Summer Vol. 75 No. 3 (2024)

NORTHERN IRELAND

LEGAL QUARTERLY

NORTHERN IRELAND
LEGAL QUARTERLY

JOURNAL INFORMATION

The *Northern Ireland Legal Quarterly* is a leading peer-reviewed journal that provides an international forum for articles, commentaries and notes in all areas of legal scholarship and across a range of methodologies including doctrinal, theoretical and socio-legal. The journal regularly publishes special issues within this broad remit.

Established in 1936, the journal has a history and rich vein of legal scholarship, combining distinct publications on the law of Northern Ireland, and prominence within the School of Law at Queen's University Belfast, with leading contributions to the discussion and shaping of law across the common law world and further afield. The School of Law at Queen's University Belfast took over the publication of the journal from SLS Legal Publications (NI) Ltd in 2008, where it has since been published quarterly. The journal became an online-only publication in January 2017.

ISSN 2514-4936 (online) 0029-3105 (print)

AVAILABILITY AND ARCHIVES

The *Northern Ireland Legal Quarterly* is committed to making its contents widely available, to broaden our readership base. At least one article per issue is made available on an open access basis and may be published in advance. All articles become available on an open access basis on our website one year after publication.

All contributions to the journal become available on HeinOnline one year after publication (with issues going back to its launch in 1936) and LexisNexis three months after publication (with issues from 2019). The journal's contents appears on a growing range of indexing and abstracting services.

Since 2018 the journal's contents is promoted via social media and the Contributors' Blog.

In the summer of 2020, we expanded the reach and use of the *Northern Ireland Legal Quarterly* by adding 17 more years of content to the journal's existing archives. These now go back to 1999 (volume 50) and are widely accessed by our readership. Visit our Archive pages for further details.

SUBMISSIONS

The journal welcomes submissions of articles, commentaries, notes and book reviews on a rolling basis. Please see our 'For Authors' section for further details.

If you have any queries about the suitability of your article for the journal or if you have an idea for a special issue, please contact the Chief Editor Professor Mark Flear. For the contribution of commentaries and notes, please contact Dr David Capper. For book reviews, contact Dr Clayton Ó Néill.

SUBSCRIPTIONS

Subscriptions pay for a minimum of three months of exclusive access to the journal's latest contents (and up to one year for those who do not have access to LexisNexis).

NORTHERN IRELAND
LEGAL QUARTERLY

Autumn Vol. 75 No. 3 (2024)

Special Issue:
The Windsor Framework – guarantees, gaps and governance

Guest editors: Tobias Lock, Mary Dobbs and Karen Lynch Shally

Contents

Commentaries and Notes

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 433–442
Editorial DOI: 10.53386/nilq.v75i3.1152

The Windsor Framework – guarantees, gaps and governance

Tobias Lock
Mary Dobbs
Karen Lynch Shally
Maynooth University
Correspondence email: tobias.lock@mu.ie.

This special issue of the *Northern Ireland Legal Quarterly* aims to uncover and examine the many layers of the Protocol on Ireland/Northern Ireland, as reformed by the Windsor Framework, focusing specifically on governance, fundamental rights and movement of people. It is the product of a workshop held in June 2023 at Maynooth University to mark the launch of the Maynooth Centre for European Law.[1] While significant literature existed on some core aspects of the original Protocol, gaps remained and the ongoing political and legal developments necessitated a renewed analysis. This was exemplified by the Windsor Framework, which was adopted only three months before the workshop was held, and the restoration of Northern Ireland's Executive in February 2024 while the articles herein were being finalised.

The highly politicised nature of the Brexit process is in many ways crystallised in the legal questions and legal solutions for dealing with the United Kingdom's (UK's) only land border with the European Union (EU) and the unique political situation in Northern Ireland. Successive UK governments have struggled with trying to reconcile countervailing, and at times contradictory, demands and desires: the EU's desire to protect the integrity of the single market, while keeping the border between Ireland and Northern Ireland open and free from checks; the (largely self-imposed) objective of removing, as far as possible, any influence of EU law from the laws of the UK, including any controls by the Court of Justice of the EU (CJEU); and the demands – mostly coming from unionists in Northern Ireland – not to create a border for goods in the Irish Sea.

1 See Maynooth Centre for European Law. The workshop was supported by Maynooth University Social Sciences Institute's (MUSSI's) Small Grants Scheme and Maynooth University's Impact Through Dissemination Support Fund.

THE CONTENTIOUS BACKDROP TO THE WINDSOR FRAMEWORK

These contradictions have been haunting the Protocol on Ireland/Northern Ireland since its inception. They proved to be the downfall of the Theresa May premiership after she was unable to secure House of Commons support for the 'backstop' version of the Protocol. The renegotiated Protocol which became part of the Withdrawal Agreement – far from having achieved the Boris Johnson Government's goal of 'getting Brexit done' – would soon come under attack too, with considerable dissatisfaction amongst Northern Irish unionists in particular. This prompted the Johnson Government to attempt to renegotiate and, failing that, to unilaterally disapply the Protocol in part or a move infamously described by then Northern Ireland Secretary, Brandon Lewis, as breaking international law 'in a very specific and limited way'.[2] This triggered push-back from the EU, with threats of legal action – a situation repeated on several occasions during Boris Johnson's reign,[3] which itself then ended somewhat prematurely without him being able to see through the (either agreed or unilateral) changes to the Protocol. His short-lived successor's successor, Rishi Sunak, then managed not only to improve EU–UK relationships and renegotiate the Protocol, but also to get the EU's agreement to rename it the Windsor Framework.[4]

The Protocol's rebranding as the Windsor Framework was accompanied by substantive changes concerning the management of trade flows between Great Britain (GB) and Northern Ireland, for example through a 'green lane' for traders that are importing goods from GB into Northern Ireland that are not considered to be at risk of subsequently entering the EU.[5] Yet the substance of the overall trading relationship remained largely unaffected. As discussed below, it also encompassed changes to article 13, complemented by unilateral guarantees by the UK Government, to provide Northern Ireland with some slightly greater say over the applicability of individual EU laws within its territory.

---

2 HC Deb 8 September 2020, vol 679, col 509.

3 Eg Jon Henley and Daniel Boffey, 'Brexit: EU poised to take legal action against UK over Northern Ireland' *The Guardian* (London 10 March 2021); and 'EU takes legal action against Britain for breaching Northern Ireland agreement' (*France 24* 15 June 2022).

4 See Joint Declaration No 1/2023 of the Union and the United Kingdom in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 [2023] OJ L102/87.

5 See 'The Windsor Framework – The Green Lane'.

Meanwhile, of course, in February 2022 the Northern Ireland Executive had collapsed following the resignation of First Minister Paul Givan of the Democratic Unionist Party (DUP). The main reason cited was the Protocol.[6]

The Executive was not reinstated until two years later in February 2024. Until then the DUP – the largest unionist, though overall now second largest party in Northern Ireland following the May 2022 Northern Ireland elections – had refused to re-enter the power-sharing Executive citing ongoing concerns about the Protocol, which even the Windsor Framework was not able to alleviate. Only after lengthy negotiations between the DUP and the UK Government, which resulted in January 2024 in a UK Government Command Paper entitled 'Safeguarding the Union',[7] accompanied by a set of measures to be adopted within the UK and under the Windsor Framework itself, did the DUP decide to go back into government.[8]

This brief overview suggests that Brexit – at least as far as Northern Ireland is concerned – is far from settled. In addition to changes to the legal rules, there is now a growing amount of litigation invoking the Windsor Framework. Since the June 2023 workshop, which resulted in this special issue, the Northern Ireland Act has been amended[9] and a number of Joint Committee decisions have been adopted to implement the Windsor Framework.[10] Moreover, there have been several judgments by the Northern Irish courts on article 2 of the Windsor Framework, which entails a guarantee regarding 'rights, safeguards

6 Damien Edgar and Eimear Flanagan, 'DUP: NI First Minister Paul Givan announces resignation' (*BBC News* 3 February 2022).

7 UK Government, 'Safeguarding the Union' (CP1021 January 2024).

8 'Research Briefing: Northern Ireland Devolution: Safeguarding the Union' 3 April 2020.

9 Notably to include sch 6B.

10 Decision No 2/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 3 July 2023 adding two newly adopted Union acts to Annex 2 to the Windsor Framework [2023] OJ L 184/109; Decision No 3/2023 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 3 July 2023 amending Part I of Annex I to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 184/111; Decision No 4/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 28 September 2023 adding two newly adopted Union acts to Annex 2 to the Windsor Framework [2023] OJ L2471; in addition, the UK and the EU have made unilateral declarations in the Joint Committee concerning the Windsor Framework.

and equality of opportunity' (RSEO). Both have required our authors to adapt their contributions, for which we are most grateful.

THE BARE BONES OF THE PROTOCOL AND SUBSEQUENT WINDSOR FRAMEWORK

Already in its original form, the (then so-called) Protocol on Ireland/Northern Ireland presented itself as a multilayered and subtle construct, which would reveal its true meaning only after careful legal analysis, requiring an indepth understanding of both the very specific circumstances of Northern Ireland, in particular the Belfast/Good Friday Agreement (BGFA) and its implementation into UK law, as well as EU law. Some of the Protocol's provisions were not what they appeared to be, most famously perhaps article 4, which stipulates at length that Northern Ireland remains part of the UK customs territory, only to be contradicted in large parts by article 5(4), which states that the provisions of Union law contained in annex 2 shall apply, which then – on closer inspection – turns out to be the entire EU customs code and other trade measures. Whether or not this particular drafting was deliberately used to disguise the true meaning of the Protocol, it is clear that, even if it were a trick to pull the wool over Northern Irish unionists' eyes, this did not work.

The spectre of a customs and regulatory border in the Irish Sea has been haunting the Protocol ever since its adoption as part of the Withdrawal Agreement between the UK and the EU. The subsequent choice by the UK Government to pursue a 'hard Brexit' by basing the overall EU–UK trading relationship on a fairly bare-bones free trade agreement (the Trade and Cooperation Agreement) resulted in the creation of two distinct (and largely uncoordinated) customs and regulatory spaces in the EU and GB respectively, with Northern Ireland caught in between. This has been made more complicated by provisions within the Windsor Framework/Protocol that provide for a role of the EU institutions, including the CJEU, where EU law continues to apply in Northern Ireland. It is this complex relationship and the question of where and how border controls should function that has driven much of the political contention noted above.

Alongside these provisions, the general focus on the BGFA and North–South cross-border cooperation is emphasised across the Preamble and several provisions, including articles 1 and 11. Yet, while the Protocol and subsequent Windsor Framework acknowledge the role of EU law in facilitating such cooperation generally and a joint EU–UK mapping exercise identified numerous areas where the EU underpinned this, this is not then reflected in the Windsor Framework/Protocol's provisions providing for the continued applicability of

various EU laws. There are major gaps in this respect, although the potential exists to add to these in future, as discussed below. On the other hand, article 2 of the Windsor Framework/Protocol provides a potential safeguard regarding rights (etc), but in a manner that requires careful teasing out to understand fully its scope and role.

An interesting feature of the Windsor Framework/Protocol since its inception has been the requirement of periodic democratic consent votes envisaged by article 18. These are due to take place every four years (unless there is cross-community consent), with the first such vote due to happen in December 2024. That vote concerns the continued operation of articles 5–10 of the Windsor Framework, which are the provisions concerning the free movement of goods. All other provisions of the Windsor Framework – including article 2, which is the subject of four contributions to this special issue – would remain unaffected by a negative consent vote.

The main innovation of the Windsor Framework in governance terms was what is colloquially known as the Stormont Brake. This mechanism allows a minority of Members of the Legislative Assembly (MLAs) of Northern Ireland (30 MLAs from at least two parties) to veto the dynamic alignment of Northern Irish law with EU law where this is envisaged by the Windsor Framework (as, for instance, under article 5(4), in conjunction with article 13). However, the Stormont Brake comes with a number of conditions attached, first and foremost a requirement that the Northern Ireland Executive has been restored.[11] The Stormont Brake only applies in cases of dynamic alignment, namely where a piece of EU law (a 'Union act') was amended or replaced at EU level. Hence it cannot affect the operation of existing EU law *per se* in Northern Ireland. In addition, the content and the scope of the Union act as amended or replaced must significantly differ from the previous version and the application of the amending or replacing act must be such that it 'would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist'.[12] In addition to these substantive (and substantial) requirements, the MLAs opposing the Union act (and thus pulling the Brake) must 'demonstrate, in a detailed and publicly available written explanation' that their notification (ie pulling the Stormont Brake) is made in the most exceptional circumstances and as a last resort, having used every other available mechanism; that the substantive conditions are met; and that the MLAs have sought prior substantive discussion with the UK Government and within the Northern Ireland Executive to examine all possibilities in relation to the Union act.[13]

11 Joint Committee Decision 1/2023, annex 1, [2023] OJ L102/61.

12 Art 13(3)(a) Windsor Framework.

13 Joint Committee Decision (n 11 above).

The effects of the Stormont Brake are therefore limited in scope to amending or replacing EU acts made operable by the Windsor Framework. Hence, where the Stormont Brake is successfully activated, the old Union act (to be replaced or amended) remains applicable in Northern Ireland. Depending on the precise content of the amendment or replacement, this could potentially result in the creation of a double barrier to market access (and cooperation) by retaining an existing regulatory difference to GB and by creating a new divergence with the EU.

While the Stormont Brake itself has not yet been used, the so-called 'applicability motion' has. Applicability motions concern new Union acts, which do not replace or amend Union acts referenced in the Windsor Framework, but nonetheless fall within the scope of the Windsor Framework. According to article 13(4) of the Windsor Framework, the Joint Committee (comprised of EU and UK representatives) may add these to the relevant Windsor Framework annex or not. The newly introduced schedule 6B of the Northern Ireland Act 1998 provides that the Northern Ireland Assembly must agree to a motion calling for the addition of that new Union act to the Windsor Framework, in order for it to be duly added.[14] A vote on an applicability motion must be passed with cross-community support. The first such applicability motion was put before the Northern Ireland Assembly on 19 March 2024. It related to EU Regulation 2023/2411 on geographical indications schemes for craft and industrial products.[15] The applicability motion – put forward by DUP MLAs – was defeated due to lack of cross-community support. While a majority of 49 out of 81 members voted in support of the motion, all unionist members opposed it.[16] According to paragraph 18(1) of schedule 6B to the Northern Ireland Act 1998, a UK minister may not now agree to the addition of that Regulation to the Windsor Framework, unless the exception in paragraph 18(2) applies, which is that there are either exceptional circumstances or that the new Union act would not create a new regulatory border between GB and Northern Ireland.

---

14 See para 17 of sch 6B, Northern Ireland Act 1998. Inserted in February 2024 by the Windsor Framework (Democratic Scrutiny) Regulations 2024 (SI 2024/118), reg 1(2).

15 Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 [2023] ELI.

16 Northern Ireland Assembly, Official Report (Hansard), Tuesday, 19 March 2024. The motion must be proposed as a positive statement, stating that 'x' should be added to the relevant annex. Therefore, to block the Regulation's addition, the DUP proposed and then voted against its own motion.

This episode suggests that a notification under the Stormont Brake 'proper' is likely to happen before too long and that its outcome may well be that a replacing or amending Union act will not be added to the Windsor Framework. The requirement of 30 MLAs from at least two parties (including no party) does differentiate it from the procedure for the applicability motion, but it nonetheless seems feasible that this hurdle could be met. It should be noted though that some unionists voted against the above Regulation due to concerns over the lack of scrutiny and therefore the uncertainty as to its impact in Northern Ireland, whereas with the Stormont Brake there is less uncertainty regarding the replacing or amending acts and simultaneously increased uncertainty if those same acts do not apply.

Overall, the Windsor Framework has wide-ranging, significant provisions that address multifaceted issues. However, their contours and parameters remain largely untested and contested, with a clear need for further investigation.

CONTRIBUTIONS OF THE SPECIAL ISSUE

The long wait until the restoration of a Northern Ireland Executive and the rejection of the applicability motion at the first possibility suggest that the UK Government's efforts at replacing the rather anodyne name 'Protocol on Ireland/Northern Ireland' with the deliberately regal title 'Windsor Framework' cannot be judged as having had the desired success of making the Protocol more palatable for unionists. As **Murray**'s article (584–612) explains, much of the motivation behind the negotiations leading to the adoption of the Windsor Framework was to bring about a restoration of the power-sharing government in Northern Ireland. This did not happen until further changes were brought in a year later. The consequences of almost two years without an executive were, as Murray shows, immense. Not only did this result in a depletion of public finances in Northern Ireland, but also a breakdown of democratic governance. This raises important questions about the future of power-sharing under the BGFA and what arrangements might realistically replace it to prevent a situation like this from re-occurring. More developments and on-the-spot creation of governance arrangements demonstrate that the Windsor Framework is only one piece in the puzzle of perpetually adapting governance arrangements for Northern Ireland.

The governance crisis around the Windsor Framework underlines the intrinsic political nature of these post-Brexit arrangements affecting Northern Ireland. Part of the politics around the Windsor Framework is playing out in the courts of Northern Ireland, chiefly because many of the provisions of the Windsor Framework have direct

effect and can therefore be invoked before a court without the need for transposition into domestic law.[17] The most intriguing developments in this regard concern article 2 of the Windsor Framework.

Article 2 of the Windsor Framework contains a commitment on the part of the UK that there shall be no diminution of RSEO as set out in the RSEO section of the BGFA. Much like the above example of the customs rules contained in article 5 of the Windsor Framework, article 2 might at first glance not appear to contain much substance. However, when analysed more closely, it reveals itself to be a fiendishly complex provision, which has resulted in a growing body of case law.

What is striking about article 2 is that it gives effect in law to a part of the BGFA which was not drafted to be justiciable, but in doing so it adds its own criteria and context. This raises many technical difficulties as to article 2's precise scope and precise effects in the law of Northern Ireland today. **McCrudden**'s contribution (443–487) is intriguing in that he uncovers the substantial influence of loyalist politicians in the drafting of the RSEO part of the BGFA. This may perhaps come as a surprise to many familiar with the politics and history of Northern Ireland, where it is often assumed that the protection of human rights at the time was mostly a concern for nationalists and not so much for unionists.

Three further contributions are concerned with the workings of article 2, each complementing the other. The article by **Deb**, **Frantziou** and **Lock** (488–521) explores the continued applicability of the EU's Charter of Fundamental Rights in Northern Ireland by virtue of the Windsor Framework. It shows that the Charter continues to have a role to play in the protection of fundamental rights in situations which would have been within the scope of EU law were Northern Ireland still in the EU. It further reveals that the practical application of article 2 is very complicated. While it is fairly clear from the wording of article 2 and the RSEO section that traditional civil and political rights can be invoked on the basis of article 2, **Bartlett** and **Hervey** (522–549) are asking whether the same is true for social rights. They are making a strong argument that at least some social rights should be considered to have been underpinned by EU law and that the RSEO section is broad enough to accommodate them. Their case studies have great political salience as they are dealing with issues such as the right to housing or the right to health, both of which have arguably suffered given the dire state of Northern Ireland's finances. While Bartlett and Hervey have put great argumentative effort into demonstrating that certain social rights were in fact underpinned by EU law – given that EU law does not itself create concrete social protections in the member states –

17 See *Ní Chuinneagain's Application for Judicial Review* [2021] NIQB 79; *Re SPUC* [2023] NICA 35; *Dillon and Others* [2024] NIKB 11.

Dobbs, **Hough**, **Kelleher**, **Whitten** and **Brennan** (550–553) were in the comfortable position of being able to point to a plethora of EU legislation in the environmental field. The focus of their article was therefore a different one: can the Windsor Framework help to protect the environment in Northern Ireland? This question is particularly intriguing given that the Windsor Framework only mentions the environment expressly once and only in the context of the aims that continued North–South cooperation is meant to achieve. Their article therefore drew on the general purposes of the Framework and sketched out the potential across different Framework articles to help protect the environment, in particular through article 2's guarantees on human rights and safeguards and article 11's focus on North–South cooperation. It shows that different tools do exist, including the novel guarantee in article 2.

While these four papers focus on article 2, they simultaneously highlight striking gaps across the Windsor Framework more generally. For instance, the lack of consideration of the environment in the Windsor Framework is just one example of the Windsor Framework's mostly narrow technical focus on fixing the border issue without adequately addressing the real need for close cooperation and alignment across the island of Ireland in other areas. Article 2 is a notable exception, which suggests that it will in future be used to effect such cooperation where possible and making continued litigation on its scope likely.

Given the issues discussed in these articles one may wonder if, and how far, the Windsor Framework can serve as any kind of role model or even as a harbinger of things to come elsewhere in the world. While it is unlikely that the very specific circumstances of Northern Ireland as a post-conflict society undergoing a process of extraction from a larger trading block will be replicated elsewhere, **O'Donoghue** shows (613–640) how Northern Ireland's economic governance model might nonetheless help to dispel notions that democratic processes hinder the success of a market economy. Her contribution features a fascinating outline of the history of exceptional economic governance spaces in which Northern Ireland, after the Windsor Framework, is one of the latest additions. In a world in which antidemocratic trends are on the rise, the Windsor Framework's robust protections concerning human rights, but also the Stormont Lock and Stormont Brake, could be seen as desirable features for any such development, be it on earth or in outer space.

