation.²⁰

The grant of further powers to civil servants was therefore unlikely to bridge Northern Ireland's yawning governance shortfall, making formal direct rule all but inevitable in a no-deal situation. Once Boris Johnson's Withdrawal Agreement was concluded in October 2019, the supporting legislation was thus drafted both to allow the UK Government to manage all aspects of its implementation and with one eye towards the Assembly's possible restoration. When the outcome of the December 2019 general election cost the Democratic Unionist Party (DUP) its pedestal to speak for Northern Ireland's interests provided by its confidence-and-supply arrangement with the Conservative Party, the pieces quickly fell in place for the Assembly to be restored.²¹

The miracle on the Wirral and *New Decade*, New Approach

For all the hyperbole that surrounded Boris Johnson's new deal, first sketched out in private meetings at a Wirral hotel between the UK Prime Minister and Ireland's Taoiseach, the main body of the Withdrawal Agreement remained unchanged from Theresa May's deal. Even within the Protocol on Ireland/Northern Ireland, the human rights and equality elements of May's deal were untouched; what was article 4 of the 2018 version of the Protocol became, word-for-word,

17 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018.

18 Northern Ireland (Executive Formation etc) Act 2019.

19 HC Deb 5 September 2019, vol 664, col 363.

20 Constitution Committee, Northern Ireland (Executive Formation and Exercise of Functions) Bill (2018) HL 211, para 24. These legislative developments followed the outcome of the *Arc21* case (*Application by Colin Buick for judicial review* [2018] NICA 26) in which the Northern Ireland Court of Appeal found civil servants approving decisions which would ordinarily require ministerial approval unlawful.

21 See J Tonge and J Evans, 'Northern Ireland: From the Centre to the Margins' (2020) 73 *Parliamentary Affairs* 172, 180–184.

article 2 of the 2019 version.²² Article 2(1) obliges the UK to ensure that there is no diminution of rights and equality standards envisaged by the Belfast/Good Friday Agreement in Northern Ireland because of Brexit.²³ This ensures that the rights and equality protections in Northern Ireland's law should not fall below the base line of those protections which were operating at the time of Brexit as a result of the UK's withdrawal from the EU.

Brexit cannot be used to create an opportunity to reduce these protections. Six of EU law's directives on equality and non-discrimination are explicitly preserved in effect in Northern Ireland's law through this provision,²⁴ but article 2(1) also reaches beyond these measures, by 'including' them alongside other EU law relevant to the Belfast/Good Friday Agreement's provisions on rights, safeguards and equality of opportunity.²⁵ These six directives do not, of themselves, provide the entire picture of the EU equality *acquis*.

Despite the prominent concerns that after Brexit the EU Charter of Fundamental Rights 'is very unlikely to have any effect in the domestic law of any part of the UK',²⁶ article 2(1) opens up the possibility of the EU's rights architecture continuing to apply with regard to any EU law which remains in effect in Northern Ireland. The UK Government has maintained throughout the Brexit process that the Charter does not create standalone rights separate from other rules and principles of EU

22 See C Murray and B Warwick, 'The strange case of Northern Ireland's disappearing rights in the EU–UK withdrawal negotiations' (2019) 19 *European Yearbook on Human Rights* 35, 56–58.

23 Belfast/Good Friday Agreement 1998 (n 2 above).

24 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

25 See S de Mars, C Murray, A O'Donoghue and B Warwick, *Rights, Opportunities and Benefits' in Northern Ireland after Brexit* (NIHRC and Irish Human Rights and Equality Commission 2020) 41.

26 Dickson (n 7 above) 125.

law,²⁷ but the case law of the Court of Justice of the European Union (CJEU) is increasingly placing weight upon the Charter as a source of enforceable rights.²⁸ This means that the terms of non-diminution under article 2(1) of the Protocol could thus be subject to expansive readings which encompass aspects of the Charter that can be linked to the 1998 Agreement's rights and equality provisions.²⁹ But the extent of inherent alignment (rather than alignment with new EU rights and equality mechanisms through Joint Committee processes, as discussed below) will depend upon how these interests are protected, particularly by the Protocol's 'dedicated mechanisms'.³⁰ Article 2(2) explicitly connects oversight of these protections to the workings of the NIHRC, the ECNI and the Joint Committee of the Human Rights Commissions of Northern Ireland and Ireland.

Article 18 of the Protocol was, by contrast, a significant change introduced as a result of Boris Johnson's renegotiation of the Protocol. Under this provision, the Assembly will be permitted to vote once every four years, starting in 2024, on the continuation of provisions relating to trade as outlined in articles 5 to 10 of the Protocol. The Northern Ireland Assembly is not simply a bystander in the Protocol, but is an active actor within it, and the provisions within the Protocol are pegged to the idea of a functioning Assembly. The Protocol's default position is that the arrangements governing Northern Ireland's relationship with the EU Single Market for goods and EU Customs Union will persist unless the Assembly opts to terminate them.³¹ The requirement that these special arrangements for Northern Ireland must receive

27 See HM Government, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446 2017) para 2.23, and Department for Exiting the European Union, *Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017) 4.

28 See, for example, C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* ECLI:EU:C:2018:871, concerning the horizontal application of art 31 of the Charter on working conditions; E Frantziou, '(Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et al' (2019) 15 *European Constitutional Law Review* 306.

29 This was acknowledged by the UK Government in August 2020; Northern Ireland Office, 'UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: what does it mean and how will it be implemented?' (2020) para 15.

30 There remains the possibility that art 2's arrangements might be little more than a 'snapshot' of the protections existing at the point of Brexit, given its explicit focus on the equality directives, but narrow readings would raise concerns regarding the terms of the Belfast/Good Friday Agreement 1998 (n 2 above); Murray and Warwick (n 22 above) 59–60.

31 See C Murray and C Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 *Journal of Cross Border Studies in Ireland* 17, 25.

the Assembly's periodic approval will, moreover, only operate if the Assembly is functional. With Northern Ireland's two largest parties, Sinn Féin and the DUP, maintaining very different perspectives over Brexit and the implementation of the Protocol, there is every possibility of a further period of institutional stalemate in the future.

The Assembly's three-year suspension demonstrated that rights and equalities remain intensely contested elements of Northern Ireland's politics. This has been seen in division on matters ranging from language rights³² to citizenship (particularly in the context of the *DeSouza* case),³³ while Sinn Féin's promotion of what it has framed as its 'equality agenda' was met with DUP opposition.³⁴ The Brexit negotiations had placed an emphasis on the fractured nature of the relevant legal protections, and Westminster's action on reproductive rights and same-sex marriage had illustrated the limits to devolution. January 2020, however, marked a turning point in the political travails of Northern Ireland with the conclusion of the *New Decade, New Approach*³⁵ agreement and a return to the Northern Ireland Assembly. This agreement provided a new agenda of ambitions to be addressed within Northern Ireland's institutions, while also reconstituting the basis of a working relationship between its two largest parties, Sinn Féin and the DUP.

Although *New Decade, New Approach* was reached in full knowledge of the content of the revised Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, references within it to Brexit were limited. The deal specifically committed the UK Government to introducing primary legislation on the linkages between Northern Ireland and the remainder of the UK internal market, and not simply effecting changes through the powers contained in the European

32 The debate over language rights, particularly regarding an Irish Language Act, was not confined to the political sphere. Civil society and activist bodies were central in this debate and helped to shape political approaches on the issue through their engagement with parties and the processes which eventually led to the signing of the *New Decade, New Approach* deal; see D Mac Síthigh, 'Official status of languages in the United Kingdom and Ireland' (2018) 47 *Common Law World Review* 77.

33 *Secretary of State for the Home Department v DeSouza* (2019) EA/06667/2016 (UKUT). See also A Harvey, *A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998* (NIHRC and Irish Human Rights and Equality Commission 2020).

34 This has been delicately described as a 'differential affinity to rights'; R Whitaker, 'Debating rights in the new Northern Ireland' (2010) 25 *Irish Political Studies* 23, 27.

35 *New Decade, New Approach* (8 January 2020). For an overview, see also S Haughey, 'Back to Stormont: the New Decade, New Approach agreement and what it means for Northern Ireland' (2020) 91 *Political Quarterly* 134.

Union (Withdrawal Agreement) Bill then before Parliament.³⁶ Other elements addressed the role of Northern Ireland's institutions in the post-Brexit arrangements. These included a (short-lived) Executive Sub-committee on Brexit,³⁷ Brexit-specific commitments of support from the UK and Irish Governments,³⁸ and measures to increase the resilience of the institutions to, in part, withstand the challenges that Brexit would present between parties with different perspectives on the matter.³⁹ The Protocol was therefore already being built upon as a fixed point in Northern Ireland's constitutional arrangements. *New Decade, New Approach* also provided for the establishment of an Ad Hoc Committee on a Bill of Rights, reflecting the Protocol's special arrangements and the prominence of rights and equality debates in Northern Ireland's political discourse.⁴⁰

Despite this, one of the restored Assembly's first actions was to unanimously pass a motion rejecting the revised Withdrawal Agreement.⁴¹ In contrast to the divergent perspectives on Brexit within the Assembly, there was a united sense of purpose that the new Withdrawal Agreement and Protocol were bad for Northern Ireland and, for different reasons, that it should not be legislated for. In addition, similar positions were also adopted in Scotland⁴² and Wales.⁴³ This showed that none of the devolved administrations approved of the Withdrawal Agreement, and further, enshrining it in UK law demonstrated an alteration to the devolution legislation, including the Northern Ireland Act 1998.⁴⁴ Such a measure would ordinarily require the devolved legislatures to approve its terms through Legislative Consent Motions, under the terms of the Sewel Convention. Secure in its advice that such an authorisation was not a legal requirement, the UK Government brushed aside refusals of consent from all three devolved legislatures, a course softened only by Michael Gove's platitudes that this was 'a significant decision and it is one that we have not taken lightly'.⁴⁵

36 Ibid annex A, paras 8–12.

37 Ibid para 3.5.

38 Ibid annexes A and B.

39 Ibid pt 2, paras 14–18.

40 Ibid pt 2, para 28.

41 Official Report of the Northern Ireland Assembly, vol 125(3), 2–27 (20 January 2020).

42 Official Report of the Scottish Parliament, cols 46–93 (8 January 2020).

43 Official Report of the Welsh Parliament, paras 159–323 (21 January 2020).

44 See, in particular, the European Union (Withdrawal Agreement) Act 2020, sch 6.

45 See M Gove, 'Update on the EU (Withdrawal Agreement) Bill' (23 January 2020) HCWS60.

The European Union (Withdrawal Agreement) Act 2020

The UK Government and rights/equality safeguards

The European Union (Withdrawal Agreement) Act 2020 provided no detailed exposition of how the Withdrawal Agreement was to be given effect, but instead provided the UK Government with sweeping powers to implement the Protocol's provisions by adding a new section 8C into the European Union (Withdrawal) Act 2018. Under this provision a UK Government Minister 'may by regulations make such provision as the Minister considers appropriate ... to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement'.⁴⁶ This enabling legislation is framed in a manner which is exceptionally broad, permitting Westminster to manage the Protocol should the Assembly collapse or should Northern Ireland departments neglect to advance or implement necessary measures. As long as such activity is appropriate to the purpose of implementing the Protocol, it permits UK Government ministers to make any new law or amend any existing law, including statutes (and even this parent statute),⁴⁷ by means of secondary legislation.

Much of the explicit content of section 8C covers the making of secondary legislation with regard to the Withdrawal Agreement's arrangements for Northern Ireland as a territory which would continue to apply the rules of the EU single market for goods after Brexit. Nonetheless, a catch-all provision applies these powers to all aspects of the Protocol and the EU law measures referenced therein, meaning that they apply equally to the Protocol's rights and equality protections.⁴⁸ The limitations on these new powers must therefore be understood if the Belfast/Good Friday Agreement's principle of non-diminution of rights protections is to be upheld. The first important factor is procedural; applications of these powers which seek to amend existing primary legislation or retained EU law require an affirmative vote in the House of Commons.⁴⁹ This protection is, however, of limited practical effect when the UK Government enjoys the support of a substantial majority of MPs. An affirmative vote, moreover, does not transform legislation which would breach the UK's international human rights and equality commitments into compliant legislation.