Finally, the shorter contributions by **Maher** (652–658) and **Schiek** (641–651) address the largely ignored people dimension of trade – or indeed, simply people. The lack of any meaningful free movement provisions in the current EU–UK relationship, including the Windsor Framework, is of course easily explained by a strong desire on the

part of the UK Government to make good on the Brexit promise of ending free movement. But this has concrete consequences for the island of Ireland, which the Windsor Framework partly ignores. While the Windsor Framework does mention the continued operation of the Common Travel Area (CTA) on the island of Ireland, it ignores the fact that the CTA is only 'common' to British and Irish citizens and does not include rights for the large number of foreign citizens (be they EU citizens or third-country nationals), even if they are family members of Irish or British citizens. That this can lead to practical difficulties is very well demonstrated in both contributions, which contain current examples of the CTA not being fit for purpose.

The Windsor Framework and Northern Ireland's post-Brexit position at the intersection of two constitutional and governance spaces remain a work in progress in many respects. The Windsor Framework does not mark the end point of relations on the island of Ireland, nor is it the end point of EU–UK relations more generally either. The recent activation of the Stormont Brake and ongoing litigation around article 2 are the most obvious evidence of this.

The articles in this special issue make a distinct contribution to the literature on the Windsor Framework by helping to throw its specific features into greater relief and by uncovering aspects that were hitherto not clear. They build on the existing literature, notably found in two edited books,[18] an NILQ special issue[19] and several journal articles in this journal and others.[20] Both edited books – which took a global and all-encompassing approach – lay the foundations for the research undertaken here, flagging many of the aspects that this special issue develops and investigates in detail. While the contributions in these books were primarily based on the text of the original Protocol, this special issue has been able to address some of the changes introduced by the Windsor Framework as well as emerging case law on it.

---

18 Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) and Federico Fabbrini (ed), *The Protocol on Ireland/Northern Ireland: The Law and Politics of Brexit* vol IV (Oxford University Press 2022).

19 Colin Murray (ed), 'Northern Ireland's Legal Order after Brexit' (2022) 73 (S2) Northern Ireland Legal Quarterly 1–7.

20 Eg Colin Murray and Niall Robb, 'From the Protocol to the Windsor Framework' (2023) 74(2) Northern Ireland Legal Quarterly 395–415; Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72(1) Northern Ireland Legal Quarterly 1–28; Katy Hayward and Milena Komarova, 'The Protocol on Ireland/Northern Ireland: past, present, and future precariousness' (2022) 13(52) Global Policy (Special Issue: Brexit – Past, Present and Future) 128–137; and Katy Hayward, '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58(2) International Studies 201–218.

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 443–487
Articles DOI:

The origins of 'civil rights and religious liberties' in the Belfast–Good Friday Agreement†

Christopher McCrudden*
Queen's University Belfast and University of Michigan Law School
Correspondence email: chris.mccrudden@qub.ac.uk

ABSTRACT

This article traces the origins of the declaration of rights in the human rights and equality section of the 1998 Belfast–Good Friday Agreement, which secured a fragile peace in Northern Ireland. It sets out in detail for the first time the drafting history of the declaration, set against the complex negotiating history of the Agreement as a whole, describing the multiple actors involved in the evolution of the declaration and their motivations, including republican and loyalist paramilitary groups, feminists and civil rights organisations, Irish and British civil servants and political advisors, as well as the political parties. It thus provides a detailed account of the evolution of human rights thinking at a critical stage of the Northern Ireland peace process. The article argues that it is now more important than ever to understand this history. Although originally conceived as merely declaratory, this declaration has, since the European Union–United Kingdom (EU–UK) Withdrawal Agreement following Brexit, taken on a new lease of life due to the Ireland–Northern Ireland Protocol to the EU–UK Withdrawal Agreement, which accorded the declaration of rights a legal status in domestic and international law that it did not have previously. The article concludes with a reflection on the implications of the history recounted in this article for the future interpretation and application of the Protocol (now, the Windsor Framework), and for the study of the historiography of human rights more broadly, emphasising in particular the extent to which the declaration exemplifies a syncretic rather than an eclectic human rights instrument.

Keywords: Belfast–Good Friday Agreement; Northern Ireland peace process; human rights history; Windsor Framework; Ireland–Northern Ireland Protocol; Ulster Volunteer Force; Irish Republican Army; Combined Loyalist Military Command; Northern Ireland Women's Coalition; Committee on the Administration of Justice; Downing Street Declaration.

† First published in NILQ 75.AD1 29–73 on 10 June 2024.

* FBA MRIA Professor of Human Rights and Equality Law, Queen's University Belfast; L Bates Lea Global Professor of Law, University of Michigan Law School. Many people assisted in the preparation of this article: Brendan O'Leary, David Cooke, Chris Hudson, Sir Quentin Thomas, Gerry Vinton, Monica McWilliams, Seán Ó hUiginn, Kieran McEvoy, Ian McBride, Dawn Prentice, Martin Mansergh,

INTRODUCTION

There is a ringing affirmation of rights in the first paragraph of the human rights and equality chapter of the 1998 Belfast–Good Friday Agreement (B-GFA, the Agreement).[1] It reads:

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation.

This article seeks to identify the origins of this declaration of rights, why it was included in the 1998 Agreement, and why it is more important than ever to understand its history. The history of this declaration is but a fragment (albeit an important fragment) of the history of the development of human rights thinking in Northern Ireland, and an even smaller piece in the global history of human rights. But one of the critically important aspects of this emerging global history is its expansion beyond the history of international human rights and the rediscovery of national developments that taken together with the international dimensions present a more complete narrative, and one that challenges theories of the genealogy of human rights based on

---

[* *cont*] Martin O'Brien, Rory Montgomery, Gary Mason, Aaron Edwards, Brian Rowan, and Richard English. I am grateful to them all. None of them should be assumed to agree with or endorse what follows. I am particularly grateful to the members of the Quill Project at Pembroke College, Oxford (Ruth Murray and Annabel Harris) who are in the process of digitising materials relating to the negotiation of the B-GFA, for help in identifying relevant sources and helping generally to construct a timeline for the negotiations. Where sources are available on the Quill website, they are identified as follows: 'digitised by Quill at [link]'. Over the next few years, anyone doing serious work on the evolution of the B-GFA will find their work of vital importance.

1 An Agreement Reached at the Multi-Party Talks in Northern Ireland, Cm 3883 (1998), sometimes referred to as the Belfast Agreement or the Good Friday Agreement (B-GFA). The Agreement is digitised by Quill at: Resource Item 16631. The human rights and equality chapter is entitled 'Rights, Safeguards and Equality of Opportunity'. The declaration is paragraph 1 of that chapter.

international and regional developments alone.[2] In a modest way, this article seeks to contribute to this historiography by providing a detailed account of the development of human rights thinking at a critical stage of the Northern Ireland peace process.

The article seeks to achieve these objectives in five steps. First, the declaration will be set in the context of the chapter on human rights and equality in the Agreement; we shall see that it was one among several other, better known, commitments. Second, we shall see that this declaration has, since the European Union–United Kingdom (EU–UK) Withdrawal Agreement following Brexit, taken on an important role in the Ireland–Northern Ireland Protocol (the Protocol) to that agreement relating to Northern Ireland,[3] giving the declaration a legal status that it did not have previously. Having set the scene, we shall then begin our exploration of the historical origins of the declaration, beginning in the third part of the article with an overview of the complex negotiating history of the B-GFA as a necessary prelude to the next section (the fourth part), which sets out in detail the drafting history of the declaration itself. The article concludes with a brief reflection on the implications of the history recounted in this article for the future interpretation and application of the Protocol, and for the study of the global history of human rights.

THE HUMAN RIGHTS AND EQUALITY CHAPTER OF THE B-GFA

The human rights and equality chapter of the Agreement committed the Irish and United Kingdom (UK) Governments together with eight political parties in Northern Ireland to a diverse range of obligations: to protect certain rights in the future, in addition to this declaration of rights; to ensure that the European Convention on Human Rights (ECHR)[4] would be incorporated into the domestic law of Northern Ireland, thereby providing domestic remedies for breaches of the ECHR;[5] to implement agreed standards for new equality legislation, including a new public sector equality duty to replace the previous

2 Christopher McCrudden, 'Where did "human dignity" come from? Drafting the Preamble to the Irish Constitution' (2020) 60 American Journal of Legal History 485.

3 The Protocol agreed in 2019 was amended as part of the Windsor Framework agreement in 2023. An unofficial, consolidated version of the text of the amended Protocol is available: The Protocol on Ireland/Northern Ireland as amended through the Windsor Framework (2023) – Consolidated Text.

4 Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

5 B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 2.

Policy Appraisal and Fair Treatment (PAFT) guidelines;[6] to commit to new protections for the Irish language and Ulster Scots; to acknowledge the rights of victims of the conflict; to provide for new human rights institutions, notably the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission (NIHRC);[7] and to require that the NIHRC report on the scope for establishing a Northern Ireland-specific Bill of Rights additional to the ECHR.[8] Other sections of the Agreement ensured that human rights would be embedded within a reformed police service, pending the review and proposals of an independent commission,[9] and a review of the administration of justice was agreed.[10]

As well as acting as guarantor of the Agreement in general, the Irish Government agreed to commit to several human rights obligations: to ensure an equivalent level of human rights protection in Ireland to that in Northern Ireland; and to provide for a joint committee of the Northern Ireland and Irish Human Rights Commissions to consider issues of mutual interest, including a possible charter of human rights for the island of Ireland as a whole.[11]

The text of the B-GFA did not itself directly create binding legal obligations in the domestic law of Northern Ireland or in Ireland; the legal obligations it gave rise to were confined to the sphere of international law, but no international legal methods of dispute settlement or enforcement were created. For the most part, the international legal obligations were therefore left legally unenforceable, perhaps trusting that these obligations would be operated in good faith by the two governments. For it to have been legally enforceable in UK domestic law, Parliament would have to incorporate it by way of legislation. Thus, the approach taken following the conclusion of the Agreement was for the bulk of the UK Government's commitments to be implemented by way of the Northern Ireland Act 1998 (NIA) (a statute of the UK Parliament), supplemented by more specific pieces of legislation such as the Fair Employment and Treatment (Northern Ireland) Order 1998. Other commitments were partly implemented in legislation applying to the entire UK, especially the Human Rights Act 1998 which incorporated the ECHR into domestic law. This meant

6 Ibid para 3. PAFT (set out in Circular 5/93) placed a positive obligation on public bodies to actively promote 'fair treatment' in policymaking, implementation and service-delivery. PAFT applied to a broad range of grounds: religion, politics, gender, disability, marital status, age, ethnicity and sexual orientation.

7 Ibid paras 5 and 6.

8 Ibid para. 4.

9 B-GFA, 'Policing and Justice', para 2.

10 Ibid para 5.

11 B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 9.

that, in future, it would be these pieces of implementing legislation that would be the primary sources of legal rights and duties in UK law, and not the B-GFA itself. It also resulted in those elements of the Agreement that were not implemented through legislation remaining unenforceable. Following the Agreement, the declaration of rights that is the focus of this article was not incorporated into the NIA or any other domestic legislation.

HUMAN RIGHTS AND EQUALITY IN THE IRELAND–NORTHERN IRELAND PROTOCOL/ WINDSOR FRAMEWORK

European Union (EU) law provided an important, and gradually expanding, underpinning of some B-GFA human rights and equality commitments.[12] This underpinning was threatened by the UK's decision to leave the EU, and that led to the inclusion of article 2 in the Protocol.[13] This provision is distinct from much of the rest of the Protocol because it imposes obligations of result rather than of conduct. The declared goal is to 'ensure that no diminution of rights, safeguards and equality of opportunity as set out' in that part of the B-GFA entitled 'Rights, Safeguards and Equality of Opportunity', will result from the UK's exit from the EU. While the *substance* of the rights in existence before withdrawal and underpinned by EU law must be retained in Northern Ireland, there is no obligation to retain *specific EU measures* themselves, but article 2 obliges the UK to achieve the functionally equivalent result: it has some discretion (within limits) over how to achieve that result.

Because of the explicit reference in the Protocol, the declaration of rights in paragraph 1 of the part of the human rights and equality chapter of the B-GFA (paragraph 1) now has a legal significance in both international law and domestic Northern Ireland law that it never had before. In the UK Government's Explainer Document on article 2, setting out the Government's understanding of the scope of rights protected under article 2,[14] the bulk of the rights specified are those listed in this paragraph 1, supplemented by references to the 'rights of victims' and 'linguistic diversity' derived from later paragraphs of the

12 For example, the extensive set of EU anti-discrimination Directives, now listed in annex 1 of the Protocol.

13 Christopher McCrudden, 'Law and a crisis of trust: human rights and the negotiation of article 2 of the Ireland-Northern Ireland Protocol' (2023) 70 Irish Jurist 156.

14 UK Government, Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity (7 August 2020) para 9.

B-GFA's human rights and equality chapter.[15] The relevant rights are also specified as including 'but may not be limited to' the listed rights in the paragraph 1 declaration. Although the reasons for this caveat are not made explicit in the Explainer Document, the first sentence of the first paragraph refers to respect for 'civil rights and religious liberties', which may significantly expand the scope of article 2 protections.

We have seen that before the Protocol, these provisions were largely aspirational rather than legally binding, even in international law. They had seldom been referred to in a legal context, let alone subjected to rigorous legal analysis, because the B-GFA was considered an unincorporated treaty in UK law.[16] The inclusion of article 2 in the Protocol, and the way it has been given direct effect in UK law,[17] has meant that the meaning and scope of the 'rights, safeguards and equality of opportunity' provisions in that part of the B-GFA, including the first paragraph quoted above, have been subject to considerably greater and more intense legal scrutiny than ever before, including in the Northern Ireland Court of Appeal.[18] The aim of this article is not to trace this case law, not least because, at the time of writing (May 2024) so many of the relevant cases are currently still in litigation. Rather, this article attempts to look back at the origins of paragraph 1; it is an historical, rather than a legal, analysis.

Nevertheless, an historical analysis has potential legal relevance. The B-GFA is a multi-party agreement among political parties in Northern Ireland brokered by the Irish and UK Governments (the multi-party agreement), and an agreement between the two sovereign governments themselves (the British–Irish Agreement, BIA). For lawyers, the starting point for the interpretation of a provision in a legally binding international agreement is the Vienna Convention on the Law of Treaties (VCLT). Two technical issues arise in applying the VCLT to paragraph 1. The first is that, as Katie Johnson has pointed out, although the British–Irish Agreement 'was concluded after the Vienna Convention on the Law of Treaties entered into force generally and for the UK, Ireland only acceded to the VCLT on

15 Found respectively in B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 12, and B-GFA, 'Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues', para 3.

16 *Re Ni Chuinneagain* [2022] NICA 56, para 68.

17 Especially through the European Union (Withdrawal) Act 2018, s 7A.

18 *Re Chuinneagain's Application for Judicial Review* [2021] NIQB 79 (Scoffield J); *In re SPUC Pro-Life Ltd* (Abortion) [2022] NIQB 9 (Colton J), [2023] NICA 35 (Keegan LCJ, Treacy LJ and Humphreys J); *Angesom* [2023] NIKB 102 (Colton J); *Dillon, et al* [2024] NIKB 11 (Colton J); *In re NIHRC and JR295* [2024] NIKB 35 (Illegal Migration Act 2023) (Humphreys J). Full disclosure: I represented the Equality Commission for Northern Ireland as intervenor in *SPUC* and *Dillon*.

7 August 2006. The BIA therefore does not fall within the scope of the VCLT.'[19] However, it is now accepted that the VCLT's provisions on interpretation codify the customary international law of treaties in that respect and therefore the VCLT's provisions are the appropriate touchstone for interpretation even where customary international law applies rather that the VCLT.[20] Second, what was concluded in April 1998 was a 'hybrid' agreement (adopting the terminology of Christine Bell),[21] in the sense that there were two agreements, the multi-party agreement and the BIA, which specifically refers to the multi-party agreement. Thus far, the court that has considered the issue in detail has concluded that the VCLT's principles of treaty interpretation apply to the multi-party agreement and not only the BIA.[22]

Article 31(1) of the VCLT sets out the general rule of interpretation of international agreements. It provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 32(2) sets out what 'the context' comprises, including:

> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 32(3) provides that 'together with the context', 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account.

Article 32 further provides that:

> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

---

19 Katie Johnson, 'The Good Friday Agreement and International Treaty Law' *EJIL: Talk!* 10 April 2023.

20 Oliver Dörr and Kirsten Schmalenbach (eds), V*ienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag 2012) 523–525.

21 Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) ch 9.

22 In *Dillon, et al* [2024] NIKB 11, Colton J held that the VCLT applied to the B-GFA, at [533]. At the time of writing (May 2024), that issue was under appeal to the Northern Ireland Court of Appeal. Full disclosure: I represented the Equality Commission for Northern Ireland as intervenor. See further Steven R Ratner, 'International law rules on treaty interpretation' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press 2022) 80–91.

So, in addition to the textual analysis of paragraph 1, it is appropriate to ask: where did these specific rights in the B-GFA come from, and why are they there? In that context, history becomes a relevant source to aid legal interpretation. However, interpreting paragraph 1 through a history of its origins poses certain problems. Several of the local parties had significant links (directly or indirectly) to paramilitary groups who contributed to the policy positions taken by these parties. One consequence is that the secrecy in which parts of the negotiations were conducted still lingers, and that makes documenting how some provisions emerged a difficult and, sometimes, a fruitless task. Following the VCLT's requirements for treaty interpretation is therefore more difficult for this peace agreement than might be the case, for example, in the interpretation of a trade agreement.

Nevertheless, significant material is now in the public domain for a provisional analysis to be possible. Interest in the drafting history of the B-GFA has grown exponentially over the last ten years, with a plethora of publications, ranging from personal histories and autobiographies, extended interviews with the key actors, and (increasingly) examination of recently released key documents accessible in the National Archives at Kew, the Northern Ireland Public Record Office in Belfast, and the National Archives of Ireland in Dublin. In addition, the Library of Queen's University Belfast, in partnership with the Quill Project at the University of Oxford, has begun the process of archiving the personal papers of key actors, including David Trimble, Lord Alderdice[23] and Monica McWilliams.[24] The archives of the Committee on the Administration of Justice (CAJ), a civil rights organisation that influenced the latter stages of the negotiations, were made available, supplemented by several informal discussions with those who have relevant information about the process.

Combining the information available from these disparate sources has enabled me to trace the evolution of the list of rights addressed in this article, namely, those included in paragraph 1 of the human rights and equality chapter of the B-GFA. The remainder of this article is solely concerned with the evolution of this list. The other provisions of the human rights and equality chapter require a separate historical analysis, partly because they arise from quite different sources.[25]

23 Digitised by Quill at Resource Collections 297.

24 Digitised by Quill at Resource Collections 295.

25 See Beatrix Campbell, *Agreement: The State, Conflict and Change in Northern Ireland* (Lawrence & Wishart 2008).

A BRIEF CHRONOLOGY OF THE NEGOTIATION OF THE B-GFA

In 1985, the Anglo-Irish (or Hillsborough) Agreement (AIA)[26] between the UK and Ireland significantly increased the input and advisory role of the Irish Government in Northern Ireland through an 'Intergovernmental Conference', made up of officials from the British and Irish Governments and headed by Ireland's Foreign Minister and the UK Secretary of State for Northern Ireland. The AIA confirmed that there would be no change in the constitutional position of Northern Ireland unless a majority of its electorate agreed to join Ireland, though it did not modify Ireland's rival constitutional claims to the whole island of Ireland.

In broad terms, two separate initiatives can be identified as having evolved between 1985 and 1992: an attempt to secure agreement on the establishment of a functioning and sustainable Northern Ireland Government through inter-party and inter-governmental negotiations (the talks process); and an attempt to secure an end to the use of violence for political ends (the peace process). The former had been unsuccessful, and the latter was mostly conducted in secret. Between 1986 and 1988 increasing attempts had been made to fuse the two initiatives, with the aim of bringing into the political dialogue the paramilitary groups (initially, the Irish Republican Army (IRA), an illegal paramilitary group committed to the use of force to achieve a united Ireland, and then subsequently the loyalist paramilitary groups, also illegal and seeking to prevent unification). The goal was 'to embrace all the constituencies with a role in the problem and therefore in its solution',[27] and to accomplish a comprehensive settlement. The two sovereign governments insisted, however, that ceasefires had to be declared by armed groups before the political parties with electoral mandates which were associated with these groups could be brought into negotiations.

From January 1988, the first public attempt at bringing the two initiatives together was underway. A brief public dialogue took place between the main nationalist party at that time, the Social Democratic and Labour Party (SDLP) and Sinn Féin (the party widely regarded as the political wing of the IRA), which broke off after a few months. Both were avowedly Irish nationalist in their aims and thus rivals for the nationalist vote. The significant difference between the two parties at that time was the close connection between Sinn Féin and support for political violence, in contrast with the SDLP, which rejected the use of

26 Digitised by Quill at Resource Item 16629.

27 Graham Spencer (ed), *Inside Accounts*, volume 1 (Manchester University Press 2020) 132 (Seán Ó hUiginn).

violence. In 1988 a secret 'back-channel' was created in parallel between Fianna Fáil (with Fine Gael, one of the two principal political parties in Ireland, and the lead party in the Coalition Government at that time) and Sinn Féin, with two or three meetings held in Dundalk. In 1989, there were talks in Duisburg, West Germany, but that initiative was repudiated by political leaders, especially John Hume (leader of the SDLP). Later, the so-called Hume–Adams talks, named after Hume of the SDLP, and Gerry Adams, the leader of Sinn Féin, were initiated. The Hume–Adams talks were intended to explore whether there was an opportunity for broader peace negotiations, at a time when neither the Irish Government nor the UK Government were willing to be seen in public to be meeting the leadership of Sinn Féin, let alone negotiating with them.[28]

Separately from the Hume–Adams initiative, attempts were underway by the UK Government to convene talks between the 'constitutional parties', namely, parties committed to exclusively peaceful and constitutional means and not connected to paramilitary activities. The talks process (though not called that at the time) began as a British initiative launched by Peter Brooke's Bangor speech in 1990, which envisaged dialogue between the two governments and the constitutional parties. Two of its key features were a comprehensive agenda and an inclusive cast list. Consistent with that was the hope on the British side (at least after Brooke's appointment as Secretary of State) that the process would eventually co-opt Sinn Féin if violence ended. (In this it must be contrasted with the earlier period culminating in the AIA 1985 which had at its heart the objective of marginalising Sinn Féin by demonstrating what constitutional nationalism could achieve.)

The Brooke initiative eventually materialised in the form of the Brooke–Mayhew talks, named after the UK Secretaries of State for Northern Ireland in office during the talks. Sinn Féin was still excluded from participating because of its connections to the IRA. So too, the loyalist political parties were excluded because of their connections to loyalist paramilitary groups. The Brooke-Mayhew talks, chaired in part by Sir Ninian Stephen, an Australian diplomat and lawyer, were conducted under the 'three strands' advocated by Hume. These would subsequently be retained in the negotiation of the B-GFA. Strand One addressed relationships between the parties within Northern Ireland; Strand Two considered relationships between Northern Ireland and Ireland (North–South); and Strand Three, considered relations

28 Martin McGuinness, one of the most senior leaders of Sinn Féin, led secret discussions about negotiations with MI6's Michael Oatley. See Niall Ó Dochartaigh, *Deniable Contact: Back Channel Negotiation in the Northern Ireland Conflict* (Oxford University Press 2021).

between the UK and Ireland (East–West). The talks began in April 1991 but were suspended in November 1992. By the end of 1992, the shift in the British position (from marginalisation to co-option) looked distinctly unsuccessful, but it remained the UK Government's aim.

A similar shift, independently arrived at, occurred in government circles in Dublin. Hume presented a first draft of a proposed declaration by the Irish Government with the aim of ending violence and securing a peace agreement, with the tacit agreement of Adams, to Charles Haughey, the Taoiseach (Prime Minister), in the autumn of 1991. The secret contacts between Irish political representatives and the republican movement (referred to as the back-channel) became critically important. The aim was to create a basis on which the IRA would declare a ceasefire, but the republican movement was not willing to do this without a direct, as opposed to just an indirect, channel of communication to the Taoiseach. These contacts were, therefore, key to the success of the whole initiative, creating trust through regular dialogue as well as helping to resolve issues of drafting as the process developed. The contacts were facilitated by individual go-betweens, in particular the Redemptorist priest, Fr Alec Reid, from the Clonard Monastery in Belfast.

From the autumn of 1991, the two governments were also meeting to consider how to nudge the peace process forward, with the aim of producing jointly agreed proposals that would lay the groundwork for a future agreement. A joint declaration by the two governments was first formally proposed to British Prime Minister John Major by Haughey on 4 December 1991.[29] The two most senior civil servants on each side (Dermot Nally, the Secretary to the Irish Government, and Sir Robin Butler, the British Cabinet Secretary) met at a subsequent meeting[30] on 16 December to discuss the initiative. Nally showed Butler the text of the draft, headed draft 2, later JD2, of the joint statement spoken about at the meeting of the Prime Minister and Taoiseach on 4 December.[31] This text is almost identical to that attributed to Hume and dated to October 1991 by the distinguished journalists Eamonn Mallie and David McKittrick, in their path-breaking study of the evolution of the peace process.[32] By February 1992, Butler had received another version from Hume directly, headed draft 3, which was in very similar terms.[33] That text is almost identical to that attributed to Sinn Féin and dated

29 National Archives of the UK (TNA), PREM 19/3823.

30 Digitised by Quill at Resource Item 24101.

31 National Archives of the UK (TNA), PREM 19/3405.

32 Eamonn Mallie and David McKittrick, *The Fight for Peace: The Secret Story behind the Irish Peace Process* (Heinemann 1996) (Mallie and McKittrick) 371.

33 Briefing Note, from W R Fittall to Stephen Wall, dated 21 February 1992, National Archives of the UK (TNA), PREM 19/3823.

to February 1992 by Mallie and McKittrick.[34] These early texts would have committed the British either to withdrawal by a specified date or to become 'persuaders' for the unification of Ireland.

Prime Minister Major parked this initiative until after the UK General Election in April 1992, but did not shut the door on it. From Dublin's perspective, the primary discussions on what became the Joint Declaration for Peace (known colloquially as the Downing Street Declaration) took place from October 1992 up to June 1993 in the secret Irish back-channel meetings between representatives of the Taoiseach (in particular, Dr Martin Mansergh, who worked for Fianna Fáil and served three Fianna Fáil leaders (Haughey, Albert Reynolds and Bertie Ahern) as Director of Research, Policy and Special Advisor on Northern Ireland) and representatives of Sinn Féin (primarily, Martin McGuinness, who may or may not have been a member of the IRA's Provisional Army Council at that time, but in any event had their confidence). Officials were not aware that direct meetings were taking place, with meetings about every six weeks up to June 1993. Senior officials were aware of the drafting outcomes and the exchange of other written communications, deemed to have come directly from Fr Reid, but in many cases from the back-channel.

By early 1993 the Irish and British Governments were discussing two initiatives: a possible joint declaration and a framework document to be issued by the two governments, leading (it was hoped) to a renewed talks process with the Northern Ireland parties getting underway, and the cessation of violence.[35] Butler and Nally continued to meet intermittently. The process then stepped up a gear in June 1993 when a new version of the draft declaration (JD6)[36] was handed by the Taoiseach, Albert Reynolds, who had replaced Haughey as leader in February 1992, to the British Cabinet Secretary at Baldonnel Aerodrome, outside Dublin.

By that time, two, relatively separate, sets of discussions between Irish and British officials were established:[37] what might be called the Nally–Butler Group, which focused on the joint declaration, and the Liaison Group, which was given a formal mandate to produce a 'joint framework statement' with a 'substantial constitutional component' by

34 Mallie and McKittrick (n 32 above) 373: Digitised by Quill at Resource Item 23544. This is referred to as JD3.

35 Described in detail from the British Government perspective in John Major, *John Major: The Autobiography* (Harper Collins 2000) 447–454.

36 Digitised by Quill at Resource Item 22956.

37 Annabel Harris and Ruth Murray of the Quill Project, and Sir Quentin Thomas and David Cooke, formerly senior British officials, were immensely helpful in clarifying this aspect of the complex negotiations. The next four paragraphs are based on this information. I am most grateful.

the Intergovernmental Conference on 19 September 1993,[38] and was jointly chaired by Quentin Thomas and Seán Ó hUiginn, respectively senior British and Irish officials. To term the Nally–Butler Group a 'group' probably overstates the formality of the discussions and identifying it as separate from the Liaison Group underplays their partially overlapping membership during 1993. As both governments came to engage on the successive drafts of what became the Joint Declaration there was a series of *ad hoc* meetings of officials convened jointly by Butler and Nally. Some exploratory work on possible text was also carried forward by members of the Liaison Group, in particular Thomas and Ó hUiginn. Since Thomas and Ó hUiginn kept meeting in the Liaison Group, some work on the Joint Declaration was conducted in the margins of it, but it was decided that the full Liaison Group would not have sight of the Joint Declaration,[39] which continued to be negotiated in the Butler–Nally Group, between Thomas and Ó hUiginn informally, and then between Major and Reynolds at the Anglo-Irish Summit in Dublin Castle on 3 December 1993.

To some degree, it seems that there was a difference of emphasis between the two sides over priorities. British officials appear to have prioritised a framework document that might be of use in inter-party talks (resuming the Brooke–Mayhew initiative) rather than a Joint Declaration, whereas Irish officials appeared less enthusiastic about a framework document (they promised the Liaison Group a draft but apparently did not secure Ministerial approval to table it) and were prioritising the Joint Declaration.

Essentially, up until the publication of the Joint Declaration on 15 December 1993, the declaration and the framework document were worked up as parallel, and to some extent even partly competing, initiatives. From late November 1993, the British decided to go with the Joint Declaration approach, but with the two sides again offering distinctly different approaches. Two texts are available from November 1993 which show the different Irish and British positions at that time: the first text, JD14,[40] was the proposed text from the Irish side, and had been the subject of discussions with the British side; the second text was a proposed British version,[41] which was conveyed to the Taoiseach by Butler, the then British Cabinet Secretary, on 26 November. The proposed British text came as something of a surprise to Dublin and was swiftly rejected by the Irish Government. Intense negotiation on the text of a Joint Declaration then took place in early December 1993,

38 Digitised by Quill at Resource Item 23437.
39 Digitised by Quill at Resource Item 23450.
40 As it was known in the British system. Digitised by Quill at Resource Item 22925.
41 Digitised by Quill at Resource Item 23065.

using the Irish text as the starting point, following the Dublin Castle Summit.

Thus far, the principal focus of this narrative has been on the attempts to bring republicans to a ceasefire. As ever, negotiators walked a tightrope. The opposition from unionist opinion to the AIA meant that gaining unionist support for these new initiatives would be difficult. Reassurance to Sinn Féin could not compromise the interests of others, including the unionists and the loyalists. But, just as there were different and competing parties on the broadly Irish nationalist side, so too were there different and competing political groupings on the broadly unionist side, which gained support predominantly from the Protestant population.

The principal unionist political party in the 1990s was the Ulster Unionist Party (UUP), led in the early 1990s by James Molyneaux and then by David Trimble. Its main rival was the Democratic Unionist Party (DUP), led by its founder the Reverend Ian Paisley. By the 1990s, neither of these parties explicitly supported any paramilitary groups, although leading members of both parties had flirted with paramilitarism at various times over the years. The DUP, for example, had been involved in establishing a paramilitary group (Ulster Resistance) as a reaction to the AIA. During 1993, there were attempts to ensure that Molyneaux in particular was engaged and informed. Robin Eames, the Church of Ireland Primate of All Ireland and Archbishop of Armagh, played an important role. Eames was in close touch with both Major and Molyneaux and was also in close contact with Reynolds. So, too, the British negotiators engaged with Molyneaux, illustrated by the fact that a draft of the Declaration, version JD14A,[42] took into account amendments that were thought likely to make the text more acceptable to Molyneaux, who had been consulted on the draft.

In addition to the UUP and the DUP, there were two political parties that were explicitly connected with unionist (often termed 'loyalist') paramilitary groups: the Progressive Unionist Party (PUP) closely aligned to the illegal Ulster Volunteer Force (UVF),[43] and the Ulster Democratic Party (UDP), closely aligned to the Ulster Defence Association (UDA). Aaron Edwards has described the PUP as having sprung from the collapse of the Northern Ireland Labour Party (NILP)[44] and several of the founding members of the PUP had been members of the NILP, including Jim McDonald, who was later

42 Digitised by Quill at Resource Item 22932.

43 For an analysis of the PUP's origins and ideology, see Aaron Edwards, 'The Progressive Unionist Party of Northern Ireland: a left-wing voice in an ethnically divided society' (2010) British Journal of Politics and International Relations 1.

44 See Aaron Edwards, *A History of the Northern Ireland Labour Party: Democratic Socialism and Sectarianism* (Manchester University Press 2009).

to become an important member of the UVF's 'Brigade Staff',[45] and David Overend, who, until the late 1980s, played a significant role in drafting PUP policy statements.[46] They remained committed to a 'left-leaning and working-class alternative to mainstream unionism'.[47] This outlook was broadly shared by several other prominent members of the PUP and the UVF, including Gusty Spence, Billy Mitchell and David Ervine.[48]

The UDA did not share the broad left-leaning politics of that section of the UVF/PUP. Both the UVF and the UDA were at one, however, in claiming to be defenders of Northern Ireland's place in the UK and employing illegal violence in furthering that aim.[49] The two loyalist paramilitary groups came together with the Red Hand Commandos (RHC) in the early 1990s to form the Combined Loyalist Military Command (CLMC), and a parallel Combined Loyalist Political Alliance (CLPA) was established to advise the CLMC on political strategy.[50]

If the political initiatives underway were to stop the violence, then these loyalist political parties and the allied paramilitary groups would also have to be brought into the process. We have seen that, at that time, the British Government was unwilling to be seen to engage with loyalist paramilitaries in political negotiations,[51] and Reynolds 'moved to fill the vacuum'.[52] Mansergh identified the Reverend Roy Magee, a Protestant Minister with close links to Loyalism as a possible

45 Brian Rowan, 'Funeral of top loyalist McDonald' *Belfast Telegraph* (Belfast 28 May 2009).

46 Edwards (n 44 above) 219.

47 Aaron Edwards, *UVF: Behind the Mask* (Merrion Press 2017) 148.

48 Ibid 146, quoting Billy Mitchell: 'I think there was a consensus among some of us, certainly amongst [David Ervine], Billy [Hutchinson], Eddie [Kinner] and Martin Snodden. … We realised that we had suffered deprivation and poverty, the same as working-class Catholics.' So too, Gusty Spence's political outlook 'was closest to the NILP' (ibid 144).

49 The UVF had been proscribed since 1975. The UDA remained legal until August 1992.

50 See eg Roy Garland, *Gusty Spence* (Blackstaff Press 2001) 282; Billy Hutchinson, *My Life in Loyalism* (Merrion Press 2020) 184; Jim Cusak and Henry McDonald, *UVF: The Endgame* (Poolbeg Press 2017) 272–273.

51 Garland (n 50 above) 283. It should be noted, however, that at this time military, policing and intelligence branches of the UK state were complicit in illegal activities by Loyalist paramilitary groups and were closely co-operating with them in several murders.

52 Conor Lenihan, *Albert Reynolds: Risktaker for Peace* (Merrion Press 2021) 154. American politicians close to the Clinton Administration were also involved at the same time in engaging with these groups. See Penn Rhodeen, *Peacerunner: The True Story of How an Ex-Congressman Helped End the Centuries of War in Ireland* (BenBella Books 2016) 93–101.

interlocutor.[53] Mansergh met Magee who agreed to act as a contact between the loyalist paramilitaries and the Taoiseach.[54] Magee was to become one of the central actors in the evolution of the declaration of rights in paragraph 1 of the human rights and equality chapter of the B-GFA, as we shall see in the next part of this article.

The urgency of engaging with loyalists, the deterioration in the security situation in Northern Ireland, and the urgency for momentum in the negotiations generally, was confirmed when, in October 1993, 10 people were killed when a bomb being planted by the IRA exploded prematurely in Frizzell's fish and chip shop on the overwhelmingly Protestant Shankill Road in Belfast. These deaths represented the greatest loss of life in Northern Ireland in a single incident since 1987. There was a wave of retaliations, with loyalist paramilitaries immediately shooting two Catholic men, one of whom died later from his wounds, followed some days later by the killing by the Ulster Freedom Fighters (a *nom de guerre* of the UDA) of six Catholics and one Protestant in an attack on the Rising Sun bar in Greysteel.

It had become clear by the early autumn of 1993 that the draft declaration (on which Sinn Féin was not prepared to negotiate further) would have to be expanded on the Taoiseach's initiative. Broadly, there were two significant additions to the text that were intended to appeal to the unionist and loyalist communities: the inclusion of language in what became paragraphs 6 and 7 of the Joint Declaration, which was directed towards unionist opinion more broadly, and was drafted at the Taoiseach's request by Eames, and the language included in paragraph 5 as a result of the Mansergh–Magee back-channel which was directed specifically to loyalists (of which, more later).

After tense and sometimes acrimonious negotiations, the two Governments announced a Joint Declaration on Peace on 15 December 1993.[55] In this, Reynolds and Major set out their vision for securing peace. It was a carefully calculated vehicle for reciprocal assurance. The Declaration was intended, at least in part, as a signal to those committed to political violence, in particular, the IRA, that an alternative way forward was possible, whilst also seeking to reassure unionist opinion that the Union was safe. Four principal reassurances can be identified from the British side:

---

53 The Reverend Roy Magee had participated in William Craig's Vanguard Movement in 1974, generally classified as a paramilitary organisation in waiting. He was also admitted on occasion to meetings with the Combined Loyalist Military Command.

54 Spencer (n 27 above) 169.

55 Digitised by Quill at Resource Item 22979.

1. the two governments would work together in partnership to find an agreed Ireland, as evidenced by the Joint Declaration itself;
2. the British had no selfish strategic or economic interest in Northern Ireland (the formulation deployed in earlier ministerial speeches);
3. the right of Irish self-determination was acknowledged; and
4. if violence were abandoned Sinn Féin could join any talks process.

The British side also received reassurances that it was hoped would be favourably received by unionists, in particular the more explicit recognition of the 'consent principle' by the Taoiseach in paragraph 5. This stated:

> The Taoiseach, on behalf of the Irish Government, considers that the lessons of Irish history, and especially of Northern Ireland, show that stability and well-being will not be found under any political system which is refused allegiance or rejected on grounds of identity by a significant minority of those governed by it. For this reason, it would be wrong to attempt to impose a united Ireland, in the absence of the freely given consent of a majority of the people of Northern Ireland. He accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland ...

Sinn Féin was critical of the Downing Street Declaration, as the document was popularly known, and sought clarifications. The IRA appears to have considered sufficient progress to have been made for it to announce, in August 1994, 'a complete cessation of military activities'. This cessation was followed six weeks later with a similar ceasefire announcement by the main loyalist paramilitaries, the UVF, the UDA and the RHC, speaking jointly through the CLMC, with Spence announcing the ceasefire flanked by Ervine and McDonald, among others.[56] Negotiations continued between the UK and Irish Governments and, increasingly, with the full range of political actors in Northern Ireland. In November, the first meeting took place between delegations from the PUP, the UDP and Northern Ireland Office officials on behalf of the British Government. In December 1994, the first acknowledged meeting took place between a Sinn Féin delegation and Northern Ireland Office officials.

Negotiations between the two governments also continued but with a change of political leadership on the Irish side. In November 1994, Albert Reynolds, then Taoiseach, and his Fianna Fáil ministers were forced to resign ending the Coalition Government of Fianna Fáil and the Labour Party. In December of the same year, a new coalition was

56 Jim Cusack and Henry McDonald, UVF: *The Endgame* (Poolbeg 2008) 319.

formed of Fine Gael, the Labour Party and the Democratic Left. John Bruton, leader of Fine Gael, was elected Taoiseach. The changes did not appear to result in any significant difference in the progress of the negotiations, and in February 1995, the two governments announced the Framework Documents,[57] which gave further detail on what the two governments considered the way forward in peace negotiations, building 'heavily' on the Downing Street Declaration.[58]

Following this, however, little progress in the negotiations was evident. Tensions on the street remained high. In July 1995, for example, the Royal Ulster Constabulary (RUC) blocked an Orange Order parade from returning from Drumcree Church to Portadown along the Garvaghy Road, a Catholic area. The decision sparked a stand-off between the RUC and the Orange Order. There were disturbances and blocked roads across Northern Ireland as protests were organised by loyalists in support of the Orange Order. A few days later, a compromise was reached which allowed the Drumcree parade to proceed down the Garvaghy Road in Portadown, but tensions remained high.[59]

The inter-governmental negotiations drifted on, with an unstable British Government under Major increasingly unable to drive the process forward partly because of internal divisions within the Conservative Party and partly because of Major's reliance on UUP Members of Parliament for critical votes in the UK Parliament. Frustrated with the lack of momentum, the IRA exploded a substantial bomb at London's Docklands in February 1996, marking the end of its ceasefire, and leading to the UK Government and Irish Government breaking off formal links with Sinn Féin. Later that month, Major, still British Prime Minister, and John Bruton, now Taoiseach and heading a new Fine Gael–Labour-Democratic Left Coalition Government, announced a date for the start of all-party talks. As part of the process of negotiations, the Northern Ireland Forum for Political Dialogue was established. One of its primary purposes was to enable delegations to be formed which would take part in these talks, and to give these

57 Digitised by Quill at Resource Item 16649.

58 David Donoghue, *One Good Day: My Journey to the Good Friday Agreement* (Gill Books 2022) 25. The terminology used to describe this initiative is confusing. 'Frameworks' (plural) is used to describe the two documents issued at that time: a joint statement by the two Governments (henceforth referred to as the Joint Framework Document), addressing Strands 2 and 3, and one put forward only by the UK Government addressing Strand One. See Government of Ireland and Government of the United Kingdom, *Frameworks for the Future* (Dublin 1995). See further, Brendan O'Leary, 'Afterword: what is framed in the framework documents?' (1995) 18(4) Ethnic and Racial Studies 862.

59 The issue recurred in July 1996 and July 1997, in each case leading to violence and protests by loyalists throughout Northern Ireland, leading in turn to instances of sectarian harassment and intimidation.

delegations a democratic mandate by being elected to the Forum. A novel electoral system was devised, with each of the top 10 parties by votes guaranteed at least two seats each, with the larger parties gaining three seats each. The purpose was to ensure that loyalists, who were not expected to do well, would be represented in the negotiations. These elections also saw the formation of a new political party (the Women's Coalition) to contest the elections. Sinn Féin increased its share of the vote, and the UDP, the PUP and the Women's Coalition each secured two seats, thus giving them a place at the table.[60] Following these elections, the talks duly began on 10 June 1996, but without Sinn Féin.