It is significant that these powers have been parachuted into the European Union (Withdrawal Agreement) Act 2020. As such, they must

46 European Union (Withdrawal) Act 2018, section 8C(1)(a).

47 Ibid s 8C(2).

48 Ibid s 8C(7).

49 See Constitution Committee, *European Union (Withdrawal Agreement) Bill: Interim Report* (2019) HL 21, para 81.

be considered in light of the legal limitations within that statute upon the operation of ministerial powers to make statutory instruments to address statute book deficiencies arising from the UK's withdrawal from the EU for two years after the end of Brexit's transition/implementation period, meaning until 31 December 2022.⁵⁰ The most important of those restrictions, in the Northern Ireland context, is the Patten Amendment, a concession made by Theresa May's Government to parliamentary pressure during the passing of the original 2018 Act.

This amendment was contained in section 10 of the 2018 Act. For Morgan LCJ, who had cause to consider it during the *McCord* challenge to the legality of the UK leaving the EU without a Withdrawal Agreement, section 10 provided 'some protection for the existing arrangements under the Agreement to function'.⁵¹ In general terms, this protection requires ministers to use their powers under the Act in 'a way that is compatible with the terms of the Northern Ireland Act 1998'⁵² and to have 'due regard' for the UK's commitments under the 2017 UK/EU Joint Report.⁵³ It also, more specifically, excludes the use of section 8 powers to 'diminish any form of North–South cooperation'⁵⁴ or to 'create or facilitate [new] border arrangements between Northern Ireland and the Republic of Ireland'.⁵⁵ These specific protections, however, only apply to the original section 8 powers, not the additional section 8C powers regarding the Protocol. Section 10, moreover, does not extend to other legislation which was essential in the UK's implementation of its Belfast/Good Friday Agreement commitments, notably the Human Rights Act 1998.

It might nonetheless be possible to use the section 10 restrictions to protect against any ministerial action, including moving statutory instruments, which diminishes human rights or equality protections relevant to Northern Ireland, on the basis that ministers must have 'due regard' for the UK's Joint Report commitments.⁵⁶ Given that the commitments on rights and equality were subsequently given legal expression in article 2 of the Withdrawal Agreement's Protocol, it would be difficult for UK Government ministers to argue that any use of this power to diminish rights and equality protections applicable to Northern Ireland is acting with 'due regard' to these commitments. Having 'due regard', however, is not an outright bar on ministerial

50 European Union (Withdrawal) Act 2018, s 8(8).

51 *In re McCord* [2019] NICA 49, [118] (Morgan LCJ).

52 European Union (Withdrawal) Act 2018, s 10(1)(a).

53 *Ibid* s 10(1)(b).

54 *Ibid* s 10(2)(a).

55 *Ibid* s 10(2)(b).

56 EU–UK Phase 1 *Joint Report* (n 3 above) paras 52–53.

action, and much therefore depends on the approach of the courts to any such challenge. The UK Government, moreover, could always seek to circumvent these strictures using primary legislation (explored in more depth below).

The Northern Ireland Assembly and rights/equality safeguards

That the provisions regarding the Northern Ireland Assembly's powers to implement the Protocol overlap with the powers of the UK Government is unsurprising given that there was no clear indication that the Assembly would be functional to undertake any of the implementation when the Withdrawal Agreement Bill was first drafted. Even so, the legislation was particularly light on detail with regard to Stormont's role, to the extent that it provided no initial domestic law basis for the operation of the Protocol's 'Stormont lock'.⁵⁷ The approval mechanism, however, relates only to articles 5 to 10 of the Protocol. Stormont's rejection of these arrangements at one of the periodic approval points beginning in 2024 would therefore not affect the operation of the rights and equalities protections provided under article 2.⁵⁸

Section 22 of the Withdrawal Agreement Act 2020 gave the Assembly, within its areas of competence, comparable powers to alter existing law as required to implement the Protocol as those granted to UK Government ministers. These powers became part 1C of schedule 2 of the European Union (Withdrawal) Act 2018. As with the UK Government's powers, these powers must be used for the purpose of implementing or dealing with matters arising out of the Protocol. These powers are restricted by the limitations to competences of the devolved institutions, to which schedule 2 of the 2018 Act are subject.⁵⁹ Under the new part 1C, provision is made for the Assembly and the UK Government acting jointly, which might be particularly important on issues at the boundaries of the Assembly's competences. The Patten Amendment's general obligations to act in a manner compatible with the Northern Ireland Act 1998 and have 'due regard' for the pledges made in the 2017 UK/EU Joint Report apply to devolved institutions as they do to UK Government ministers.⁶⁰ The overlap between the

57 A Statutory Instrument was passed in December 2020 to address this in the form of the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, SI 2020/1500, which inserts a new s 56A and sch 6A into the Northern Ireland Act 1998.

58 See K Hayward, D Phinnemore and M Komarova, *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* (UK in a Changing Europe May 2020) 18.

59 European Union (Withdrawal) Act 2018, s 11.

60 *Ibid* s 10(1).

UK Government's powers and those of the Assembly thus speaks to a pervasive uncertainty over the continued operation of power sharing in Northern Ireland, and to the UK Government seeking to immediately have the powers at its disposal to manage Northern Ireland-related aspects of Brexit should an untimely collapse occur.

Further specific limitations relevant to the UK's commitments under article 2 of the Ireland/Northern Ireland Protocol are imposed under schedule 3 of the Withdrawal Agreement Act. The Assembly will have no competence to make law which is incompatible with article 2,⁶¹ and Ministers of the Northern Ireland Executive are to be restricted from exercising their functions in a manner which is incompatible with this Protocol provision.⁶² The scope of these restrictions is potentially broad. Article 2's commitment to non-diminution of rights and equality protections extends beyond the non-discrimination directives that the UK is specifically required to retain as part of Northern Ireland's law; the UK's obligation 'include[s]' these protections, but it does not stop at them. These new provisions could therefore provide the basis of judicial review challenges against any laws passed by the Assembly or exercises of powers by Ministers of the Northern Ireland Executive which arguably undermine rights and equalities protections.

In general, these human rights and equality aspects of the Withdrawal Agreement and the Protocol have hitherto remained relatively uncontroversial within Northern Ireland politics. Long-standing disputes over rights and equalities have manifested in proxy struggles, particularly around the *DeSouza* case, as opposed to extensive debate on the substantive content and implications of article 2.⁶³ Particularisation, it would appear, matters. Heated political disputes over rights have proven difficult to sustain in the abstract. For all that trade issues have to date been pushed to the fore, once article 2 takes effect and starts to impact upon particular cases, political dispute over its terms is sure to follow.

The UK Internal Market Act 2020

Article 2 of the Protocol and the commitment to non-diminution of rights in Northern Ireland might be the antithesis of the prominent agenda for a clean-cut exit from the EU, but these arrangements have

61 Northern Ireland Act 1998, s 6(2)(ca).

62 Ibid s 24(1)(aa).

63 The nationalist SDLP and Sinn Féin parties supported the case, while unionist parties broadly remained opposed to the premise of the case. One notable exception was the UUP's former leader Mike Nesbitt, who publicly spoke in support of the case and was widely criticised by his party for doing so. For a summary of key political perspectives on the case, see E DeSouza, 'The DeSouza case: an explainer' (13 November 2019).

hitherto generated little of the opposition which has been focused upon the Protocol's measures relating to Northern Ireland's place in the EU Single Market for goods. But, before addressing the enforcement of the Protocol's rights and equalities protections, we must address the destabilising effect of part 5 of the United Kingdom Internal Market Bill, introduced in September 2020, and the Northern Ireland Secretary's incendiary admission that the Bill's provisions would allow the UK Government to breach its commitments under the Protocol in 'a very specific and limited way'.⁶⁴

Clauses 42 and 43 of the Bill, as introduced,⁶⁵ sought to give the UK Government the power to take steps with regard to customs declarations and state aid which, by Brandon Lewis's own admission, would be contrary to the UK's obligations to give effect in domestic law to the provisions of the Ireland/Northern Ireland Protocol relating to customs declarations and state aid.⁶⁶ Clause 45, moreover, sought to permit ministers to take such action 'notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent', effectively curtailing any possibility for legal challenge against this breach in the domestic courts.

Although these provisions related specifically to state aid and barriers to trade, rights and equality protections were soon drawn into the narrative around the legislation in Northern Ireland Assembly debates:

The dreams of future generations cannot be crushed by the imposition of a Tory nightmare vision of the internal market. The provisions of the internal market [Bill] risk undermining the human rights and equality protections in the Irish protocol, which states that there should be no diminution of rights.⁶⁷

That the Internal Market Bill's provisions did not relate to article 2 might be thought to mark such claims as game playing, but they are difficult to dismiss offhand. The curtailing of the ordinary workings of judicial oversight, even with the amendment of clause 45 to deny any power to interfere with incorporated provisions of the European Convention on Human Rights (ECHR), itself imperilled the right of access to the

64 Brandon Lewis MP, HC Deb 8 September 2020, vol 679, col 509.

65 All references herein are to the Bill as introduced to the House of Commons in September 2020.

66 Withdrawal Agreement (n 1 above) art 4.

67 M Anderson MLA, Official Report of the Northern Ireland Assembly, vol 130(7), 54 (22 September 2020).

courts and drew prompt criticism from the NIHRC and ECNI.⁶⁸ In more emotive terms, Lord Neuberger presented this measure as being on a ‘very slippery slope’ towards ‘dictatorship’ or ‘tyranny’.⁶⁹

The introduction of legislation which sought to circumvent obligations assumed not 12 months previously, moreover, called into question the UK Government’s attitude towards upholding other Withdrawal Agreement commitments. At the time the Internal Market Bill was introduced, the NIHRC and ECNI’s putative special oversight and enforcement powers with regard to the Protocol, which will be explored in the next section, remained subject to commencement regulations which had yet to be tabled.⁷⁰ The shock which accompanied the Internal Market Bill and the UK Government’s delay in confirming that the Commissions’ new powers would commence at the end of the transition/implementation period contributed to an atmosphere in which the Protocol’s rights and equalities protections suddenly appeared less secure.⁷¹ It undermined the trust necessary between the Northern Ireland parties, the UK Government and the EU to make the Protocol function and became a red-line issue for the EU in negotiations over a future relationship agreement.

The Bill faced extensive challenge in Parliament. Bouncing several times between the House of Commons and the House of Lords, it became an Act on 17 December 2020, providing the UK with a default fallback position should an overarching future relationship deal with the EU not be reached. The Bill’s most controversial clauses were, however, removed once agreement had been reached over the implementation of the Ireland/Northern Ireland Protocol.⁷² This in turn cleared the way for the UK and EU to conclude the Trade and Cooperation Agreement (TCA) on 24 December 2020.⁷³ The manner in which the Internal Market

68 NIHRC and ECNI, [Briefing on the Internal Market Bill](#) (2020) para 1.12.

69 O Bowcott, ‘Brexit strategy risks UK “dictatorship”, says ex-president of Supreme Court’ *The Guardian* (7 October 2020).

70 European Union (Withdrawal Agreement) Act 2020, s 42(7).

71 Parts of sch 3 of the European Union (Withdrawal Agreement) Act 2020 took effect in May 2020 (European Union (Withdrawal Agreement) Act 2020 (Commencement No 3) Regulations 2020, SI 2020/518), but no legislation provided for the commencement of the dedicated mechanism arrangements at the end of the transition window until 21 December 2020 (SI 2020/1622); The European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 (Commencement, Transitional and Savings Provisions) Regulations 2020, Regulation 5(i).

72 For details on the outcomes of these committee processes, see M Gove, *The Northern Ireland Protocol* (December 2020) CP346.

73 [Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part](#) (24 December 2020).

Bill was introduced nonetheless remains significant, illustrating the ongoing likelihood of the special arrangements applicable to Northern Ireland becoming the subject of negotiation brinkmanship between the UK Government and the EU.