Once the inter-party talks began, the issues to be discussed were divided into three 'strands', reflecting the 'three-strand' approach adopted in the earlier Brooke-Mayhew talks, each with its own Committee. In addition, there was to be a Plenary, in accordance with the 'Ground Rules' published by the two governments on 16 April 1996,[61] and a Business Committee, whose role was to address unresolved procedural issues.

In 1997, General Elections in both Ireland and the UK resulted in significant changes in both jurisdictions. In May, the Labour Party, led by Tony Blair, was elected to replace John Major's Conservative Party as the UK governing party, and in Ireland the Fine Gael–Labour Coalition Government was replaced in June with a Fianna Fáil–Progressive Democrats coalition, led by Bertie Ahern. The coincidence of both states having new governments contributed to a greater optimism that progress could be made in Northern Ireland. In July of that year, the IRA reinstated its ceasefire enabling Sinn Féin to take part in the inter-party and inter-governmental talks, chaired by former United States Senator George Mitchell, who had been nominated by the United States President, Bill Clinton. However, as one party joined the talks, others left: Sinn Féin entered the talks at Stormont in September 1997 but the DUP walked out in protest at their admission, as did the small UK UUP, led by Robert McCartney. The other main unionist party, Trimble's UUP, remained to negotiate. So did the loyalist political parties, the PUP and the UDP. Jim McDonald, David Ervine and Billy Mitchell, together with Billy Hutchinson, were members of the PUP's talks team.[62]

---

60 For an assessment of the results of the election, see Geoffrey Evans and Brendan O'Leary, 'Intransigence and flexibility on the way to two forums: the Northern Ireland elections of 30 May 1996 and public opinion' (1997) 34(3–4) Representation 208; Geoffrey Evans and Brendan O'Leary, 'Frameworked futures: intransigence and flexibility in the Northern Ireland elections of May 30 1996' (1997) 12 Irish Political Studies 23.

61 Ground Rules for Substantive All-Party Negotiations, 16 April 1996.

62 Edwards (note 47 above) 258.

These negotiations continued during the rest of 1997 and into 1998, without apparent progress, amid continuing disputes over the connections between the loyalist parties and their associated paramilitary groups and between Sinn Féin and the IRA. Involvement in continuing violence led to the UDP and Sinn Féin's participation being suspended for periods, amid increasing political pressure for the 'decommissioning' of weapons. In January 1998, the multi-party talks resumed at Stormont. The British and Irish Governments issued their 'Propositions on Heads of Agreement'[63] document in an attempt to push the talks process on. Several parties at the talks welcomed the document but, critically, Sinn Féin rejected it later that month, and the UUP's Jeffrey Donaldson dramatically tore it up at a press conference in Lancaster House where the talks had briefly moved to. In order to nudge the talks forward to a conclusion one way or another, Senator Mitchell set a deadline of 9 April 1998 as the conclusion of the process, with or without an agreement.

By the beginning of April, Irish and British civil servants had begun, in the words of Mo Mowlam, the Secretary of State for Northern Ireland at the time, 'working like mad pulling bits together from old papers and putting new ideas' into a draft agreement.[64] On the evening of 6–7 April 1998, the two Governments produced a draft agreement (named 'the Mitchell draft' in an effort to distance the Governments from the draft to make it more palatable).[65] Intense further negotiations continued between then and 10 April 1998,[66] when a final Agreement between all the parties in the negotiations and the two Governments was reached. A month later, in referendums held simultaneously in Ireland and in Northern Ireland, the Agreement was supported by 71.1 per cent of the people of Northern Ireland, including a majority of unionist voters, and 94.4 per cent in Ireland.

---

63 Digitised by Quill at Resource Item 17115.

64 Mo Mowlam, *Momentum: The Struggle for Peace, Politics and the People* (Hodder 2003) 208.

65 Donoghue (n 58 above) 143.

66 Senator Mitchell has provided an account of the negotiations: George Mitchell, *Making Peace: The Inside Story of the Making of the Good Friday Agreement* (Heinemann 1997). Tony Blair's Chief of Staff, Jonathan Powell's account of the negotiations is: Jonathan Powell, *Great Hatred, Little Room: Making Peace in Northern Ireland* (Vintage 2009). Monica McWilliams, one of the leaders of the Women's Coalition, published her account in Monica McWilliams, *Stand Up, Speak Out: My Life Working for Women's Rights, Peace and Equality in Northern Ireland and Beyond* (Blackstaff 2021).

EVOLUTION OF PARAGRAPH 1 OF THE B-GFA'S 'RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY'

Having set out a brief summary of the negotiating context, we turn now to consider specifically the evolution of the declaration of rights in paragraph 1 of the human rights and equality chapter of the B-GFA. At this point, a closer textual analysis of the paragraph is useful. Paragraph 1 has two operative parts. The first is general. The first sentence states: 'The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community.' The second operative part introduces a list of specified rights, followed by the list of rights themselves ('Against the background of the recent history of communal conflict, the parties affirm in particular: the right of free political thought …' etc). The origin of the first sentence (the 'general' part) is significantly different from that of the second sentence (the 'specified rights' part). Significant parts of both these elements in paragraph 1 were first found in paragraph 5 of the Downing Street Declaration, agreed and published by the Irish and British Governments in December 1993. This part of the article is devoted to identifying the sources of these different elements.

Downing Street Declaration and the Joint Framework Document

From a political perspective, the importance of paragraph 5 of the Downing Street Declaration taken as a whole was that it formally recognised the exercise of self-determination by the people of Ireland as a whole (including deciding to create a united Ireland) but that it would also require the consent of a majority of the people of Northern Ireland, thus instantiating what has come to be termed the principle of 'consent'. Concurrent self-determination meant that the consent of the people of the (Republic of) Ireland was also required. For our purposes, however, what is striking about the drafting of paragraph 5 is that the Taoiseach also recognised, on behalf of the Irish Government, that any exercise of self-determination by the Irish people must also respect certain substantive values, in addition to respecting the principle of consent: the 'civil rights and religious liberties of everyone in the community' would be protected.

The general part: 'civil rights and religious liberties of everyone in the community'

The Downing Street Declaration, including paragraph 5, was the culmination of previous negotiating processes both public and private. As identified by Mallie and McKittrick, three drafts emerged out of the Hume–Adams dialogue between October 1991 and June 1992, each

of which significantly foreshadowed what became paragraph 5 of the Downing Street Declaration. The existence and content of these drafts have been confirmed by the opening up of the archives, as we have seen.

'A Strategy for Peace and Justice in Ireland' (October 1991, 'by John Hume, Charles Haughey and Dublin officials')[67]	*'Draft of a declaration which Sinn Féin suggests should be made jointly by the British and Dublin governments' (February 1992 'sent to John Hume and the Irish government by the republican movement', February 1992)*[68]	*'Draft of a declaration which Sinn Féin suggests should be made jointly by the British and Dublin Governments' (June 1992 'Sinn Féin draft')*[69]
'The Taoiseach, on behalf of the Irish Government, accepts that the exercise of the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities, whether majority or minority.'	'The Taoiseach, on behalf of the Irish Government, accepts that the exercise of the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities.'	'The Taoiseach, on behalf of the Irish Government, ... accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities.'

The function that paragraph 5 was to play was already evident in these early drafts. The approach suggested in the documents emerging from Hume–Adams was that there would be a series of paragraphs setting out several principles that the Taoiseach, on behalf of the Irish Government, would commit to and which he considered should be reflected in any future political and constitutional arrangements. We can see that an early draft of the phrase in the Declaration embodying the commitment of the Taoiseach to these principles is first found

67 Mallie and McKittrick (n 32 above) 371; digitised by Quill at Resource Item 23543. This is referred to as JD2.

68 Mallie and McKittrick (n 32 above) 373. Digitised by Quill at Resource Item 23544. This is referred to as JD3.

69 Mallie and McKittrick (n 32 above) 375.

in the October 1991 document 'A Strategy for Peace and Justice in Ireland' attributed by Mallie and McKittrick to 'John Hume, Charles Haughey and Dublin officials', and that it flows through each of the Hume–Adams documents and drafts from that time up to and including the June 1992 draft proposed by Sinn Féin, identified by Mallie and McKittrick.

We have seen, too, that the process of drafting a joint declaration by British and Irish officials was restarted in June 1993, a year and a half after it had first been proposed by Dublin to London.[70] From now on, I shall refer to the relevant documents using the British document number. Document JD6,[71] apparently agreed between the Taoiseach and the IRA's Provisional Army Council,[72] presumably after discussions in the back-channel, was handed to UK officials by Irish officials on 6 June 1993. For our purposes, the relevant text of paragraph 5 reads:

> He [the Taoiseach] accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with the agreement and consent of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and provide entrenched guarantees of the civil rights and religious liberties of both communities.

It will be seen that two significant changes in drafting occurred between June 1992 and June 1993: the inclusion of 'and religious liberties', and the stipulation that 'civil rights and religious liberties' would be protected by 'entrenched guarantees'.

Unfortunately, we do not have access to a copy of JD4, which is one of two documents that preceded JD6, and which had been passed to British officials in April 1992. However, a UK Government commentary on JD6 (which, as we have seen, contains a reference to 'religious liberties') says that the relevant paragraphs of JD6 'appear to follow JD.4 word for word'.[73] It is possible, therefore, that the first mention of 'religious liberties' might have been as far back as JD4, handed to the UK Government in May 1992. However, against that view is the identification by Mallie and McKittrick of a version of the declaration proposed by Sinn Féin, dated April 1992, which as we have seen does not contain a mention of 'religious liberties'. The fact that another version of the draft joint declaration, dated 29 March 1993,

---

70 Annabel Harris of the Quill Project was immensely helpful in clarifying this aspect of the complex negotiations. The next three paragraphs are based on this information. I am most grateful.

71 Digitised by Quill at Resource Item 22956.

72 The Taoiseach was clear that JD6 had been signed off by the Provisional Army Council: digitised by Quill at Resource Item 22957.

73 Digitised by Quill at Resource Item 22959.

is in the Nally papers that it also does not contain any mention of this phrase is further evidence that it was not in JD4.[74] The first verified version of a draft containing 'religious liberties' is JD6, which is the version handed to Butler by Reynolds. JD6 will then have gone into the Nally–Butler Group for negotiation.

Document JD8, handed to Thomas by Ó hUiginn on 24 September 1993,[75] contains the language that ends up in the final version of the Joint Declaration:

> He [the Taoiseach] accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with the agreement and consent of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and the civil rights and religious liberties of both communities.

Importantly, the phrase 'provide entrenched guarantees' has disappeared. This revised version of paragraph 5 was retained in further Irish Government drafts of the Declaration that were being worked up by the Irish and British negotiators in early October 1993[76] and found their way into the three November 1993 texts referred to previously (JD14, the British alternative draft, and JD14A, the text that followed consultations with Molyneaux), and thence into the final Declaration. On 6 October 1993, a further phrase was added at a meeting of the Butler–Nally Group which discussed the latest version of the Joint Declaration (JD10) and amended it.[77] The amendment added the sentence at the end of paragraph 5 which provided that: 'These would be reflected in any future political and constitutional arrangements emerging from a new and more broadly based agreement.'

As to who drafted the critical phrases that found their way into the final Declaration, the documents made available thus far do not indicate. Ó hUiginn has described the texts coming out of Hume–Adams as resulting from 'rather a floating drafting exercise where many hands refined a text to arrive at a result that might reflect a generally acceptable compromise'.[78] That said, there is some external evidence that a likely draftsperson was Mansergh, who, as we have seen, was during this period the principal liaison person between successive leaders of Fianna Fáil (beginning with Charles Haughey, then Albert

74 Papers of Dermot Nally, UCD Archives, University College Dublin Library, Ireland, P254.

75 Digitised by Quill at Resource Item 23027.

76 John Coakley and Jennifer Todd, *Negotiating a Settlement in Northern Ireland, 1969–2019* (Oxford University Press 2020) 258 (quoting Dermot Nally).

77 Papers of Dermot Nally, UCD Archives, University College Dublin Library, Ireland, P254.

78 Spencer (note 27 above) 127.

Reynolds and later Bertie Ahern) and the republican movement. His role in drafting has been acknowledged by several people involved in the discussions.[79] He himself acknowledged his involvement in the drafting of another part of paragraph 5, as we shall see. And he closely identified the importance of the commitment to the whole Declaration, suggesting in 2003 that the '*whole thrust of the declaration* was to work towards a new agreed Ireland, based on justice and equality and respect for the democratic dignity, civil rights and religious liberties of both communities'.[80] The important point, however, is that whoever was the draftsperson, it reflected a consensus position at that time between the Irish Government and the republican movement, as represented by Sinn Féin. The understanding of the phrase 'civil rights' therefore was likely to have strongly reflected the understanding of that phrase that Northern Ireland 'civil rights' activists of the late 1960s would have recognised, namely the importance of equality rights involving voting, housing, employment and non-discrimination but, equally clearly, it went beyond that meaning. It is worth bearing in mind that the issue of the incorporation of the ECHR into the domestic law of the UK (and its application in Northern Ireland law) had been discussed for some 20 years and 'civil rights' would also have been seen in part in this context.

It is particularly hard to argue for a narrow interpretation of 'civil rights' when combined with the reference to 'religious liberties'. The expression 'religious liberties' may have been included to give the paragraph a more Protestant and unionist flavour. The Orange Order, for example, had been founded in 1795 to uphold the Williamite Settlement and the 1688 Glorious Revolution, including the protection of 'civil and religious liberty available under a British, Protestant, monarch as opposed to a dictatorial Roman Catholic Papacy'.[81] One of the traditional objections of Unionism and organised Protestant opinion to a united Ireland was that their freedom to practise their religion would not be protected, and that any united Ireland would be dominated by Catholic teaching and dogma. For the Irish Government, therefore, sending a signal that this concern was recognised would have been considered useful in helping persuade Protestant opinion in Northern Ireland that a new Ireland contemplated by the Taoiseach in paragraph 5 would be protective of their rights in this respect.

---

79 Ibid at 128, 130.

80 Martin Mansergh, *The Legacy of History* (Mercier Press 2003) 103.

81 See eg Dominic Bryan, 'The right to march: parading a loyal Protestant identity in Northern Ireland' (1997) 4(3/4) International Journal on Minority and Group Rights 373, 380. Blair Worden, *God's Instruments: Political Conduct in the England of Oliver Cromwell* (Oxford University Press 2012) ch 8, shows how the term 'civil and religious liberty' pre-dates 1688 and had already become embedded under Oliver Cromwell and was already 'ubiquitous'.

Nor would the inclusion of 'religious liberties', together with 'civil rights' be seen in republican circles as weakening commitment to the latter. The terms used had clear echoes of the Proclamation of the Irish Republic on Easter Monday 1916, which included the commitment: 'The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens …'. Its inclusion was likely to appeal not only to Protestants but also Northern Ireland Catholics, whose places of worship were not always free from harassment. It was also consistent with Sinn Féin statements at that time. Sinn Féin had, at least from 1987, acknowledged the importance of the protection of rights in a united Ireland. In 'A Scenario for Peace'[82] first issued in May 1987, it stated that 'republicans have consistently asserted that the loyalist people, in common with all other citizens, must be given firm guarantees of their religious and civil liberties'.[83]

The reference to specific rights: the second sentence

Paragraph 5 of the Downing Street Declaration goes well beyond this attempt at reassurance, if such it was. Following the text that reads 'and must, consistent with justice and equity, respect the democratic dignity and the civil rights and religious liberties of both communities …' a significant addition to the text was introduced 'at a very late stage in the draft'.[84] The first time such an addition was on the cards was on 9 December 1993, when an insert was included in draft JD15B which includes in square brackets: 'These rights would include in particular [the "Magee list": to be provided on Monday].' Following extensive back and forth between Butler and Nally on 13 December 1993, this list of rights is included in the revised text. The additional text reads, after 'communities':

> … including: the right of free political thought; the right to freedom and expression of religion, the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to live wherever one chooses without hindrance; the right to equal opportunity in all social and economic activity, regardless of class, creed, sex or colour …

Where did this list of specific rights come from? The reference to the 'Magee list' gives a clear indication. The following origins story is attested to in numerous accounts of those close to the discussions from the Irish side, and from published accounts by Reynolds himself. The list of rights derives substantially from a document which was

82 Digitised by Quill at Resource Item 22375.

83 Sinn Féin, *A Scenario for Peace: A Discussion Paper* (Sinn Féin 1987) 4.

84 Coakley and Todd (n 76 above) 257 (quoting Dermot Nally). Dermot Nally's Papers now made clear that the language was introduced no earlier than 13 December 1993.

brought secretly by Magee from the CLMC in Belfast to Mansergh, probably in early October 1993.[85] Separately, the list had also been given by Gusty Spence, a leading member of the CLPA, and former leader of the UVF, and David Ervine, then leader of the PUP and formerly of the UVF, to Fergus Finlay, the political advisor to Dick Spring of the Irish Labour Party, then Ireland's Tánaiste (Deputy Prime Minister), at a meeting in Belfast.[86] Finlay described the list as 'a set of principles about discrimination, which formed the core of their own political philosophy, and which had been published as part of their party literature'.[87] We have seen that Magee was one of several back-channels being established between politicians in Ireland and paramilitaries to encourage political negotiations and the cessation of political violence.[88] The list was then inserted by Reynolds, into paragraph 5 of the Downing Street Declaration, as a way of demonstrating to loyalists that they would be listened to by the Irish Government, at a delicate stage of attempting to secure a ceasefire by these groups.

The account provided up to this point is largely based on published accounts. More recently, however, the actual document brought to Dublin by Magee has become available with the release of Nally's papers, which, given his role as the leading Irish civil service negotiator at the time, are of considerable importance. Several important details emerge from the Nally papers, and from the Magee document that the papers include. According to Mansergh, the only significant change made in the list of rights brought to Dublin by Magee and inserted

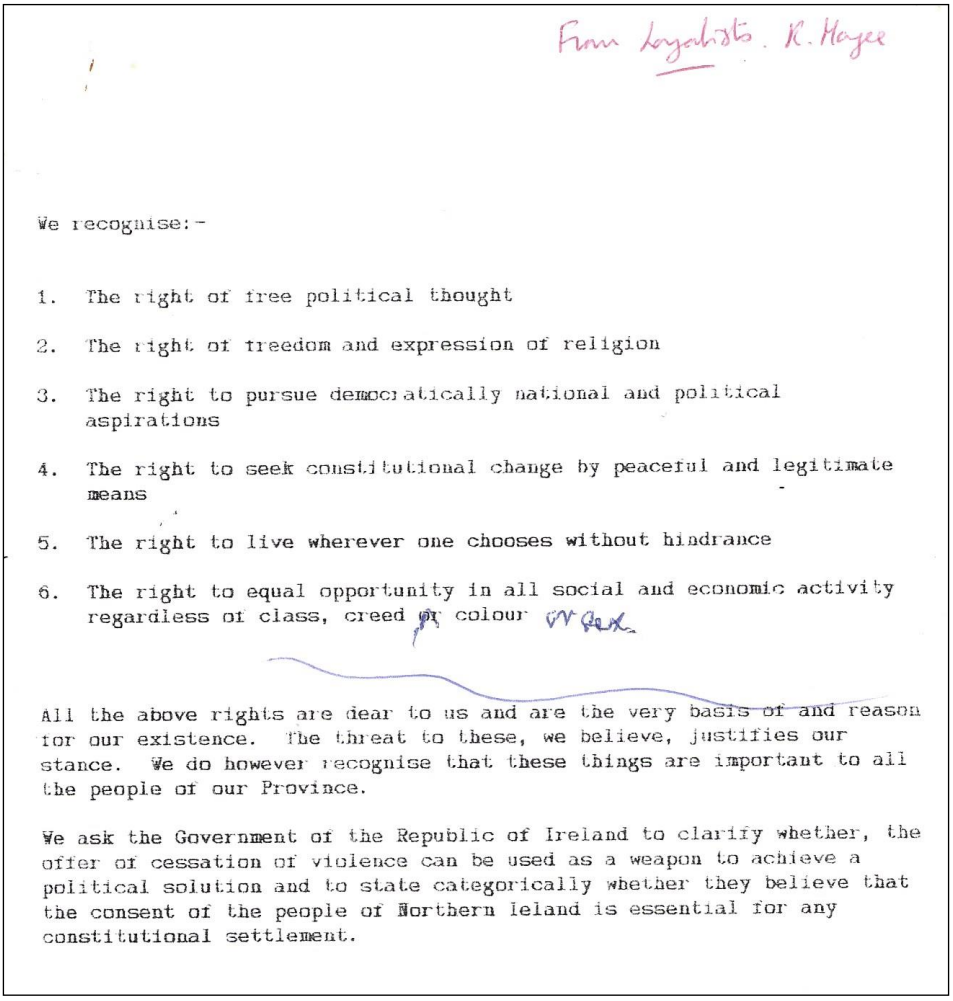
85 In his autobiography, Reynolds quotes Magee's account: 'We had a meeting of the combined Loyalist leadership discussing the way that they would be happy with things if certain points were drawn up. I met Mr Reynolds the following day and he asked me, "What was the situation?" I explained about the meeting, which I had the right to do and the permission to do. "Could I see those points?" he said. I gave them to him, and those were the six points written into the Downing Street Declaration.' Reynolds adds: 'I included them unchanged in paragraph 5.' Albert Reynolds, *Albert Reynolds: My Autobiography* (Transworld Ireland 2010) 332.