OVERSIGHT AND ENFORCEMENT OF THE PROTOCOL'S HUMAN RIGHTS AND EQUALITY PROTECTIONS

The human rights and equality Commissions' mandates and EU law

The NIHRC's mandate under the Northern Ireland Act 1998, as enacted, covered the oversight of 'the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights'.⁷⁴ This clearly raised issues of EU law, and, in the context of Brexit, the Commission was drawn into debates over whether the arrangements for the UK's withdrawal from the EU would involve a diminution of human rights protections and a consequent breach of the UK's Belfast/Good Friday Agreement commitments. As noted above, the outcome of these debates was article 2(1) of the Withdrawal Agreement's Ireland/Northern Ireland Protocol, which includes an open-ended obligation upon the UK Government to secure non-diminution of rights in Northern Ireland notwithstanding the UK's withdrawal from the EU. The Withdrawal Agreement also obliges the UK to 'facilitate' the work of the NIHRC and ECNI.⁷⁵ Together, these obligations are intended to copper-fasten the UK's existing rights-and-equality commitments under the Belfast/Good Friday Agreement insofar as they might be affected by Brexit. In order to assess the effectiveness of these arrangements, however, the new roles of the NIHRC and ECNI must be understood in the context of the oversight and enforcement arrangements of the Withdrawal Agreement as a whole.

The Withdrawal Agreement

The CJEU is the final arbiter on the application of EU law and retained this role during the Withdrawal Agreement's transition/implementation period which operated between February and December 2020.⁷⁶ Thereafter, other than potential violations which occurred before the end of the transition/implementation period, its general jurisdiction with regard to the UK will generally end. Special rules, however, cover aspects of the settlement, including aspects of

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

75 Withdrawal Agreement (n 1 above) PINI, art 2(2).

76 Ibid art 131.

the Protocol on Ireland/Northern Ireland and the rights of EU citizens in the UK and UK citizens in the EU post-Brexit. Setting aside the latter issues for present purposes, under these provisions the CJEU's ongoing jurisdiction with regard to Northern Ireland will only apply to the rules of the EU single market in goods and related level-playing field obligations, such as state aid rules.⁷⁷ Its jurisdiction does not extend over the operation of the Protocol's rights and equality obligations.⁷⁸

The Withdrawal Agreement makes extensive provisions for implementation and dispute settlement and obliges the parties to make recourse to these where disputes arise. At the apex of this system is the Joint Committee, which is made up of representatives appointed by the UK and EU.⁷⁹ It will meet at least once a year and its decisions have 'the same legal effect as this Agreement'.⁸⁰ Although its decisions are therefore binding over the UK and EU, the balance of representatives means that they will be issued by a process of mutual consent. Under the Protocol's rights and equalities provision, however, its implementation function can extend indefinitely. If new EU law addresses issues which fall within the scope of the Belfast/Good Friday Agreement's 'rights, safeguards and equality of opportunity' provisions, then the Joint Committee must decide whether these new measures, which will be applicable in Ireland, should also apply in Northern Ireland.⁸¹ In light of the 1998 settlement's cross-border linkage of rights protections,⁸² such a dynamic application of article 2's obligation might prove difficult for the UK Government to resist (even though it has disputed the impact of these linkages throughout the Brexit process).

Specialised Committees staffed by subject experts have also been established under the Withdrawal Agreement to 'assist the Joint Committee in the performance of its tasks'.⁸³ This means that they will be able to address issues within their remit before passing them to the Joint Committee for decision or recommendation. Under the procedures set out in Annex VIII of the Withdrawal Agreement, both the Specialised Committees and the Joint Committees will operate on a 'closed door' basis; '[t]he relevant rules suggest that meetings would be confidential, decisions might not be published, and even summary

77 Ibid PINI, art 5 and art 7 to 10.

78 Ibid PINI, art 12(4).

79 Ibid art 164.

80 Ibid art 166.

81 Ibid PINI, art 13(4).

82 Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 9.

83 Withdrawal Agreement (n 1 above) art 164(5)(b).

minutes might not be made publicly available'.⁸⁴ The work of one of these Specialised Committees is devoted to the implementation of the Protocol on Ireland/Northern Ireland. This system has important implications for the NIHRC, together with the Joint Committee and the ECNI. Under article 14(c) of the Protocol, the Ireland/Northern Ireland Specialised Committee is specifically tasked with considering any matters relating to article 2 of the Protocol which are brought to its attention by these bodies.

For all of its sophistication, this committee system will struggle to replicate the oversight currently provided by the CJEU where fundamental rights and equality protections are at issue. Northern Ireland residents affected by the implementation of the Withdrawal Agreement could have limited opportunity to engage with the Specialist Committee, unless the statutory NIHRC or ECNI takes up their cause. Even if an issue is heard, the internal processes of the committee system are opaque and could result in no meaningful outcome (if there is no agreement between UK and EU representatives) and no reasoned decision made publicly available.⁸⁵

The Withdrawal Agreement Act 2020

As introduced under section 23 of the 2020 Act, schedule 3 made important modifications to the provisions of the Northern Ireland Act 1998 which detail the NIHRC's functions.⁸⁶ These reforms are the culmination of a prolonged struggle over the NIHRC's litigation competences. At its creation, the NIHRC was conceived as a 'visible and accessible body' which would work to restore the trust in the state's commitment to human rights which had been undermined by the decades of conflict in Northern Ireland.⁸⁷ Many judges, however, have long given the distinct impression that they regarded the Commission as an unnecessary interloper.

Its competence to intervene in cases was the subject of protracted litigation.⁸⁸ Even after this role was grudgingly accepted by the

84 EU Committee, *Brexit: The Withdrawal Agreement and Political Declaration* (2018) HL 245, para 37.

85 See EU Committee, *The Protocol on Ireland/Northern Ireland* (2020) HL 66, para 310.

86 Northern Ireland Act 1998, ss 69 and 71.

87 S Livingstone, 'The Northern Ireland Human Rights Commission' (2000) 15 *Irish Political Studies* 163, 170.

88 *In re Northern Ireland Human Rights Commission* [2002] UKHL 25. See A Smith, 'Access to intervene: the Northern Ireland Human Rights Commission and the Northern Ireland Act 1998' [2003] *European Human Rights Law Review* 423.