86 Connal Parr suggests that, as 'part of an intriguing working-class dynamic', while the UVF leadership were 'more comfortable' meeting Spring because he was Labour Party leader, Spence and Ervine felt able also to meet Reynolds, 'Ending the siege? David Ervine and the struggle for progressive Loyalism' 33(2) Irish Political Studies 202, 210.

87 Fergus Finlay, *Snakes and Ladders* (New Island Books 1998) 200. Mansergh himself believes that the list was handed to him by Magee in early October, personal communication.

88 Donoghue (n 58 above) 24; Garland (n 50 above) 284. Another key intermediary between Loyalists and Dublin politicians was Chris Hudson, who acted as a conduit between the UVF and members of the Irish Labour Party. Hudson does not appear to have been involved with the Magee List. Hutchinson (n 50 above) 189; Finlay (n 87 above) 199.

in the Downing Street Declaration was the inclusion of 'sex' among the list of grounds of discrimination. Who made that change seems to be disputed, with both Mansergh and Finlay claiming involvement in introducing that amendment.[89] The handwritten addition of 'sex' in the draft set of rights provided by Magee to Mansergh and included in the Nally papers[90] appears to have been inserted by Mansergh or by Reynolds himself.[91]



From Loyalists. K. Magee

We recognise:-

1. The right of free political thought
2. The right of freedom and expression of religion
3. The right to pursue democratically national and political aspirations
4. The right to seek constitutional change by peaceful and legitimate means
5. The right to live wherever one chooses without hindrance
6. The right to equal opportunity in all social and economic activity regardless of class, creed or colour ~~or sex~~

All the above rights are dear to us and are the very basis of and reason for our existence. The threat to these, we believe, justifies our stance. We do however recognise that these things are important to all the people of our Province.

We ask the Government of the Republic of Ireland to clarify whether, the offer of cessation of violence can be used as a weapon to achieve a political solution and to state categorically whether they believe that the consent of the people of Northern Ireland is essential for any constitutional settlement.

89 Martin Mansergh, personal communication; Finlay (n 87 above) 200–201: 'I changed the phrase to "class, creed, sex or colour". It enabled me to claim credit, if nothing else, for putting sex into the Downing Street Declaration.'

90 Dermot Nally Papers, UCDA P254/85, digitised by Quill at Resource Item 23495.

91 Martin Mansergh, personal communication.

Nally's papers also include a note to the Taoiseach of 13 December 1993 stating that the inclusion of the rights had been discussed with Sir Robin Butler that day. The various texts of the draft Downing Street Declaration, such as that of the 9 December 1993 quoted previously, also demonstrate how *both* Governments realised that the list derived from Magee on behalf of the loyalists. The annotated British draft[92] of the final text Declaration confirms clearly that the UK Government realised that Magee was, indeed, the source of this list of rights (it is referred to as the 'Magee list'), and that its intended purpose at that time was to 'reassure unionists'.

To those unfamiliar with the history of Loyalism in Northern Ireland, the involvement of the CLMC in apparently proposing a list of rights to the Irish Government might seem strange. Beginning in the 1970s, however, an important strand of loyalist opinion had strongly supported the idea of a Bill of Rights.[93] We have seen that several founding members of the PUP had been members of the NILP, which had, from the 1960s, adopted a Bill of Rights as a key part of its political reform platform.[94] Loyalist political parties frequently referred to the need for a Northern Ireland Bill of Rights and included proposals for such a Bill in their manifestos.[95] Indeed, it was one of

92 Digitised by Quill at Resource Item 23107.

93 Tony Novosel, *Northern Ireland's Lost Opportunity: The Frustrated Promise of Political Loyalism* (Pluto Press 2013), recounting the UVF's political agenda, which included supporting rights, during the 1970s. See also Anne Smith, Monica McWilliams and Priyamvada Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (Transitional Justice Institute, University of Ulster 2014), ch 2, which sets out the positions of the political parties on a Northern Ireland Bill of Rights from the 1970s to the conclusion of the B-GFA.

94 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (HMSO 1972), annex 6 ('Views of the Northern Ireland Labour Party'). See further Aaron Edwards, *A History of the Northern Ireland Labour Party: Democratic Socialism and Sectarianism* (Manchester University Press 2009) 136.

95 As early as 1979, the Progressive Unionist Group (the forerunner of the PUP) published its Proposed Democratic Devolved Administration for Northern Ireland, which included a proposed Bill of Rights 'for all United Kingdom citizens', see Novosel (n 93 above) 189. In 1985, the PUP expanded on this idea, PUP, *Sharing Responsibility*, September 1985 Irish Left Archive: 'Freedom from fear and violence, social deprivation in all areas, negations of basic human rights and many other issues have not received the public emotional attention that they so richly deserve. The result has been catastrophic. … The constitution of Northern Ireland should embody a Bill of Rights along the lines of the European Convention on Human Rights which would include guarantees against discrimination.' This was 'created' by Hugh Smyth, Jim McDonald and David Overend: Novosel (n 93 above) 214. See the later iteration of this policy in PUP, War or Peace: Conflict or Conference: Policy Document of the Progressive Unionist Party (nd, 1986–1987?) 5–6; PUP, Progressive View (1996, No 3 February). Somewhat equivalent proposals were made by the UDA: UDA, A Bill of Rights (UDA 1986). This had been preceded by several publications by the New Ulster Political

the significant ways (apart from their espousal of political violence) in which those parties could be differentiated from the UUP and the DUP. This emphasis on human rights was seen by these parties as part of their self-understanding as working class, urban and committed to left-wing politics,[96] whilst remaining Protestant and unionist. Some of their grievances were strikingly similar to the grievances identified by working-class Catholics and republicans: for example, that the conditions under which loyalist prisoners were held amounted to violations of human rights.[97] In light of that history, then, it is not too surprising that a list of rights would be signed off by the CLMC.

Historical uncertainties not infrequently attract conspiracy theories, and the origins of the text we are concerned with is no exception. Was it possible that the list was conceived in Dublin and cunningly fed to the loyalists indirectly who then (unaware of its provenance) fed it back to Dublin?[98] Identifying conspiracy theories, even to rebut them, is hazardous, in that it risks giving them a credibility that they clearly lack. The hypothesis that the list had been drafted originally in Dublin, identified by a political commentator close to current loyalist thinking as in circulation among these groups,[99] seems extremely unlikely, and may say more about contemporary splits within Loyalism than anything else. Mansergh has indicated that he 'certainly never suggested [such a list]. Indeed, it came as a significant surprise. At no point was it suggested to me by Roy Magee, that the idea had been prompted by anyone in Dublin.'[100] No one else who was involved at the time and has subsequently written about it has suggested it, even

---

[*n 95 cont*] Research Group, which was an advisory body to the UDA. See New Ulster Political Research Group, *A Proposed Bill of Rights* (NURPG 1979); New Ulster Political Research Group, *Beyond the Religious Divide* (NURPG 1979); Ulster Political Research Group, Common Sense: Northern Ireland – An Agreed Process (Ulster Political Research Group 1987, 1993).

96 At that time, support for a Bill of Rights also emanated from Left Republicans hostile to Sinn Féin in the form of the Workers Party (see 'Bill of Rights essential for democracy', *The Northern People*, 28 May 1990, 3), and the Official IRA (with whom the UVF was in dialogue at the time).

97 *Combat*, October 1991; *Combat*, June 1992.

98 There is no evidence for this, it should be said. There are faint glimmers of similar language in the version of the Irish Draft Joint Working Paper which was leaked to the *Irish Press* and published in that newspaper on 19 November 1993. This refers to 'a number of principles which the two governments hold in common ... [including] recognition of and respect for the identities of the two communities in Northern Ireland, and the right of each to pursue its aspirations by peaceful and constitutional means ... and with the opportunity for both communities to participate fully in the structures and processes of government.' But it is likely that the Irish Government already had sight by that time of the 'Magee List'.

99 The source of this information has requested anonymity.

100 Mansergh, personal communication.

when they are otherwise willing to claim credit for events. Third-party non-governmental organisations or individuals are possible sources, but if they had written it, would they have subsequently hidden their light under a bushel? As Mansergh states:

> The image of loyalists in Dublin at the time was such that it would have occurred to very few, or even anyone, inside or outside of government, that loyalists had the slightest interest in human rights or that they would be receptive to any suggestion from Dublin that they should put forward a list.

We can, I suggest, safely dismiss this theory, not least since there are much better alternatives available. Henry Sinnerton, the biographer of Ervine, provides the most detailed and (in the absence of other evidence) most plausible explanation for how the list evolved. In meetings between Spence and Ervine on the one side and Finlay on the other side, Sinnerton says ('in September and October 1993')[101] that the loyalists 'put on the table the political documents on which the Combined Loyalist Political Alliance had been working'.[102] He continues: 'Finlay suggested to Spence and Ervine that his political masters in Dublin would be very keen to see their ideas in print … and the thinking of the loyalists eventually made its mark upon the two government's deliberations.'[103] Then, referring to the list of rights, Sinnerton adds that the list was 'written by the Combined Loyalist Political Alliance and approved by the Combined Loyalist Military Command on the Shankill Road'.[104]

The Magee List appears remarkably similar to a list published in the UVF magazine, *Combat*, in November 1993.[105] Embedded in an article by 'Carson' (a *nom de plume*), and seemingly entirely unrelated to that article, is the following:

> All human beings have the right to: Free political thought. To Freedom. To worship where and when they so desire. To political aspirations of their choice. To seek change constitutionally. To equal opportunity. There can be no price for peace. There is a price for war!

Some similar phrases also appear in a statement issued by the CLMC in early December 1993.[106] The editor of *Combat* magazine at the

101 Henry Sinnerton, *David Ervine: Uncharted Waters* (Brandon 2002) 150.
102 Ibid 150.
103 Ibid 150.
104 Ibid 151.
105 *Combat*, November 1993.
106 See, Gerry Moriarty, 'Loyalists seek solution that recognises two traditions' *Irish Times* (Dublin 11 December 1993): 'We defend the right of any one or group to seek constitutional change by democratic, legitimate and peaceful means.'

time,[107] who would presumably have an insight into who 'Carson' was, and why the list of rights was embedded in an article which otherwise had little connection with the list, is unfortunately dead.

Who actually drafted the Magee List is also still to be determined. Was it Ervine, a former member of the UVF but by this time the leader of the PUP and a committed advocate of a pluralist Northern Ireland? Was it Spence, the *eminence grise* of the UVF, and a member of the CLPA?[108] Or Billy Mitchell, also a former member of the UVF, recently released from prison in 1990, and later to produce highly articulate and theoretically sophisticated justifications of human rights from a loyalist perspective?[109] Was it Magee himself?[110] Or was it drafted by advisors external to the CLMC and the CLPA? The most likely answer is that it was the result of a collective effort. Dawn Purvis, who was to become leader of the PUP, but at this time was not in a leadership position, has said that:

> from [her] experience ... Billy Mitchell was the writer of many PUP papers including drafts that went to the CLMC from the CLPA. Writing papers was usually a joint effort beginning with a Billy Mitchell draft with input from David [Ervine], Gusty [Spence], Eddie Kinner and Jim McDonald.[111]

---

107 Dawn Purvis, subsequently leader of the PUP, has said that 'Billy Mitchell and Jim McDonald were ... editors of Combat with input from the UVF "Brigade Staff".': personal communication. In November 1993, McDonald was more likely to have been the editor than Mitchell, who is said to have become disillusioned with the publication by that time: Aaron Edwards, personal communication.

108 Spence subsequently spoke eloquently about the need for a 'pluralist and equitable society': 'A comprehensive programme of inalienable principles manifesting themselves in freedom of speech, of opportunity, of worship, of political practice, of dignity and of absolute parity solidly encapsulated in a Bill of Rights agreed by all the Parties in Northern Ireland.' Speech to PUP Conference, 11 February 1995, excerpted in Political Profile 3, *Combat*, April 1995.

109 Mitchell has been described as 'the PUP's brain': Edwards (n 47 above) 230. See further, Billy Mitchell, 'Democratic socialism and progressive unionism' (1998) 9 New Irelander; Political Profile 1, Combat, April 1995; PUP, Principles of Loyalism: An Internal Discussion Paper, November 2002 (written by Mitchell).

110 In his obituary of Magee, *Irish Independent*, 15 February 2009, Reynolds wrote: 'At my request he wrote paragraph 5 of the Downing Street Declaration'. He is also quoted as saying: 'Paragraph 5 was what Roy Magee had written at meetings on the Shankill Road. I read it and I was happy to run with it.': John D Brewer, Gareth I Higgins and Francis Teeney, *Religion, Civil Society, and Peace in Northern Ireland* (Oxford University Press 2011) 116. See further: Statement by Albert Reynolds, in response to the Combined Loyalist Military Command Ceasefire, 13 October 1994; John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Blackwell 1995), appendix B, 421–422; Seán Duignan, *One Spin on the Merry-Go-Round* (Blackwater Press 1995) 101, 126; Patrick Maume, 'Magee, Roy (Robert James)', Dictionary of Irish Biography (originally published, December 2014).

111 Dawn Purvis, personal communication.

Viewed objectively, the list appears to be a combination of general (even universal) principles and principles addressing specific local loyalist concerns. There are some familiar rights, traditional in any human rights document, such as freedom of religion, but several of them are far from ordinary. Even as regards the traditional rights, the way they are presented (the reference to 'religious liberties', for example), seems to owe more to Lockean conceptions of religious tolerance and the rights established by the Glorious Revolution of 1688 than it does to the Universal Declaration of Human Rights. Clearly this list of rights is not a cut and paste extract from that Declaration or any other human rights convention. The 'right to live wherever one chooses without hindrance' could very well have been included because there was a well-publicised claim in the border areas of Northern Ireland, reflected in the pages of *Combat*, that the IRA and militant republicans were allegedly engaged in 'ethnic cleansing'[112] of Protestants and unionists.[113] So too, protections from sectarian discrimination would respond to fears by Protestants about the new fair employment legislation, seen as favouring Catholics.[114] Nor was the list of grounds included in the right to equality of opportunity (class, creed, or colour) simply a reflection of other equivalent lists discussed at the time, including the PAFT guidelines.[115] The original Magee List includes 'class' (not included in PAFT), no doubt reflecting the left-wing identity of prominent loyalist leaders at that time, but does not include politics, gender, disability, marital status, age, and sexual orientation, all of which, as we have seen, were included in PAFT.

Mallie and McKittrick, in their account, also introduced a degree of ambiguity into what motivated the list, recounting how the Taoiseach and the loyalists may have been at cross purposes in their understandings. They say:

> The misunderstanding arose because Reynolds assumed the points were what loyalists wished to be reassured about. In fact, however, they were points which the loyalists were prepared to offer to Catholics and nationalists. Mr Magee later explained: 'I presented six points. He [Reynolds] assumed that what he was being told was what loyalists wanted written into a Bill of Rights. What they were saying was, "Here

112 'Senator', 'Like Hell They Will', *Combat*, June 1993. On the concept of 'ethnic cleansing' and expulsions in general, see Meghan Garrity, 'Introducing the government-sponsored mass expulsion dataset' (2022) 59(5) Journal of Peace Research 767.

113 See 'Cameron', 'US Watch-Dog for Human Rights Here', *Combat*, February 1991; 'Claen', 'Around the Province', *Combat*, April 1992; 'Carson', 'The Scorched Earth Policy of Republican Sectarianism', *Combat*, October 1992.

114 Editorial, 'The War of Words', *Combat*, June 1993; 'Vigilant', 'Discrimination in Employment', *Combat*, July 1994.

115 See n 6 above.

> is what we would want to see written into a Bill of Rights to make sure nationalists would be comfortable." They were in fact conceding them, which is different.'[116]

On this reading, while the Taoiseach included the list in paragraph 5 as an intended reassurance to loyalists, presumably in a putative united Ireland, the loyalists had intended the list as a reassurance to nationalists, presumably within a British Northern Ireland, resulting (as one participant subsequently observed) in mutual reassurance but based on a shared misunderstanding.[117]

The likelihood is that both intentions played a part in the construction of the list. Leading loyalists, indeed, had developed a political understanding that 'if we wanted the Union to remain safe, then we would have to appeal to ... middle-class Catholics'.[118] Presenting a list of rights could be seen as part of that strategy. But equally, the list included rights that grew directly from the grievances of working-class Protestants. This latter interpretation seems to be clearly indicated by the message which accompanied the list of proposed rights that Magee sent to Dublin, which, as we have seen, has only recently become available. The author of the note (and we have seen that who that was is uncertain) wrote: 'All the above rights are dear to us and are the very basis of and reason for our existence. The threat to these, we believe, justifies our stance.' To this was added, however: 'We do, however, recognise that these things are important to all the people of our Province.'[119]

Whatever its provenance and motivation, the same Magee list is repeated word for word in the joint Irish–UK Framework Document published in February 1995, with the minor exception that 'gender' is substituted for 'sex' as a protected ground, and there is a minor redrafting of the 'right to choose one's residence'.[120] However, while the text of the Magee List remained substantially the same, the object and purpose of the list shifted significantly between its original conception in December 1993 and the joint Framework Document. As we have seen, its original manifestation in paragraph 5 of the Downing Street Declaration was in the context of commitments by the Taoiseach to the loyalists, as the former saw it at least. In the joint Framework Document, the list was placed in a paragraph in which *both*

116 Mallie and McKittrick (n 32 above) 224. Mansergh, Reynold's adviser on Northern Ireland at the time, recounts that he 'always understood the Magee list being primarily what Loyalists were prepared to concede, but it could be read in more than one way'. Martin Mansergh, private communication.

117 Senior UK civil servant, personal communication.

118 Hutchinson (n 50 above) 182.

119 Dermot Nally Papers, UCDA P254/85.

120 Joint Framework Document (n 58 above), February 1995, para 51.

Governments urged the parties in forthcoming talks to consider the list as the basis for a Charter of Rights for the island of Ireland to be agreed by elected representatives North and South, a concept that had been introduced by Irish negotiators into the mix during the negotiations on the joint Framework Document during 1994 and was broadly accepted by both sides by March of that year.

From Magee to Mitchell (1995 to 6 April 1998)

After 1995, however, the Magee List barely features directly in any of the available documents from the joint Framework Document until the so-called Mitchell Draft was circulated to the parties on 6 and 7 April 1998. The list had not been included, for example in the Joint Irish–UK Propositions on Heads of Agreement document circulated on 12 January 1998,[121] or in the British Government's Rights and Safeguards Paper of February 1998.[122] So too, the political parties seldom referenced the specific rights included in the Magee List in their various submissions,[123] with the notable exception of the Ulster Democratic Party, linked to the Ulster Defence Association, in its submissions during the talks process.[124] 'Civil rights and liberties' which the UDP identified as needing to be addressed, included, 'amongst others':

> The freedom of expression
>
> The freedom of assembly
>
> The freedom of religious expression
>
> The right to democratically pursue national and political aspirations
>
> The right to seek constitutional change and legitimate means
>
> The right to live wherever one chooses without hindrance
>
> The right to equal opportunity in all social and economic activity, regardless of class, religion, gender or colour

121 Propositions on Heads of Agreement, 12 January 1998, CAJ Papers.

122 Rights and Safeguards: Paper by the British Government, February 1998, CAJ Papers.

123 Paddy O'Hanlon, of the SDLP, did, however, reference the text on rights in para 5 of the Downing Street Declaration in his confidential (and influential) submission to the Irish Government of December 1997. His paper did not consider the issue of human rights or equality as such, however; nor did it form part of the submissions to the talks process and was not generally known about until his posthumous autobiography. See Paddy O'Hanlon, *End of Term Report* (Paddy O'Hanlon Publishing Ltd 2011), app: 'The Document'. I am grateful to Brendan O'Leary for the reference.

124 UDP: Position Paper – Strand Three, MMW Papers, Box 17, Strand 3 and Cross-cutting: Party Submissions to Strand 3, October 1997–February 1998.

> The right to full participation in democratic politics
>
> The right to be protected by law
>
> The right to liberty and security of person
>
> The right to a fair trial

However, although the list of rights included in the Magee paper were seldom explicitly referenced by the parties, the role of rights played an important part in the evolving negotiations. In a Consultation Paper by the British and Irish Governments of 14 October 1997, the two governments reiterated that they would 'encourage democratic representatives from both jurisdictions in Ireland to adopt a Charter or Covenant, which might reflect and endorse agreed measures for the protection of the fundamental rights of everyone living on the island of Ireland', and requested the views of the parties on 'which rights might be specifically cited in any such Charter or Covenant'.[125]

In its paper on 'Rights and Safeguards' of 7 November 1997,[126] the Irish Government returned to the issue of a Charter or Covenant, suggesting that the proposal in the joint Framework Document could be valuable, and repeating that it could 'also pledge a commitment to mutual respect and to the civil rights and religious liberties of both communities'.[127] Such a Charter or Covenant 'would represent a set of political commitments by the democratic representatives of the people of Ireland which would underpin the range of human rights and institutional safeguards legally enshrined in an agreement emerging from the present negotiations'.[128]

The SDLP supported the suggestion of a Covenant or Charter but proposed that the 'extensive body of internationally agreed individual and communal rights provides the basis' for such a Covenant or Charter.[129] So, too, did Sinn Féin.[130] As explained by the SDLP in the discussion of rights on 2 March 1998:

> the idea had arisen from the previous round of talks in response to Ian Paisley's comment that a Northern Ireland Bill of Rights was predicated on Northern Ireland remaining in the UK, and any change in this status

125 Strand Three – A New Agreement: A Consultation Paper by the British and Irish Governments, 14 October 1997, MMW Papers, Box 17, Strand 3 and Cross-Cutting.

126 Digitised by Quill at Resource Item 17404.

127 Strand Two – Rights and Safeguards: Paper Presented by the Irish Government, 7 November 1997, CAJ Papers.

128 Ibid para 13.

129 SDLP Submission to Multi-Party Talks, October/November 1997, Rights and Safeguards, Strand 2: Agenda Item 5: digitised by Quill at Resource Item 17416.

130 Rights and Safeguards: A Sinn Féin submission to Strands 1, 2 and 3, 8 February 1998, CAJ Papers.

> would leave Protestants unprotected. The SDLP said it was possible that in the future Northern Ireland may opt by consent for reunification; therefore, it was important that they create rights that would apply equally for Unionists in such an eventuality as for nationalists at the present time.'[131]

Explicit reference was made to the joint Framework Document provisions.

In its paper on 'Rights' to Strand One, the Women's Coalition also reiterated its support for such a Covenant and, in the context of spelling out its commitment, its representative 'read from paragraph 51 of the joint Framework Document [containing the Magee List] and said it believed it was important for the process to obtain some view of a declaration or covenant of rights'.[132] There was, as yet, no set of principles on the table to be agreed, but 'it was clear that any which were drafted would have to be sufficient and dynamic to cover any attitudinal change [presumably a reference to unification] ... and that it was vitally important that such principles were developed on the basis that they would not provoke fears for anyone'.[133]

When a (slightly) modified Magee List was included in the Mitchell Draft, therefore, it flowed from agreement between the two governments, rather than at the urgings of the political parties, but the discussions leading to its inclusion had strongly hinted that something like it could well play a role in any agreement. No one had expressed any opposition to the list and therefore retaining it as unmodified as possible was a way of heading off rejection by any party. Thus, the only significant change in the list between 1995 and 6 April 1998 was the addition of the 'right to freedom from sectarian harassment' in the Mitchell Draft. I understand from Martin Mansergh that he had advised the inclusion of this right during discussions between the two Governments in the second half of 1997, motivated by reported incidents of sectarian harassment in Northern Ireland at the time, not least the events surrounding the Garvaghy Road dispute.

So, although the Magee List remained substantially the same, its object and purpose shifted yet again between its original outing in December 1993 and its reappearance in April 1998. In its original manifestation in paragraph 5 of the Downing Street Declaration it was part of commitments by the Taoiseach to the loyalists. In the

---

131 Summary Record of Inaugural Cross-Strand Meeting – Monday, 2 March 1998 (14.15), MMW Papers, Box 17 Strand 3 and Cross-Cutting – Summary Record, 2 March 1998: digitised by Quill at Resource Item 17470.

132 Summary Record of Inaugural Cross-Strand Meeting – Monday 2 March 1998 (14.15), MMW Papers, Box 17 Strand 3 and Cross-Cutting – Summary Record, 2 March 1998, para 27.

133 Summary Record, para 36.

joint Framework Document, it was placed in a paragraph in which both Governments urged the parties in forthcoming talks to consider the list as the basis for a Charter of Rights for the island. Now, in the Mitchell Draft, it was included as a commitment by all the parties to the Agreement, applicable in both jurisdictions immediately. The list was separated from being an explicit basis for a future Charter of Rights for the island, becoming instead a simple declaration of general principles which all parties to the Agreement recognised.

The idea of such a declaration had first been identified by the UK Government in an internal HMG Paper for Ministers on Human and Civil Rights (in April 1996) which assessed options ministers might consider in the forthcoming talks and included a discussion of a possible 'Declaration of Human Rights' which would 'be a presentational device involving little substantive change'.[134] There would be 'no statutory force to the Declaration, nor would it be in any way entrenched'. At that time, however, as reported to UK Ministers, the Irish Government

> showed little enthusiasm for a declaration on these lines when it was proposed ... and we expect that it would probably be unattractive to the SDLP and Alliance. This is not an option which we should reject at this stage, if only because it might play a useful role in a settlement.

And so it became. The Magee List was separated from the idea of an all-island Charter or Covenant and became instead the centre piece of what was effectively the declaration envisaged by the UK Government.

Negotiating the final text of the B-GFA (6 April to 10 April 1998)

The basic Magee List remained intact, and, despite the apparent lack of previous consultation on the inclusion of the list as such with the parties, no component of what became paragraph 1 of the human rights and equality chapter of the Agreement was ever the source of any political showdown. That is not to say that the list passed without comment. The CAJ, the principal Northern Ireland human rights NGO, which was briefed unofficially on the content of the human rights and equality provisions of the Mitchell Draft during the morning of 7 April, suggested in a note to several of the political parties that the grounds on which equality of opportunity should be provided in paragraph 1 should be amended to include 'disability' and 'sexual orientation', both listed in the PAFT Guidelines.[135] Both the Women's Coalition and

134 Ibid at para 9(a).

135 Notes from Martin O'Brien to PUP, UDP, Sinn Féin, NIWC, including Some Notes [on the Mitchell Draft], 7 April 1998, CAJ Papers.

Sinn Féin proposed changes to the draft,[136] only some of which made it into the final agreement, but in the context of so much controversy over other sections of the agreement, the final version of paragraph 1 appears to have been accepted by all parties largely without demur. Both Sinn Féin and the Women's Coalition were primarily focused on other parts of the section on rights, safeguards and equality of opportunity, in particular the provisions on the public sector equality duty and the inclusion of language on victims.

Some amendments to the Magee List were made, however. One of the recurring fears of elements of civil society particularly involved with human rights issues had been that the negotiations would result in a backward-facing agreement, purely concerned with a 'two-communities' understanding of the conflict. In an internal CAJ paper, before the start of the negotiations, this fear was expressed as follows:

> There is a need in particular to protect minority group rights in addition to the rights of the main traditions. Since the main thrust of the framework document is towards a political accommodation protecting the rights to the two main traditions in Ireland, there is a danger that the rights of other minorities (such as Travellers, ethnic minorities, lesbians and gays, and the disabled) will be overlooked. The … Charter of Rights could play an important role in this regard.[137]

In its paper on 'Rights' to the Strand One committee of the talks, in the run-up to the Mitchell Draft, the Women's Coalition had also stressed that, in its view, 'rights should not be seen as concessions to one side of the community or another, but rather as the benchmark and basis for the development of relationships characterised by equity, inclusion and respect for individual and community rights in Northern Ireland'.[138] It had urged that the talks should 'pay particular attention to the individual and collective rights of women; minority ethnic groups; people with disabilities, and other specific groupings within society that have experience of both direct and indirect discrimination'.[139]

We have noted earlier the addition of 'sex' (later replaced by 'gender') to the original Magee List, but beyond that the list of protected grounds was narrow. Slowly but surely, however, the focus of attention shifted imperceptibly towards a somewhat more inclusive approach. Subtle

136 Mansergh has described Sinn Féin's involvement at this time: 'If you fast forward to the Good Friday Agreement, the night before it was concluded they came with a list of seventy-plus points that needed to be addressed …': Spencer (n 27 above) 172–173.

137 Colm Campbell, Draft Initial Comments on Framework Document, March 1995, in CAJ Papers.

138 MMW Papers, Box 12, Strand 1 Papers Agenda Items 5 and 6, NIWC, Submission, para 2.1: digitised by Quill at Resource Item 17305.

139 Summary Record, para 36.

changes (such as the shift from 'everyone living in Ireland' and the reference to 'both communities' in the joint Framework Document, to the use of the expression 'everyone in the community' in the B-GFA) hint how the human rights provisions in the Agreement were subtly providing an alternative, or at least supplementary, vision to the 'two communities' narrative of so much else in the Agreement.

In the context of this history, the other changes made in the final hours to paragraph 1 were significant.[140] Three sets of important changes were made. The first change to the Mitchell Draft was the addition of 'the right of women to full and equal political participation', at the request of the Women's Coalition. Monica McWilliams has described how the two governments agreed to insert it at the last minute, during the all-night negotiations on the night of 9/10 April.[141] The second change was the addition of language on the victims of the 30-year-long conflict, some of which was framed in the language of rights. This too was proposed at the last minute by the Women's Coalition and included in the final draft, as Williams put it, 'by the skin of our teeth'.[142] Third,

140 Digitised by Quill at Resource Item 17140.

141 McWilliams (n 66 above) 208. A rather more colourful description of the process by which the provision was agreed to be included is by Kate Fearon, one of the other Women's Coalition negotiators, in *Women's Work: The Story of the Northern Ireland Women's Coalition* (Blackstaff Press 1999), chapter 4: 'The NIWC decided that it had not been in the process for two years for nothing to be acknowledged about women's rights, and thus proposed the addition of "the right of women to full and equal political participation" (wording arrived at only after revisiting the Beijing conference document and considering the wording of the Guatemalan peace agreement as found on the Internet). The offensive to have this inserted was mounted on a number of fronts. First, Sagar went to visit Mo Mowlam, who was being jealously guarded by her officials. Not to be put off, Sagar hung around the corridor. When Mowlam appeared, Pearl said she needed to speak to her urgently, so they shared a toilet cubicle while Pearl told her about the provision. Mo went back into her offices, and Sagar, after a quick Menthol Light in the toilet of the non-smoking building, went out into the corridor again. Here she met one of the officials, who told her she was not allowed to see the Secretary of State. She laughed. "Been there, done that, worn the T-shirt," she informed the stunned official. "You're too late."

Other officials were open to suggestion from the NIWC. They just needed a little persuading. For example, once Mowlam had deemed the issue of women's rights to be important enough to be pursued, one male official sat late into the night, looking slightly bewildered amongst ten women, trying to discover if rational arguments really existed for its inclusion. The rights laid down in the agreement, he observed, were specifically relevant to a situation of conflict – where did women fit in? "It's simple," Avila Kilmurray told him, quoting Derry civil rights activist Cathy Harkin. "We've been living in an armed patriarchy for the past thirty years!"

"Oh, right," came the sensible reply. And that was it. The NIWC addition was in. Once in, no one dared take it out.'

142 McWilliams (n 66 above) 208.

the list of protected grounds identified in the provision guaranteeing equality of opportunity was amended to include 'disability', and to substitute 'ethnicity' for 'race' (sexual orientation was not included as a protected ground). These amendments were proposed by the Women's Coalition,[143] at the urging of the CAJ,[144] which as we have seen was in contact with several of the political party representatives present in the negotiations, although it was not a party to the negotiations.

Following publication of the Agreement, the declaration of rights in paragraph 1 elicited opposed assessments, when it was addressed at all. On the one hand, the organisation British Irish Human Rights Watch was highly critical of what it saw as the failure of the drafters of the Agreement to do more to break the 'two communities' approach. Referring specifically to the list in paragraph 1, it considered that it was

> clear that the list contained in the Agreement has been introduced in order to appease or reassure one faction or another ... . Thus the list ... perpetuates the approach of regarding human rights as bargaining chips, rather than recognising that they are universal and apply to everyone. The sooner the notion that human rights are a series of claims that need to be balanced between communities is abandoned, the better.[145]

The Women's Coalition took a different view, with Monica McWilliams viewing this part of the Agreement with pride because it was inclusive and broke out of the 'two communities' narrative of rights.[146] For the most part, however, paragraph 1 elicited little comment.

CONCLUSION ... AND A POSTSCRIPT

We have seen in this article that the list of rights in paragraph 1 of the human rights and equality chapter of the B-GFA resulted from the collective involvement of many parties between 1991 and 1998. At one time or another, representatives of Sinn Féin, the IRA and the SDLP, the Irish Government and the British Government, the Women's Coalition and the CAJ, all played a role in producing a list of rights that each could live with. The dialogue that was initiated with Sinn Féin and the IRA contributed to the commitment that future constitutional arrangements would safeguard 'civil rights'. We have also seen that progressive loyalism, in the shape of members of the CLMC, the PUP and the UDP, also played an important role in shaping the embryonic declaration of human rights, supplying the language that

143 Ibid 207.

144 CAJ Archives.

145 British Irish Human Rights Watch, *The Mitchell Agreement: An Assessment of the Human Rights Dimension* (April 1998), CAJ Papers.

146 McWilliams (n 66 above) 208.

formed the basis of paragraph 5 of the Downing Street Declaration. The loyalist and republican role in contributing to the human rights element of the B-GFA and the peace process should, I think, be more widely recognised, not least if the communities from which they came are to feel any attachment to it. The fact that what were seen as the two political extremes were so central to the narrative is a critically important part of the story. The language chosen, and the process from which it came, were both carefully constructed precisely so that they would appeal to the political extremes in Northern Ireland, those who considered themselves (whether loyalist or republican) to be marginal to the society in which they lived.

What will be seen by some, at first reading, as a rather odd miscellany of rights, incubated on the hard streets of Belfast, survived largely intact in the cauldron of drafting what became the B-GFA. But grafted into the original Downing Street Declaration formulation were the subsequent contributions of a highly diverse group of strange bedfellows, who probably did not fully appreciate the origins of what they were contributing to. The traditions from which those who contributed to the final product came included: republicanism, liberalism, Lockean religious toleration, socialism and feminism. Was the result an eclectic collection of disconnected rights or was there a merging of these originally discrete traditions into an integrated and cohesive understanding of human rights?

At this point, the narrative set out in this article can usefully draw on, and contribute to, the historiography of human rights. A common theme in the study of the intellectual history of human rights is the extent to which human rights has come to challenge, if not replace, other previous ideologies.[147] Though this 'replacement theory' is regarded with some scepticism,[148] it does have the virtue of emphasising similarities between the role of human rights and the role of other competing ideologies. For the purposes of this article, the argument that human rights has become a new global civic religion is particularly interesting because the global growth of human rights in the twentieth century echoes the global growth of the Christian religion in the nineteenth century. The concepts that were developed to analyse the latter seem particularly adaptable in analysing the former, in particular the extent to which, when multiple religions came into contact with each other, what resulted was a merging or assimilation of these discrete traditions, what became known as 'syncretism'. Does this explain what occurred between 1993 and 1998 in Northern Ireland? Do we see the emergence of a syncretic human rights understanding? In

147 Samuel Moyn, *The Last Utopia* (Harvard University Press 2012).

148 Christopher McCrudden, 'Human rights histories' (2015) 35 Oxford Journal of Legal Studies 179.

particular, is there a central element that links the disparate traditions together sufficiently to create an integrated, inclusive idea of human rights?

One of the phrases that we have not so far considered is the reference to 'democratic dignity' in paragraph 5 of the Downing Street Declaration. We have seen that paragraph 5 comprised two main parts: the first section dealing with issues of political self-determination and the principle of consent, and the second part on the importance of rights. 'Democratic dignity' neatly links the two parts of the paragraph, with 'democratic' referring to the first part, and 'dignity' referring to the second part. In this context, the language of 'democratic dignity' speaks in terms of 'respect'. Indeed, in important ways, the concept of dignity as respect is the central idea of the whole paragraph. This message, that those on the extreme and the marginalised were respected, was a powerful signal of inclusion and possibility.

Were it not for Brexit, however, the story of how paragraph 1 came to be would be little more than a footnote in the history of the B-GFA. After the successful conclusion of the negotiations in 1998, paragraph 1 was treated with scant regard. How things have changed! For, now, the Magee List forms a significant part of the architecture that article 2 of the Protocol establishes for the continuing role of EU human rights and equality standards in Northern Ireland. When paragraph 5 of the Downing Street Declaration was amended to include the promise that rights listed 'would be reflected in any future political and constitutional arrangements', few if any could have imagined that it would be in the political and constitutional arrangements flowing from Brexit that the list of rights was to take centre stage. Nor that what was once, rightly, viewed as a set of legally unenforceable principles, of little immediate practical value, would become a key element of an enforceable set of legal obligations, both in domestic law and in international law, after being incorporated into the enforceable, and justiciable, legal provisions of the Protocol. Determining the extent to which British negotiators realised the full import of what was being agreed in Protocol article 2, in particular the change in the status and enforceability of the various aspirational rights in the B-GFA, is beyond the scope of this article, but contemporaneous evidence indicates that this was understood,[149] and none of the initiatives taken since, whether in the Windsor Framework,[150] or in the agreement between the DUP and the UK Government that led to the restoration of the Northern

149 The negotiating history of art 2 of the Protocol is considered in depth in McCrudden (n 13 above).

150 HM Government, Windsor Framework: A New Way Forward (CP 806 2023).

Ireland Assembly and Executive,[151] has sought to diminish the scope of article 2, and the new role of the Magee List in that context.

There are several ironies in this aspect of the story. First, at the time of the B-GFA, the UK Government could afford to be tolerant of the incorporation of the declaration of rights in paragraph 1 because it had succeeded in stripping it of any enforceability, really from the time of the Downing Street Declaration on. It is ironic that it is because of the effects of Brexit, a decision of the British people that (on one reading, at least) wanted to free itself of such obligations, that the B-GFA's declaration of rights is now enforceable through the Protocol. The role of the Magee List in this respect is significant, providing one of the key elements in determining which pre-Brexit rights underpinned by EU law should be protected after Brexit. Article 2 of the Protocol essentially stakes out a conservative position, seeking to preserve and maintain the *status quo* prior to Brexit, rather than push forward a progressive agenda. But its conservative orientation is, paradoxically, a radical move considering the hostility to rights seen to be coming via 'Europe' from significant factions of the Conservative Party and it could well lead to Northern Ireland law diverging from the rest of the UK, so far as the protection of rights is concerned.

There is another irony in the Brexit aspect of the story. Northern Ireland civil society was remarkably successful in achieving several advances in the protection of human rights and equality in the B-GFA, and these have been identified previously. But for much of the history recounted here, civil society's focus in the run-up to the B-GFA was not on the declaration of rights. Indeed, the development of the declaration of rights had been under its radar, although near the end of the process there was an attempt, partially successful, to reconcile that list with current human rights thinking, but only marginally. One of the characteristics of the Magee List was how far it was from the traditional list of rights that human rights organisations themselves would have produced. We have seen, too, that the declaration of rights was met with some scepticism by at least one prominent human rights organisation at the time, when it eventually emerged. The irony lies in the fact that the list, through its incorporation in Protocol article 2, has now a significant role in several of civil society's most important human rights campaigns in Northern Ireland post-Brexit.[152] The stone that the builders rejected has become the cornerstone, perhaps?

151 HM Government, Safeguarding the Union (CP 1021, 2024).

152 In particular, the campaigns against the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, the Nationality and Borders Bill 2023, the Northern Ireland Protocol Bill 2022, the Bill of Rights Bill 2023, the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024.

The courts are likely to become heavily involved in these issues in the future. If so, the origins story told in this article may influence the interpretation of article 2. To say the least, it is an intriguing story and, in several ways, potentially quite important in the future application of article 2 of the Protocol. The complex story told here is, however, unlikely to be seen as easily supporting any very clear analysis of the 'object and purpose' of the provision, as the VCLT demands. Perhaps the most that this narrative can do is to challenge some interpretations that might be advanced. At least two potential errors about the drafting of the list of rights in paragraph 1 can be challenged: it simply is not the case that the list represents predominantly the preferences of nationalists and republicans, rather than unionists and loyalists. And it is not the case that the list of rights only looks back in time to address the 'factory of grievances' that occupied Northern Ireland before 1998. We have seen that there is also room for a narrative that sees the declaration of rights in paragraph 1 as addressing the concerns of republicans and loyalists, whilst at the same time supplementing the dominant 'two communities' approach in much of the rest of the B-GFA with a vision of the future based on the protection of human rights and the advancement of equality for 'everyone in the community'.

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 488–521
Articles DOI: 10.53386/nilq.v75i3.1118

The EU Charter of Fundamental Rights in Northern Ireland under the Windsor Framework*

Anurag Deb
Queen's University Belfast
Eleni Frantziou
Durham University
Tobias Lock
Maynooth University
Correspondence email: adeb01@qub.ac.uk.

ABSTRACT

This article analyses the ways in and extent to which the European Union Charter of Fundamental Rights (CFR) continues to operate in Northern Ireland after Brexit. It shows that, primarily through article 2 of the Windsor Framework and article 4 of the Withdrawal Agreement, the CFR retains considerable force in Northern Ireland, even though it has been removed from the statute books in the rest of the United Kingdom (UK). This retention is legally significant as the CFR gives rise to stronger individual remedies and protects a broader range of fundamental rights than any other instrument in UK law, including the Human Rights Act 1998. The article contributes to litigation and human rights policy in Northern Ireland a) by explaining the added value of the CFR for individuals and b) by setting out the legal tests that must be met for the CFR's application, under both EU law and Brexit legislation.

Keywords: Brexit; Windsor Framework; Charter of Fundamental Rights of the EU; human rights; fundamental rights; article 2 of the Northern Ireland Protocol; EU–UK Withdrawal Agreement; diminution of rights.

INTRODUCTION

The year is 2024 AD. The United Kingdom (UK) has entirely expunged the European Union (EU) Charter of Fundamental Rights (CFR) from domestic law and restored its constitutional sovereignty. Well, not entirely … There is one small bastion of impenetrable constitutional complexity, where the CFR still holds out. And life is

* This article is based on research commissioned by the Northern Ireland Human Rights Commission (NIHRC) on 'The Interaction between the EU Charter of Fundamental Rights and the general principles of EU Law with the Windsor Framework', 12 September 2024.

not easy for the MPs and civil servants who garrison the law-drafting chambers at Westminster …

Much like *Asterix* (which inspired this introduction), where a small village of indomitable Gauls tirelessly held out against the Romans, Northern Ireland is in a unique position in post-Brexit UK. It continues to apply aspects of EU fundamental rights law including the CFR since the ratification of the Withdrawal Agreement (WA), even though these have otherwise disappeared from the statute books.