House of Lords, judicial sniping continued. In the *Holy Cross* case,⁸⁹ touchstone litigation for the place of human rights in Northern Ireland after the 1998 settlement, Lord Hoffmann saw no benefit to the Commission's role and bluntly asserted that its intervention had 'only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant'.⁹⁰ All of which set the scene for the UK Supreme Court's 4:3 decision in 2018 that the NIHRC was not granted standing under the Northern Ireland Act 1998 to pursue a judicial review of Northern Ireland's abortion law.⁹¹ It did so over Lord Kerr's powerful dissent that such standing was very much the point of section 69(5) of the 1998 Act when read in light of the Belfast/Good Friday Agreement provisions it was enacted to implement.⁹²

In response to this sorry state of affairs, schedule 3 modifies section 71 of the 1998 Act to explicitly provide for the Commission's standing to institute legal proceedings under the Human Rights Act 1998. Even though this reform is thus tangential to Brexit, in providing a secure legal basis for the Commission's litigation activity, it makes the institution a much more potent instrument for exercising the new powers granted to it with regard to Brexit. Put simply, this reform frees the Commission from persistent worries about its standing which have long left it looking over its shoulder. This enables the NIHRC (and the ECNI) to flex its new powers inserted as sections 78A to 78E of the Northern Ireland Act 1998, relating to Brexit and human rights. Three of these powers will be outlined below, and the fourth, a litigation function, will be explored in the next section.

The first of these are oversight powers; tasking the Commission with monitoring and reporting to the UK Government and Northern Ireland Executive on the implementation of article 2(1),⁹³ requiring reply to their recommendations,⁹⁴ and enabling them to issue formal advice to the Assembly on compatibility of legislative proposals with article 2(1).⁹⁵ This pre-legislative oversight role corresponds, to an extent, with existing duties to advise the Assembly upon its law making.⁹⁶ The extension of these powers to cover the law making of the Secretary of

89 *In Re E (a child)* [2008] UKHL 66.

90 *Ibid* [3].

91 *In re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2018] NI 228.

92 *Ibid* [168]–[169]. See J Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82 *Modern Law Review* 525, 534.

93 Northern Ireland Act 1998, ss 8A(1)–(2) and 78B(1)–(2).

94 *Ibid* ss 78A(3) and 78B(3).

95 *Ibid* ss 78A(5)–(6) and 78B(5)–(6).

96 *Ibid* ss 69(4) and 73(3).

State with regard to Northern Ireland is potentially a more complex task, with the Commissions not being embedded in Westminster, but arguably a necessary one in light of the unstable nature of power sharing in Northern Ireland and the UK Government's broad powers under the 2020 Act with regard to the Protocol's implementation.

The second element imposes a duty upon the Commission to educate and inform the general public in Northern Ireland about the operation of article 2.⁹⁷ The duty to educate and inform the public regarding article 2 again closely correlates to their existing functions with regard to fostering awareness of human rights and equality in Northern Ireland.⁹⁸ It, moreover, responds to the Commission's recommendations that more must be done by public bodies to educate and inform on the rights impacts in Northern Ireland of Brexit.⁹⁹ If additional resources are not provided to facilitate this duty, however, following a decade of budget cuts the Commissions risk not being able to perform their task adequately, whilst other public bodies might step back from this task in light of the Commission's new mandate.¹⁰⁰

The third element of these provisions brings into domestic law the Withdrawal Agreement's provisions regarding the formal role of the Commission in feeding concerns over article 2's implementation into the treaty's Committee system (as discussed above).¹⁰¹ This new power, however, could appear more impressive on paper than in practice. The nature of the Withdrawal Agreement's committee system, and particularly the lack of openness and transparency in its decision making, makes it an uncertain avenue for rights protection.

The Commission's fourth new function, bringing or intervening in judicial review proceedings related to potential breaches of article 2(1), therefore requires specific attention.

Direct effect, supremacy and article 2(1) Protocol on Ireland/Northern Ireland

Potentially the most important of the new powers vested in the Commissions is their ability to bring or intervene in legal proceedings relevant to article 2(1) of the Protocol¹⁰² and to assist others engaged in

97 Ibid ss 78A(7) and 78B(7).

98 Ibid ss 69(6) and 73(3).

99 NIHRC, *The 2018 Annual Statement: Human Rights in Northern Ireland* (2018) 192.

100 The adequacy of the NIHRC's budget has been questioned since its inception; B O'Leary, *A Treatise on Northern Ireland: Volume 3 – Consociation and Confederation* (Oxford University Press 2019) 200.

101 Northern Ireland Act 1998, ss 78A(9) and 78B(9).

102 Ibid s 78C(1).

litigation drawing upon article 2(1).¹⁰³ To understand the significance of this power, this Protocol provision must be understood in the context of the Withdrawal Agreement as a whole. The Withdrawal Agreement might not be an EU law treaty, but article 4 nonetheless vests its provisions with the EU law concepts of direct effect and supremacy, provided that they meet the requirements for direct effect.¹⁰⁴ This means that such provisions will continue to be enforceable within the UK's domestic courts after Brexit. With regard to article 2 of the Protocol, the EU directives relating to equality listed in annex 1 of the Protocol have all long operated on the basis that they are directly effective within domestic law.¹⁰⁵ The broader commitment to non-diminution of rights is, by its nature, more vague, and this want of clarity puts the direct effect of this commitment in doubt.¹⁰⁶

This difficulty is not necessarily resolved by the UK's implementation legislation. It is not ordinarily possible for parties to a judicial review action to ground that action upon unincorporated treaty provisions.¹⁰⁷ Article 2 of the Protocol is not explicitly incorporated into domestic law in the legislation. Instead, the legislation states that such 'rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement ... are without further enactment to be given legal effect or used in the United Kingdom'.¹⁰⁸ Which again leaves open to question whether or not the UK's legal obligations under article 2 cover only the listed EU directives or extend to the general commitment to the non-diminution of rights and equality protections.

A narrow reading of these provisions does not account for the NIHRC and ECNI being granted the explicit power to use judicial review to uphold the UK's article 2 commitment.¹⁰⁹ This power could change the dynamic of protecting against a diminution of rights after

103 Ibid s 78D(1).

104 As classically formulated in *Van Gend*, EU Law provisions enjoy direct effect within the domestic legal orders of member states when they are clear, provide for negative obligations, unconditional, make no reservation for member states and are not dependent for their effect on member state implementation measures; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

105 See U Belavusau and K Henrard, 'A bird's eye view on EU anti-discrimination law: the impact of the 2000 equality directives' (2019) 20 *German Law Journal* 614, 618–619; and P Craig, 'The legal effect of directives: policy, rules and exceptions' (2009) 34 *European Law Review* 349.