This article analyses the ways in and extent to which the CFR continues to operate in Northern Ireland after Brexit. More specifically, while some attention has already been paid in the academic literature[1] to the possibility of a diminution of rights in Northern Ireland following Brexit in the context of article 2 of the Windsor Framework,[2] this article is among the first to analyse the status of the CFR in the context of Northern Ireland's special post-Brexit constitutional arrangements. The article's contribution is twofold: first, it highlights the important benefits that the CFR continues to bring to litigation and human rights policy in Northern Ireland through its capacity to engage strong individual remedies, as well as through its protection of various fundamental rights which have no equivalent protection elsewhere in UK law. Second, the article explains and sets out the legal tests for the application of the CFR in Northern Ireland, bringing together the requirements for the application of the CFR under EU law and the specificities of Brexit legislation. In this respect, the article argues that the application of the CFR in Northern Ireland currently flows from two separate legal obligations: first, there is an obligation to observe the CFR under the WA, which renders the CFR as interpreted by the Court of Justice of the European Union (CJEU) directly relevant to domestic law and litigation in the fields of continuing application of EU law. Second, there is a seemingly more limited obligation to observe the CFR under the non-diminution requirement in article 2 of the Windsor Framework, whose significance is defined by the scope of both EU law and of the Belfast/Good Friday Agreement 1998 (BGFA). The article shows that the distinct legal character of these obligations

1 See eg Christopher McCrudden, Human Rights and Equality, in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 143.

2 The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland. In fact, the Withdrawal Agreement still calls it that, but in line with Joint Declaration No 1/2023 of the Union and the United Kingdom in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 [2023] OJ L102/87, this article refers to it as the Windsor Framework.

is determinative of the extent and, crucially, the *means* of the CFR's applicability in Northern Ireland.

The article is structured in three parts: first, it sketches the legal framework that defines the application of the CFR in Northern Ireland, explaining the different sources that protect its application and their interaction. It then goes on to analyse and showcase, through a series of hypothetical examples, the operability of the CFR, firstly, through article 4 of the WA and, secondly, through article 2 of the Windsor Framework. Finally, it highlights the significance that the CFR's continued application could make to Northern Irish citizens and institutions, through the maintenance in Northern Ireland of otherwise obsolete rights and remedies.

INTERPRETING THE LEGAL FRAMEWORK GOVERNING THE APPLICATION OF THE CFR AFTER BREXIT

In order to be able to fully appreciate the applicability of the CFR in Northern Ireland litigation and policy, it is essential to understand both the requirements for engaging the CFR under EU constitutional law and the provisions made for it under the legal framework governing Brexit. This section sets out these requirements in turn and interprets their interaction: first, it outlines the applicability of the CFR under EU law, which is the starting point for *any* further analysis of the CFR's application in Northern Ireland. It then goes on to outline the legal framework that deals with the applicability of the CFR in EU–UK relations under the WA. Lastly, it analyses the interaction between the provisions of the WA and domestic Brexit statutes – the European Union (Withdrawal) Act 2018 (EUWA) and Retained EU Law (Revocation and Reform) Act 2023.

Applicability of the CFR *rationae materiae* under the principles established by the CJEU

The CFR applies primarily to the institutions, offices, bodies and agencies of the EU. Hence, the EU is bound to comply with the CFR in everything it does. By contrast, according to article 51(1) thereof, the CFR applies to the member states 'only when they are implementing Union law'. As will be shown, the same applies under the Windsor Framework: the UK and Northern Ireland institutions can only be bound by the CFR when the threshold criterion of 'implementing Union law' is met. It is therefore necessary to establish what is meant by 'implementing Union law'.

In the landmark judgment of *Åkerberg Fransson*, the CJEU adopted a wide understanding of this criterion and equated 'implementing Union law' with acting 'in the scope of Union law'.[3] This encompasses two broad situations: the first is where a member state is relying on a derogation from EU free movement law.[4] An example would be the removal of an EU citizen from a member state's territory for public security reasons, which requires compliance with article 7 CFR, the right to private and family life. The second situation is where the member state is 'implementing Union law' in the strict sense, that is, the member state is acting in order to comply with an EU law obligation (eg an obligation under an EU directive; application of an EU regulation).

The second situation, which is conceptually more complex, is illustrated by the facts of the *Åkerberg Fransson* case. Mr Åkerberg Fransson – a self-employed fisherman – was charged with serious tax offences for providing false information in his tax returns concerning income tax and value added tax (VAT). He was further charged for failing to declare employers' social security contributions. The tax authorities ordered him to pay tax surcharges in relation to the wrongly declared tax and social security contributions, which Mr Åkerberg Fransson did not challenge. He subsequently relied on article 50 CFR – the prohibition of double jeopardy[5] – to challenge the compatibility of his criminal prosecution with the Charter. In the case, neither the national legislation on whose basis the tax penalties were ordered to be paid nor the national legislation on which the criminal proceedings were founded had been adopted by Sweden to implement an EU obligation. In fact, they pre-dated Sweden's EU membership.

Nonetheless the CJEU found there to be an 'implementation of Union law' in so far as VAT was concerned, given that the relevant VAT Directive[6] in combination with article 4(3) of the Treaty on European Union prescribed that every member state was under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. This finding was buttressed by article 325 of the Treaty on the Functioning of the European Union (TFEU), which obliges the member

3 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

4 Case C-390/12 *Pfleger* EU:C:2014:281; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* ECLI:EU:C:1991:254.

5 Article 50 CFR reads: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

6 Directive 2006/112/EC, arts 2, 250(1) and 273.

states to counter illegal activities affecting the financial interests of the EU through effective deterrent measures.[7]

Hence the tax penalties and criminal proceedings in relation to VAT constituted an implementation of the obligations flowing from the VAT Directive and from article 325 TFEU and thus of EU law. The Court deemed it irrelevant that the national legislation was not adopted in order to transpose the directive.

The *Åkerberg Fransson* judgment is instructive in at least two respects: first, it adopts a functional approach to the term 'implementing Union law'. This means that, as long as a national law provision has the function of effecting compliance with an EU law obligation, it constitutes an implementation even if historically it was adopted independently of such an obligation. Second, one and the same national law provision may be considered an implementation of Union law under one set of facts and not an implementation under another set of facts. In *Åkerberg Fransson* the relevant provisions of the tax code and of domestic criminal law were only implementations of EU law in so far as VAT was concerned. As far as income tax and social security contributions were concerned, they were not. This resulted in the case being split up into a purely domestic part (concerning income tax and social security contributions), to which the CFR did not apply, and an EU law part (concerning VAT), to which the CFR applied.

The precise decision of whether a national law provision constitutes an implementation of Union law or not is at times difficult to make. The CJEU reiterates that implementation 'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[8] The CJEU spelled out a set of indicators, which may inform such a decision:

> In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it … .[9]

The CJEU's broad interpretation of the threshold criterion contained in article 51(1) CFR means that, in principle, there is no area of EU law to which the Charter does not apply. And more importantly, perhaps, there is no area of domestic law that is *per se* immune from

7 *Åklagaren v Hans Åkerberg Fransson* (n 3 above) [25]–[26].

8 Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126, [24].

9 Ibid [25].

CFR review.[10] As the judgment in *Åkerberg Fransson* demonstrates, even in fields like substantive criminal law, for which the EU only has limited competence, member state legislation can constitute an 'implementation of Union law' if the legislation has the function of ensuring compliance with a broader obligation under EU law to ensure the correct collection of VAT.

According to the CJEU, a member state is implementing EU law also where the member state has discretion over *how* to comply with its EU law obligations;[11] and even where a member state has discretion *whether* to act at all, provided it chooses to act.[12] By contrast, where EU law stipulates minimum harmonisation requirements, the member states are not deemed to be 'implementing Union law' in so far as their national implementation exceeds the minimum required by EU law.[13]

Before leaving the EU, then, the CFR applied to domestic authorities (including domestic courts) in any situation in which EU law was involved, whether to a significant or to a more limited degree, and regardless of whether the legislation in question was specifically designed as an implementing measure. An example of the application of the Charter in a case concerning the exclusion of EU measures is *Benkharbouche*.[14] In this case, the Employment Appeal Tribunal and Court of Appeal accepted, and the Supreme Court confirmed, that the CFR was applicable in a dispute between two domestic workers and their employers (the Sudanese and Libyan embassies in London). The dispute engaged the CFR because it concerned the setting aside of the Working Time Regulations (a domestic piece of secondary legislation implementing the EU Working Time Directive), as a result of the application of the State Immunity Act 1978.

An example of a situation concerning the meaning of the phrase 'implementing EU law' under article 51(1) CFR can be seen in the

10 Daniel Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 Common Market Law Review 1267, 1278.

11 Case C-571/10 *Servet Kamberaj v Istituto per l 'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233, [80].

12 Joined Cases C-411/10 and C-493/10 *N S v Secretary of State for the Home Department* EU:C:2011:865, [68].

13 Joined Cases C-609/17 and 610/17 *TSN and AKT* EU:C:2019:981, [41]–[55].

14 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, [2019] AC 777.

judgment of the Northern Ireland High Court in *SPUC*,[15] where this issue was addressed in a post-Brexit context. In that case, the question arose whether the CFR applied because the EU was a party to the United Nations Convention on the Rights of People with Disabilities (UNCRPD). The UNCRPD was concluded by both the EU and the member states as a 'mixed' agreement chiefly because the EU did not possess the competence to conclude the agreement alone. Hence the UNCRPD is only 'Union law' in so far as the EU had the competence to conclude it. For this reason, any member state implementation of EU law with regard to the UNCRPD presupposes that the member state was implementing an obligation under the UNCRPD for which the EU had competence. Otherwise, the member state would not be 'implementing Union law'. In this case, the applicant – an anti-abortion society – sought to rely on the UNCRPD as a general lock onto EU law in order to benefit from the CFR's protection of the right to non-discrimination on grounds of disability under articles 21(1) and 26 of the CFR. Colton J therefore concluded that 'the applicant cannot rely upon the UNCRPD, or the Charter or EU General Principles because the issue of abortion is not an EU competence'.[16] In turn, when properly understood within its specific (and atypical) context of an established lack of EU competence,[17] the *SPUC* judgment can be viewed as a clear restatement of the principles of the application of the CFR *rationae materiae* in domestic law before Brexit and even, as we will go on to explain in the following section, of the continued application of the CFR in Northern Ireland in certain cases.

The continued application of the Charter in Northern Ireland under the WA

The WA concluded between the EU and the UK, including the Windsor Framework, contains five provisions that are relevant for the purposes of assessing the applicability of the CFR in the Northern Ireland legal order.

The first provision is article 2 WA, which defines 'Union law' as including the CFR and the general principles of EU law and defines 'member states' as the 27 member states of the EU.

15 *Re SPUC's Application for Judicial Review* [2022] NIQB 9, subsequently affirmed on appeal ([2023] NICA 35). Similarly, in the more recent judgment in *Dillon* the court emphasises the 'scope of EU law' requirement by noting that diminution of victims' rights was a matter relevant to article 2 Windsor Framework because the UK would have needed to implement the Victims' Rights Directive: *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons' Applications for Judicial Review* [2024] NIKB 11, [578], per Colton J.

16 *SPUC* (n 15 above) [131].

17 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and Others* EU:C:1991:378.

The second provision is article 4(1) WA, which mandates that the 'provisions of Union law made applicable' in the WA shall 'produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This includes direct effect and primacy or – as article 4(2) puts it – disapplication of inconsistent domestic law.[18] Furthermore, articles 4(3) and 4(4) require an interpretation of EU law (referred to in the WA) which is in accordance with the general principles of EU law, and which conforms with relevant CJEU case law. It is also noteworthy that this mandate for the conformity of EU law interpretation with CJEU case law is not temporally limited to case law handed down prior to the end of the transition period on 31 December 2020, as article 13(2) of the Windsor Framework (the third relevant provision) removes article 4's temporal limit. The fourth relevant provision is article 13(3), which creates an obligation of dynamic alignment between the UK and the EU for all EU acts referred to in the Windsor Framework.[19]

The fifth and final provision of relevance is the non-diminution guarantee contained in article 2(1) of the Windsor Framework, which reads:

> The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol,[20] and shall implement this paragraph through dedicated mechanisms.

---

18 On these concepts see below.

19 This is subject to the so-called 'Stormont Brake' in article 13(3a) Windsor Framework, briefly explained in the 'Editorial' to this special issue (433–442).

20 The annex 1 Directives are: 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.

By virtue of the express inclusion of the CFR in the definition of 'Union law' in article 2 WA, therefore, the CFR continues to apply in Northern Ireland in all areas of application of the WA (including article 2 of the Windsor Framework), in line with article 4 WA. Moreover, in the circumstances in which dynamic alignment is engaged, this obligation entails a prospective, forward-looking dimension because it is essential to track future changes to annexed measures.

The relationship between the WA and Windsor Framework and UK-wide Brexit legislation

The terms of the WA and Windsor Framework at first glance appear to be contradicted by UK-wide domestic legislation for Brexit. Section 5(4) of the EUWA provides: 'The [CFR] is not part of domestic law on or after [the end of the implementation period following the UK's exit from the EU]'. This sweeping statement is somewhat qualified when considered alongside other aspects of domestic law, notably section 5(5) EUWA, which clarifies that the exclusion of the CFR does not thereby exclude the retention of any general principles of EU law, and that any EU case law which contains references to the CFR should be read as referring to these general principles.[21] However, the practical effect of the retention of the general principles for claimants is limited.[22] Schedule 1 EUWA declares that general principles of EU law which emerge after Brexit are not part of domestic law,[23] abolishes the right of action in domestic law grounded on a breach of the general principles of EU law,[24] and prevents disapplication and quashing of inconsistent national law ensuing therefrom.[25] Finally, any possibility of relying on fundamental rights as general principles of EU law in order to bridge the contradiction between the terms applicable in Northern Ireland under the WA and Protocol and the exclusion of the CFR from domestic law under the EUWA has now been eliminated by the Retained EU Law (Revocation and Reform) Act 2023 (REULA), section 4 of which has ended the availability of general principles of EU

21 According to the CFR's preamble, it 'reaffirms' the general principles of EU law, so that there is a considerable degree of overlap (though in some cases the general principles go further): see Koen Lenaerts and Antonio Gutiérez-Fons, 'The place of the Charter in the European legal space' in Steve Peers et al (eds), *The Charter of Fundamental Rights* 2nd edn (Hart 2021) paras 55.53–58; Tobias Lock, 'Article 6 TEU' in Manuel Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 12019) para 23.

22 EUWA, sch 8, para 39 provided for temporal limits for the use of general principles to ground actions arising within three years of the end of the implementation period, but these have now expired and the limitations in sch 1 are operational.

23 Ibid sch 1, para 2.

24 Ibid sch 1, para 3(1).

25 Ibid sch 1, para 3(2).

law in the domestic legal order entirely as of 1 January 2024.[26] How, then, can the apparent incompatibility between the terms of the WA/Windsor Framework and the terms of the EUWA/REULA be resolved?

The answer is still found in the EUWA itself. Section 7A EUWA – added to the EUWA by the European Union (Withdrawal Agreement) Act 2020 – does three things. First, it directly incorporates the UK–EU WA into domestic law.[27] Second, it mandates that the 'rights, powers, liabilities, obligations and restrictions' which are created, or which arise 'from time to time' under the WA, be given legal effect within domestic law 'without further enactment'.[28] Third, it subjects every enactment, including provisions within the EUWA itself, to the incorporated WA.[29] The immediate consequence of this is the same as under the now repealed section 2(1) of the European Communities Act 1972: the entirety of the WA, *including* the principles which inform its application and scope, as these principles develop or are progressively interpreted, have automatic effect (via section 7A) within the domestic legal sphere in the UK generally and Northern Ireland specifically. Last but not least, the exceptions in schedule 1 WA mentioned above are in turn subjected to a long list of overriding provisions in section 7C, which restores their applicability in the application of 'separation agreement law' which includes, *inter alia*, article 4 of the WA[30] and article 13 of the Windsor Framework.[31] Since the whole of section 5 EUWA (including section 5(4)) is subject to 'separation agreement law', defined in section 7C as *inter alia* including section 7A, the requirements of article 4 WA (including, crucially, the primacy requirement) and article 13 of the Windsor Framework,[32] the apparent irreconcilability of section 5(4) EUWA with the provisions of the WA and the Windsor Framework falls away given that section 5(4) EUWA has been modified by virtue of section 7A EUWA.

This interpretation has already been confirmed by the Northern Ireland High Court in *SPUC*, discussed earlier. As Colton J put it in that judgment:

> The combined effect of section 7A EUWA 2018 and Article 4 of the Protocol limits the effects of section 5(4) and (5) of the EUWA 2018 and Schedule 1, para 3 of the same Act which restrict the use to which

26 REULA, s 4(2)(a). The provision was brought into force by the Retained EU Law (Revocation and Reform) Act 2023 (Commencement No 1) Regulations 2023, reg 3(b).
27 EUWA, s 7A(2).
28 Ibid s 7A(1).
29 Ibid s 7A(3).
30 Ibid s 7C(2)(a).
31 Ibid s 7C(2)(c).
32 Ibid s 5(7) and s 7C(2) and (3).

> the Charter of Fundamental Rights and EU General Principles may be relied on after the UK's exit.[33]

The same conclusion would appear to follow from the judgment of the Northern Ireland Court of Appeal in *Allister and Peeple's Applications for Judicial Review*[34] and from the judgment of the UK Supreme Court when the case reached it on appeal.[35] The Supreme Court's judgment in this case confirmed that section 7A EUWA does not merely modify domestic UK law (including Northern Ireland law) by giving primacy to the express provisions of the WA (and the Windsor Framework), but also modifies domestic law in ways which are a *necessary implication* of the WA's incorporation into domestic law.[36] This approach to section 7A WA was also recently confirmed, within the specific context of article 2 Windsor Framework, in *Re Dillon*.[37]

Overall, then, existing case law confirms that the operation of section 7A of the EUWA ensures not only that the CFR has effect, but that it has effect to the maximum possible extent to ensure compliance with EU law obligations in the broadest terms. Given that the CFR has the same legal force as the EU treaties under EU law,[38] this means that, section 5(4) of the EUWA notwithstanding, the CFR has the same effect in Northern Ireland law as it did before Brexit, albeit in respect of a greatly reduced body of EU law mentioned in the Windsor Framework.

The effect of section 7A of the EUWA appears indeed to be preserved (notwithstanding the amendments made by section 3 of the REULA) by section 3(3) of the REULA, which supports our analysis. Section 3(3) REULA *inter alia* replaces subsections (1)–(3) of section 5 of the EUWA (including references to these subsections within section 5 of the EUWA) with new subsections (A1)–(A3). The effect of this replacement is at its most important in the reference to (new) subsection (A1) in section 5(7) of the EUWA. This last provision subjects the sweeping language of section 5(1) (which brings an end to the principle of EU law supremacy in the domestic legal order) to 'relevant separation agreement law', defined in section 7C of the EUWA to include, *inter alia*, section 7A of the EUWA, all of the requirements of article 4 of

33 *SPUC* (n 15 above) [78].

34 *Allister and Peeple's Applications for Judicial Review* [2022] NICA 15, [328].

35 *Allister and Peeple's Applications for Judicial Review* [2023] UKSC 5, [2023] 2 WLR 457.

36 The explicit disapplication of the petition of concern mechanism was achieved by way of secondary legislation amending the Northern Ireland Act 1998, but section 7A had already 'modified' the Northern Ireland Act – see *Allister and Peeple's* (n 35 above) [108]. See also Anurag Deb, 'Allister: the effect of the EU Withdrawal Act' (*EU Law Analysis* 22 February 2023).

37 *Re Dillon* (n 15 above) [525]–[526].

38 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 6(1).

the WA and article 13 of the Windsor Framework (conferring dynamic alignment on the annex 1 EU legislation concerning equality and non-discrimination).[39]

The key principle of this meandering and complicated statutory tangle appears to be that section 3(1) of the REULA, which purports to end the supremacy of EU law, applies to assimilated law *only* (formerly known as 'retained EU law'), thereby preserving supremacy for 'genuine' EU law (that is, law made by the EU and not its UK simulacrum created by the EUWA) as applicable via the WA and the provisions of the EUWA which incorporate it. The same goes for the effect of section 4 REULA. This would apply to the Northern Ireland legal order in much the same way as the wider UK legal order: in any matter *not covered by or within the scope of the Windsor Framework*, the supremacy of EU law would not apply.

Consequently, in our view, the only viable position for ensuring respect of the Windsor Framework is to treat the CFR as applicable in the same manner as it was prior to Brexit – the only difference being that it is now only relevant to the reduced body of EU law applying to the UK (mainly in respect of Northern Ireland) as a result of Brexit.