106 de Mars et al (n 25 above) 43.

107 See, for example, *Secretary of State for the Home Department v DeSouza* (n 33 above).

108 European Union (Withdrawal) Act 2018, s 7A(1).

109 Northern Ireland Act 1998, s 78C(1).

Brexit. If the general commitment against diminution can be litigated in this way, then public bodies could potentially be held to account for breaches of any aspect of this commitment, not simply those explicitly set out in the retained EU directives. The legislation, however, denies that this provision creates any new cause of action.¹¹⁰

This thoroughly ambiguous statutory jumble might therefore have appeared set for litigation once the implementation/transition period elapsed, had the UK Government not issued a belated clarification, through a Written Answer in the House of Lords, that it ‘considers that article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts’.¹¹¹ This might appear to be a slender hook on which to hang the broad range of rights protections which could operate under article 2, especially in light of the reassertion of parliamentary sovereignty in the 2020 Act¹¹² and the UK Government’s willingness to breach other Protocol provisions. This hook, however, does not simply sustain the NIHRC and ECNI’s pre-Brexit powers with regard to EU law, but yokes them into redefining the protection of human rights and equality in Northern Ireland after Brexit.

TOWARDS A BILL OF RIGHTS FOR NORTHERN IRELAND?

New momentum: New Decade, New Approach

New Decade, New Approach brought the issue of establishing a Bill of Rights back onto the table, announcing an Ad Hoc Northern Ireland Assembly Committee on a Bill of Rights, which was established in February 2020.¹¹³ In an attempt to prevent this body from becoming a talking shop, or succumbing to some of the intractable differences in opinion between Members of the Legislative Assembly (MLAs) on many of the issues within its remit, it was determined that it would be supported by a panel of five experts, appointed by the First and deputy First Ministers.¹¹⁴ It was not immediately clear who these experts would be, or who would constitute an ‘expert’ on the matter. Neither were the roles of the experts, the terms of reference for their positions,

110 Ibid s 78C(2).

111 Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020).

112 European Union (Withdrawal Agreement) Act 2020, s 38.

113 See also C Rice, ‘Briefing on the New Decade New Approach deal in Northern Ireland – governance and identity’ (24 January 2020).

114 *New Decade, New Approach* (n 35 above) paras 5.27–5.28.

or practicalities such as term of office or payment outlined within *New Decade, New Approach*. It was not until June 2020 that these practical details were clarified by Executive Office officials.¹¹⁵

In light of this guidance, the Committee expressed concern that it could not justify the financial cost of calling upon the panel to offer advice, at up to £2500 per meeting, nor were members clear over what would be required of the panel.¹¹⁶ Some members were also unsure why five experts had been deemed an appropriate number and questioned whether a panel was needed at all in light of experts from a range of backgrounds having been forthcoming to provide evidence at no cost.¹¹⁷ While Mike Nesbitt (Ulster Unionist Party (UUP)), Paula Bradshaw (Alliance Party) and the Michelle McIlveen (DUP) opted to seek clarification from the Executive Office on these particulars, two Sinn Féin members voted against doing so, primarily on the basis that it could lead to delays in the appointment of the panel. This division might indicate that the expert panel was a Sinn Féin-sponsored element within *New Decade, New Approach*.

The dispute furthermore illustrates that the divergences between the Northern Ireland political parties on rights and equalities have not abated. However, the strong emphasis that has to date been placed on expert evidence and public input has mitigated the opportunity for these differences to prevail in Committee hearings. The real test will come when the Committee attempts to process this information. It is perhaps at this point also that an independent expert panel could prove most valuable. Given that other aspects of *New Decade, New Approach* have been quietly abandoned, notably the Executive Subcommittee on Brexit,¹¹⁸ and the difficulties in getting the First Minister and deputy First Minister to agree on high-profile appointments since the Assembly reconvened,¹¹⁹ it remains to be seen whether this panel will ever be appointed.

The Committee's remit is to 'consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights'.¹²⁰ In light of the NIHRC having been the body assigned the task of laying the groundwork for a Bill of Rights

115 As of April 2021, a panel remained to be appointed.

116 *Minutes of Proceedings*, 4 June 2020.

117 *Minutes of Proceedings*, 18 June 2020.

118 *New Decade, New Approach* (n 35 above) pt 2, para 16.

119 Most notably, a replacement head of the Northern Ireland Civil Service remains to be appointed despite the completion of shortlisting and interview processes for potential candidates. In March 2021, it was decided to split the duties of the post across two positions.

120 *New Decade, New Approach* (n 35) pt 2, para 28.

in the Belfast/Good Friday Agreement,¹²¹ this raises a question as to why the Commission has not been afforded a defined role in these fresh deliberations, and what is to be gained by appointing a panel of experts which might be thought of as acting in its stead. It could be that, having submitted its final advice on a Bill of Rights over a decade ago, the Commission itself regards its role as fulfilled. The Committee's work, moreover, could generate more political acceptance for Bill of Rights proposals than the Commission was able to achieve. The stalled appointments process for the panel of experts nonetheless suggests that some parties regard the Committee as a convenient way to either further undermine the concept of a Bill of Rights for Northern Ireland or, at least, to delay any possible reform.¹²²

A de facto Northern Ireland Bill of Rights?

The Committee's prominence within *New Decade, New Approach* is nonetheless reflective of wider domestic, national and international political developments which contributed to the collapse of the Assembly and Executive in 2017 and snowballed in the intervening years. The January 2020 deal was reached in full knowledge of the Protocol's terms, and of the UK Government's antipathy towards its ECHR commitments and its reluctance to confirm those commitments as part of the EU–UK Future Relationship negotiations.¹²³ Vocal elements within the Conservative Party have long trumpeted modifying or repealing the Human Rights Act 1998 as way of asserting the UK's sovereignty post-Brexit, notwithstanding the consequences of such upheaval for Northern Ireland.¹²⁴

The UK Government thus also potentially benefits from the Ad Hoc Committee's quest for a politically acceptable Bill of Rights. Given its expressed desire to preserve the protections for Northern Ireland necessary to maintain compliance with its Belfast/Good Friday Agreement obligations, and its corresponding eagerness to prevent those obligations from working against its political ambitions to unpick parts of the Human Rights Act, it cannot be assumed that the 1998 Agreement's explicit references to the ECHR will provide sufficient

121 Belfast/Good Friday Agreement 1998 (n 2) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 4.

122 This strategy mirrors the efforts of the UK Coalition Government between 2010 and 2015 to bury their differences over human rights in an extended consultation process; M Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' [2013] *European Human Rights Law Review* 137.

123 O Boycott, 'UK Government plans to remove key human rights protections' *The Guardian* (13 September 2020).

124 See C Harvey, 'Mutual respect? Interrogating human rights in a fractured union' (2018) 29 *King's Law Journal* 216, 231–234.

enough basis to ensure the Human Rights Act's retention in its current form. Nor does the inclusion of UK commitments to the ECHR within the TCA mean that the practical operation of human rights in the other parts of the UK cannot be subject to change. A distinct Bill of Rights for Northern Ireland might therefore become a necessary element of this project.¹²⁵

The Ad Hoc Committee has given fresh momentum to the debate over a Bill of Rights for Northern Ireland, but it remains unclear how this momentum will be translated into practical outcomes.¹²⁶ *New Decade, New Approach* simply states that the Committee should 'consider' the creation of a Bill of Rights.¹²⁷ It could therefore offer advice on the codification of the existing legal framework for rights and equality protections in Northern Ireland into a single document, lead moves within the Assembly to advance this proposition, or make proposals for enhancing the system for rights and equality protections. Indeed, some combination of all three is a possibility. As Harvey and Russell once warned, a 'bill of rights that is not properly grounded will have an insecure future and risks irrelevance'.¹²⁸ Article 2 therefore provides a useful anchor point for the Committee's work, given that it has proven, at least prior to its implementation and resultant litigation, to be an uncontroversial element of the Protocol. But focusing on this measure, and upon maintaining the ECHR's incorporation, could well come at the expense of the Committee's work providing any form of novel departure.

Even if the work of the Committee comes to nothing,¹²⁹ article 2 of the Protocol will continue to provide Northern Ireland with a distinct set of protections for rights and equalities. In terms of substantive protections, article 2 reaches beyond the specific EU directives protecting against discrimination.¹³⁰ Even though the specific

125 See S de Mars, C Murray, A O'Donoghue and B Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) 84–85.

126 See C Harvey and A Smith, 'Designing Bills of Rights in contested contexts: reflections on the Northern Ireland Experience' (2020) 44 *Fordham International Law Journal* 357, 392–394.

127 *New Decade, New Approach* (n 35 above) pt 2, para 28.

128 C Harvey and D Russell, 'A new beginning for human rights protection in Northern Ireland?' [2009] *European Human Rights Law Review* 748, 753.

129 At the time of writing, the pressure on the Human Rights Act is apparently diminishing as a result of the progress of the EU–UK Future Relationship negotiations; D Boffey, 'Boris Johnson set for compromise on Human Rights Act – EU sources' *The Guardian* (7 October 2020).

130 See n 25 above.

directives began 2021 as retained EU law throughout the UK,¹³¹ there is immediate scope for their application in other parts of the UK to diverge and also the likelihood, discussed above, that the application of these measures within Northern Ireland's legal order will keep pace with new developments in EU law.¹³² The extensive range of oversight mechanisms applicable to article 2, moreover, will extend to Northern Ireland, and not to other parts of the UK, from the end of the transition/implementation period.

The combination of article 2 of the Protocol's potentially far-reaching terms, its enforceability in domestic courts and its exclusion from the workings of the Stormont lock pose one further question about the future of Northern Ireland's legal order. If Northern Ireland's human rights and equality protections are now so distinct from those in operation in the remainder of the UK,¹³³ does Northern Ireland already have its own *de facto* Bill of Rights? Article 2 takes a place alongside the distinct protections for the ECHR's application in Northern Ireland under the Belfast/Good Friday Agreement¹³⁴ and Northern Ireland law's protections against discrimination on grounds of political opinion.¹³⁵ Rights and equality provisions in Northern Ireland will thus take on a unique character, divergent from the remainder of the UK and the EU. Taken as a whole, these distinctive measures already amount to an uncodified Northern Ireland Bill of Rights. Oxymoron though that might be, it is perhaps in keeping with the compromises inherent in Northern Ireland's post-1998 governance order.

CONCLUSION

The Withdrawal Agreement fundamentally changes how rights derived from EU law are to be protected in the context of Northern Ireland post-Brexit. The non-diminution guarantee, derived from the Belfast/Good Friday Agreement, is prominently placed within the revised Agreement. But, if this commitment is to be meaningful, the work of

131 European Union (Withdrawal) Act 2018, s 4(1). See J Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' [2019] Public Law 683.

132 Seen 82 above.

133 See ECNI, 'Gaps in equality law between Great Britain and Northern Ireland' (March 2014).

134 Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 2.

135 Northern Ireland Act 1998, s 75(1) and Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162. See *Lee v Ashers Baking Company Ltd* [2018] UKSC 49; [2019] NI 96.

Northern Ireland's statutory human rights and equality bodies will have to change to match their new-found gatekeeper status where article 2 of the Protocol is at issue.

The UK's obligation to 'facilitate' their work might well ring hollow if their expanded roles are not accompanied by a reversal of a decade of funding cuts.¹³⁶ Scarce resources that are expended in supporting litigation before the Northern Ireland Courts will not be available to prepare memoranda for the attention of the Specialised Committee, engaging in pre-legislative scrutiny or public education. In addition, they might have to make choices over whether to focus on the continuing implementation of EU law's non-discrimination directives or the potentially broader implications of article 2.

In time, article 2's arrangements could provide a framework for rights and equality protections in Northern Ireland which operates very differently from the remainder of the UK and, perhaps, even circumvent the need for Northern Ireland's politicians to reach an agreement over a Northern Ireland Bill of Rights. This would also have the virtue of contributing to the degree of cross-border rights alignment envisaged by the Belfast/Good Friday Agreement. Such a solution to the intractable debates over a Northern Ireland Bill of Rights would, however, make for a rather minimalist project and one of preservation, rather than advancement, of rights and equality within Northern Ireland's distinct constitutional order.

136 Withdrawal Agreement (n 1 above) PINI, art 2(2). For UK Government commitments in this regard, see Northern Ireland Office (n 29 above) para 30.