THE OPERABILITY OF THE CHARTER IN NORTHERN IRELAND

Having established the applicability in principle of the CFR in Northern Ireland under the Windsor Framework, it is nevertheless necessary to explore in greater detail the different ways in which it can operate. One can distinguish two principal avenues through which the CFR has effect in the Northern Ireland legal order: the first is via article 4 WA, which provides for EU law to be interpreted according to its own methods of interpretation. Given that EU law must be interpreted and applied in accordance with the CFR, this also applies in Northern Ireland in so far as the Windsor Framework lists EU law as applicable (notably through its annexes). The second avenue through which the Charter applies in Northern Ireland is article 2 of the Windsor Framework. This section goes on to analyse the operation of the Charter under these two avenues in turn, highlighting the potentially divergent extent to which it is likely to shape law and policy in Northern Ireland.

39 EUWA, s 7C(2) and (3).

Applicability of the Charter in Northern Ireland due to article 4 WA

Various provisions of the Windsor Framework make reference to EU law or declare specific provisions of EU law applicable in Northern Ireland.[40] One can broadly distinguish three situations: first, the Windsor Framework declares EU secondary law laid down in annexes 2–5 of the Windsor Framework applicable;[41] second, the Windsor Framework provision itself declares one or more provisions of EU primary or secondary law applicable, for example articles 34 and 36 TFEU;[42] third, the Windsor Framework makes reference to 'Union law' more broadly.[43]

According to article 4(3) WA the 'provisions of [the WA, of which the Windsor Framework is a part] referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law'. According to the CJEU, this means in particular that:

> every provision of [Union] law must be placed in its context and interpreted in the light of the provisions of [Union] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[44]

In other words, the provisions of EU law made applicable by the Windsor Framework must be interpreted and applied in the same way as they would be interpreted and applied in an EU member state. As far as the applicability of the CFR is concerned, the CJEU put it succinctly thus: the 'applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter'.[45] Hence the CFR must be considered to apply by virtue of article 4 WA, in so far as Union law is made applicable by it.[46] The reference to the 'general principles of Union law' in article 4(3) WA confirms this: after all, they guarantee – broadly speaking – the same rights as the CFR and apply in the same situations as the CFR.[47]

There are four situations in which the CFR may have an effect in the Northern Ireland legal order under this heading. First, the CFR

40 Notably, arts 5(3)–(5), 7(1), 8(1), 9(1), 10(1), 11(1), 13(7).

41 Eg art 8(1).

42 Art 7 (1); but also the limitation in art 13(7).

43 Art 11(1).

44 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, [20].

45 *Åklagaren v Hans Åkerberg Fransson* (n 3 above), [21].

46 See also Bernard McCloskey, 'The Charter of Fundamental Rights' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 159.

47 See n 21 above.

may be used to interpret the provisions of EU law made applicable by the Windsor Framework. Second, the CFR may be invoked where such provisions are 'applied' in Northern Ireland, that is, beyond the interpretation of the provisions themselves, so that the CFR may notably be used to inform the way they are enforced. Third, the CFR may be invoked to challenge the validity of EU secondary law made applicable by the Windsor Framework. And fourth, the Charter is relevant when interpreting provisions of the WA and Windsor Framework themselves.

The third situation also means that the CFR may be of relevance in the context of article 4 WA challenges to new EU secondary law with which Northern Ireland would be dynamically aligned according to article 13(3) of the Windsor Framework. All EU secondary law must be CFR-compliant to be valid. Article 12(4) of the Windsor Framework decrees that the CJEU continues to have jurisdiction as regards articles 5 and 7–10 and thus over EU secondary law mentioned in annexes 2–5. Article 12(4) also makes express reference to the CJEU's jurisdiction over preliminary references from national courts. According to article 267(1)(b) TFEU preliminary references can be requested concerning the validity and interpretation of the acts of EU institutions. Given that article 12(4) makes reference to article 267(2) and (3) TFEU which gives the courts a right to request a preliminary ruling (paragraph 2) on such questions, and in the case of the highest court a duty to do so (paragraph 3), it will be possible for claimants in Northern Ireland to challenge the validity of EU secondary law that is currently applicable or which becomes applicable through dynamic alignment by virtue of article 13(3) of the Windsor Framework.

As far as case law handed down by the CJEU after the end of the transitional period is concerned, article 13(2) would strongly suggest that the provisions of EU law referred to in the Windsor Framework continue to be interpreted and applied in light of such case law.[48] Hence, any interpretations of the CFR in connection with those provisions in post-Brexit case law would need to be followed, too.

An example of the Charter applying in the context of the Windsor Framework's obligations relating to the free movement of goods would be the case of *Schmidberger*. The case concerned a potential clash between the right to free movement of goods (article 34 TFEU – made expressly applicable by article 7(1) of the Windsor Framework) with a fundamental right (freedom of assembly – now guaranteed by

48 For a fuller analysis, see Sarah Craig and Eleni Frantziou, 'Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments' (2022) 73(S2) Northern Ireland Legal Quarterly 65.

article 11 CFR).[49] In *Schmidberger*, the Austrian authorities ordered the closure of the Brenner motorway – the major transit route for goods connecting Germany and Italy through Austria – for a duration of 30 hours so that a demonstration organised by an environmental group could take place. The demonstration and the fact that it had been given permission by the authorities had been announced well in advance. The claimant in the case was a haulage company, which claimed that it had suffered a loss (lost profits, having to pay drivers' wages etc) due to the motorway closure. The claimant relied on EU state liability, which required it to show a 'sufficiently serious breach' of EU law.

The CJEU accepted that the free movement of goods guaranteed by article 34 TFEU – which remains applicable in Northern Ireland due to article 7(1) Windsor Framework – not only concerned imports of goods, but also their transit.[50] Hence the decision not to ban the demonstration was capable of restricting intra-EU trade, so that this decision amounted to a 'measure having equivalent effect to a quantitative restriction' and was thus incompatible with article 34 TFEU, unless it could be objectively justified.[51]

It then held that fundamental rights could be invoked as a legitimate interest which 'in principle justifies a restriction of the obligations imposed by [EU] law, even under a fundamental freedom guaranteed by the treaty such as the free movement of goods'.[52] The CJEU then pointed out that free movement of goods is subject to restrictions according to article 36 TFEU – also applicable in Northern Ireland – as well as the unwritten overriding (or mandatory) requirements.[53] It then carried out a proportionality exercise weighing the interests concerned – the free movement of goods on the one side and freedom of expression and assembly on the other – and balancing them and concluded that Austria had not violated article 34 TFEU by allowing the demonstration to go ahead as it enjoyed wide discretion in this case. There was therefore no breach of EU law, which meant that there was no basis for a claim of state liability.

It is not difficult to imagine a similar situation in the context of Northern Ireland (eg a protest by environmentalists, or perhaps even

49 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333; it should be noted that the *Schmidberger* case arose before the Charter became binding, so that the CJEU based its decision on EU fundamental rights guaranteed as general principles of EU law. If the case arose today, it would in all likelihood be argued and decided in the same manner with the exception that, instead of the general principles, the Charter would be invoked as the main source of fundamental rights in the EU legal order.

50 Ibid para 61.

51 Ibid para 64.

52 Ibid para 74.

53 Ibid para 78.

a protest blocking a transit route by people opposed to the Windsor Framework).

While the example of *Schmidberger* concerned the (rare) clash between a fundamental right and the free movement of goods, Case C-579/19 *Food Standards Agency* is another example, which shows how the procedural rights in the Charter – first and foremost article 47 CFR – are relevant in litigation concerning EU secondary law (Regulations 854/2004 and 882/2004)[54] made applicable by the Windsor Framework.[55] According to article 54(3) of Regulation 882/2004 the operator of a slaughterhouse has to be informed of rights of appeal against decisions taken under the Regulation, notably a decision by an official veterinarian – such as the one in the case before the Court – not to affix a hygiene mark to the carcass of a slaughtered animal, which means that it cannot be sold for human consumption. One of the questions in the case was whether the limited judicial review against such a decision available in England and Wales was compatible with the right to an effective remedy guaranteed by article 47 CFR. The CJEU held that for a court or tribunal to determine a dispute concerning rights and obligations under EU law, it must have power to consider all the questions of fact and law that are relevant to the case.[56] Yet this was not the case because the powers of judicial review of the courts in England and Wales in the case did not go so far as to constitute an appeal on the merits of the decision. Instead, the courts were limited to reviewing the decision of the veterinarian declaring the carcass unfit for human consumption as to its lawfulness, which includes whether the veterinarian acted for an improper purpose, failed to apply the correct legal test or reached a decision that was irrational or taken without sufficient evidential basis.

The CJEU decided that the regulations 'read in light of Article 47 CFR' did not require more expansive powers of judicial review. This was chiefly because the veterinarian had to carry out a complex technical assessment and possessed broad discretion. In light of the objective of protecting public health, article 47 CFR therefore did not require

54 Regulation 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L 226/83; Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165/1 (since replaced by Regulation 2017/625); applicable by way of Windsor Framework, annex 2.

55 Case C-579/19 *Food Standards Agency* EU:C:2021:665.

56 Ibid [80].

judicial supervision of all of the veterinarian's assessments of the very specific facts of the case.[57]

Applicability of the Charter under article 2 of the Windsor Framework

The non-diminution provision contained in article 2(1) of the Windsor Framework may also result in the CFR being applicable in the Northern Ireland legal order. Considering that the CFR was applicable in Northern Ireland before Brexit in cases where the public body at issue (whether UK-wide or specific to Northern Ireland) was deemed to be 'implementing EU law', on a plain reading of article 2 the non-diminution obligation must include rights contained in the CFR, in so far as they would have protected individuals before Brexit and in so far as the additional requirements of article 2 are met.

According to the Northern Ireland Court of Appeal, the test for the application of article 2 is as follows:[58]

> A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
>
> i. That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
>
> ii. That Northern Ireland law was underpinned by EU law.
>
> iii. That underpinning has been removed, in whole or in part, following withdrawal from the EU.
>
> iv. This has resulted in a diminution in enjoyment of this right; and
>
> v. This diminution would not have occurred had the UK remained in the EU.

The key thing to remember in respect of the application of the CFR in this context is that, as noted earlier, the CFR only applies where a member state is implementing Union law. This question is best considered at stage iii) of the test outlined above as the Northern Ireland law in question was only ever underpinned by the CFR if there was an implementation of EU law. This requires answering the hypothetical question: was this situation in the scope of EU law, when the UK was still an EU member state? This question cannot be answered in the abstract, as the answer is always dependent on

57 Ibid paras [85], [88], [91].

58 *SPUC v Secretary of State for Northern Ireland and Others* [2023] NICA 35, [54]. NB: in *Angesom* [2023] NIKB 102, [86], per Colton J, the above test was slightly revised. However, in *Dillon* (n 15 above), the *SPUC* test was affirmed as it is of higher authority.

a concrete set of facts. One cannot therefore say, for instance, that certain Charter rights are *per se* captured by article 2 of the Windsor Framework and therefore applicable in Northern Ireland in all circumstances and that others are not. Nevertheless, the applicability of the CFR in the context of the non-diminution obligation can be further broken down into two areas, which engage the Charter with a varying degree of certainty: the annex 1 directives and all other EU law. As we highlight below, with respect to the former set of measures, the CFR is engaged in quasi-automatic fashion as soon as these directives apply. On the other hand, the CFR also applies, albeit subject to closer scrutiny over its scope of application, to any other situation that engages the 'Rights, Safeguards and Equality of Opportunity' (RSEO) section of the BGFA.

Annex 1 directives

If a situation falls within the scope of the annex 1 directives,[59] the applicability of the CFR is relatively straightforward: article 2 itself decrees that the annex 1 directives form part of the non-diminution commitment; the directives had been made applicable in Northern Ireland law through regulations prior to 31 December 2020;[60] and those domestic regulations must be considered an implementation for the purposes of article 51(1) CFR.[61] As a consequence, the CFR applies whenever the annex 1 directives apply.

This is in keeping with the settled case law of the CJEU, which shows that the operative provisions of these directives merely constitute a 'specific expression' of the corresponding provisions of the CFR, such as the right to equal treatment,[62] and must in any event be interpreted in accordance with any CFR provisions that may be relevant to a particular factual scenario. In other words, it is essential to highlight that the annex 1 measures do not simply engage the CFR's provisions on equality and working conditions (ie strictly the provisions corresponding to the content of these measures). Rather, they trigger the application of the CFR as a whole and may equally engage, for example, the application of its dignity or justice chapters.

This is illustrated by the case of *Egenberger* which, despite being a case about discrimination substantively, offers a telling account of the importance of the CFR more generally – in this case through reliance

59 Listed in n 20 above.

60 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (ECNI, NIHRC and IHREC 2022) app 4.

61 See eg Case C-414/16 *Egenberger* EU:C:2018:257, [49].

62 See eg Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* EU:C:2010:21, [21].

on both article 21 CFR (the right to equal treatment) and article 47 CFR (the right to an effective remedy). In the case, the claimant had applied for a temporary position with a development organisation wholly owned by various German Protestant churches and church organisations. The position would have mainly involved the drawing up of a parallel report to an official German government report to be submitted to the United Nations in accordance with the UN Convention on the Elimination of All Forms of Racial Discrimination. The claimant was not invited to interview for the post despite being shortlisted because she was not a member of a Protestant church; the post went instead to an active member of that church. The respondent relied on the German transposition of article 4(2) of Directive 2000/78, which contains the so-called 'religious ethos exception' allowing churches and other religious organisations to treat persons differently according to their religion if that 'person's religion or belief constitute a genuine, legitimate and justified occupational requirement'. According to German law, the decision whether such an occupational requirement existed was to be determined by the organisation itself 'in view of its right to self-determination', so that judicial review was limited to a review of the plausibility of such a decision on the basis of the church's self-perception.[63]

The CJEU held that Directive 2000/78 should, as a whole, be interpreted as a 'specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter'.[64] Article 4(2) of Directive 2000/78 was designed to ensure a fair balance between the right of autonomy of churches and the rights of workers not to be discriminated against and that it set out the criteria to be taken into account in the balancing exercise which must be performed to ensure a fair balance between those competing rights. The CJEU then went on to hold that 'in the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court'.[65]

Hence, the CJEU held that article 47 of the CFR (the right to an effective remedy) applied in this case, and this created an obligation on national courts to hear challenges and, in appropriate cases, set aside decisions by churches and affiliated bodies that invoked the 'religious ethos exception' in the directive. Interestingly, the referring German court subsequently decided that the German legislation allowing the churches to determine the existence of a genuine occupational requirement autonomously would have to be disapplied. It then

63 *Egenberger* (n 61 above) [31].
64 Ibid [47].
65 Ibid [53].

went on to review the decision of the church organisation itself and concluded that the applicant had been discriminated against on the basis of her religion.[66] This case demonstrates how the CFR could be invoked in an annex 1 scenario and result in the disapplication of domestic law which restricted the availability of certain judicial remedies (such as full judicial review).[67]

The CFR and article 2 outside the annex 1 directives

The applicability of the CFR by virtue of the non-diminution obligation contained in article 2 of the Windsor Framework is more complex outside the annex 1 directives. This is due to the interaction between elements i) to iii) of the test outlined above with the requirement that the situation at issue is deemed to be an implementation of Union law.

Apart from the directives mentioned by the UK Government as falling within the scope of article 2,[68] there is a degree of legal uncertainty in this area at present as to which rights, safeguards or equality provisions contained in the RSEO section of the BGFA were underpinned by a domestically effective iteration of EU law on 31 December 2020. The RSEO section is worded as follows under the sub-heading 'human rights':

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation.

The Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission's working paper on the scope

66 Federal Labour Court (Bundesarbeitsgericht) 8 AZR 501/14, DE:BAG:2018:251018.U.8AZR501.14.0.

67 More on disapplication as a remedy in the next section.

68 '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?'.

of article 2(1)[69] features an appendix mapping relevant rights contained in the RSEO section of the BGFA onto EU law as it stood on 31 December 2020. This provides a good indication as to which provisions of EU law might be considered to underpin the civil and political rights mentioned in the RSEO section, though it should not be considered exhaustive in this regard. Moreover, as appears from the text of the RSEO section quoted above, the section *itself* is not drafted with sufficient particularity or precision to embody legally enforceable rights – the famed 'constructive ambiguity' of the BGFA,[70] a feature which also runs through the RSEO section, thus makes it crucial to understand the *underpinning* EU law through which these rights were realised prior to Brexit, and which cannot now be eroded without breaching the guarantee in article 2 Windsor Framework.

The effects of the CFR in these cases are twofold: first, it may be relevant for the interpretation of the legislation that is considered to have 'implemented Union law' in Northern Ireland on 31 December 2020; and, secondly, the CFR may have the effect of requiring the availability of a specific remedy to give effect to the implementing act. The following three examples – based on CJEU case law – demonstrate how the CFR applies outside the scope of the annex 1 directives at present. The examples were chosen to reflect the degree of connection with the RSEO section ranging from the UK Government's own suggestion of a connection in example 1 to a more tenuous, but still very much arguable connection in example 3.

Example 1: Parental Leave Directive – mentioned in the UK Government explainer

According to the UK Government, Directive 2010/18/EU on parental leave is within the scope of the UK Government's commitment under article 2[71] as – even though the UK Government does not expressly say so – it helps to ensure the right to equal opportunity in all social and economic activity found in the RSEO chapter of the BGFA. Consequently, there must be no diminution of existing parental leave rights.

Case C-129/20 *Caisse pour l'avenir des enfants* shows that the rights contained in the directive must be interpreted in light of article 33(2)

69 NIHRC and ECNI Working Paper, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol' (December 2022).

70 Chris Ó Rálaigh, 'From constructive ambiguities to structural contradictions: the twilight of the Good Friday Agreement?' (2023) Peace Review 1.

71 UK Government (n 68 above) para 13.

CFR.[72] In the case the claimant was a mother of twins who had applied for parental leave to be granted by her employer, the state of Luxembourg. According to Luxembourgish law, she would have only been entitled to parental leave if she had been employed at the time of the birth of the children, whereas the claimant had been unemployed at that time. The CJEU held that:

> the individual right of each working parent to parental leave on the grounds of the birth or adoption of a child, enshrined in clause 2.1 of the revised Framework Agreement [to which Directive 2010/18/EC gives effect], must be interpreted as articulating a particularly important EU social right which, moreover, is laid down in Article 33(2) of the CFR. It follows that that right cannot be interpreted restrictively.[73]

The CJEU thus used the CFR to reiterate the fundamental right-character of the right to parental leave,[74] which means that it had additional weight compared to rights merely guaranteed in secondary EU law. This then allowed the CJEU to conclude that the right could not be interpreted restrictively. As a result, the claimant in the case could not be excluded from claiming parental leave because she was not in employment at the time she was giving birth.

Example 2: data protection law – right contained in the ECHR as ratified by the UK

The second example relates to the broader category in the RSEO section of 'civil rights and religious liberties of everyone in the Community'. Given the prominent role accorded to the European Convention on Human Rights (ECHR) in the BGFA, it would be a convincing argument to assume – as the two commissions do in their article 2 working paper[75] – that the term 'civil rights' encompasses at a minimum the rights contained in the ECHR. At this juncture it may be useful to distinguish between ECHR rights contained in parts of the ECHR that have been ratified by the UK and those that have not. While it should not be suggested that the latter are outwith the scope of the non-diminution commitment (see the next example), the connection between the former and the non-diminution commitment is more certain than in case of the latter.

---

72 Art 33 (2) CFR reads: 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.'

73 Case C-129/20 *Caisse pour l'avenir des enfants* EU:C:2021:140, [44].

74 Previously established in Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* EU:C:2015:473, [19].

75 NIHRC and ECNI Working Paper (n 69 above).

Applying the test set out in *SPUC* (above), one can argue as follows: first, the broad field of data protection is covered by the right to private and family life in article 8 ECHR. As argued above, the term 'civil rights' encompasses the rights contained in the ECHR, so that a data protection case engages a right included in the RSEO section, particularly given the European Court of Human Rights' long-established line of case law in this regard.[76] Second, that right was given effect in Northern Ireland before the end of the transposition period primarily through the General Data Protection Regulation 2018 (GDPR). Third, it was underpinned by EU law, most prominently by the GDPR.[77] This also brings into play the Charter as whenever the GDPR would have been applied (or was wrongly not applied) in Northern Ireland, the situation would have been in the scope of EU law, so that the criterion for the Charter's applicability laid down in article 51(1) CFR would have been met. This is relevant because the CJEU has interpreted the GDPR and connected data protection provisions broadly in light of those CFR rights. For instance, it read a 'right to be forgotten' into the GDPR's predecessor Directive 95/46/EC.[78] Furthermore, articles 7 and 8 CFR set clear limits to the extent to which EU member states can order the wholesale retention of communication data[79] as well as to the transfer of data to non-EU countries.[80] Those limits therefore form part of the non-diminution commitment.

Example 3: prohibition of double jeopardy – right in an ECHR protocol not ratified by the UK

Could rights contained in a protocol of the ECHR, which has not been ratified by the UK, be considered 'civil rights and religious liberties of

76 Going back to cases such as *Klass and Others v Germany* 6 September 1978, Series A no 28; *S and Marper v United Kingdom* ECHR 2008; and most recently *Big Brother Watch and Others v United Kingdom* nos 58170/13, 62322/14, 4960/15, 25 May 2021.

77 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.

78 Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317.

79 Fundamentally established in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* EU:C:2014:238 and later refined in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970; Case C-623/17 *Privacy International* EU:C:2020:790; Joined Cases C-511/18, 512/18, 520/18 *La Quadrature du Net and Others* EU:C:2021:791; and Case C-140/20 *GD* EU:C:2022:258.

80 *Maximillian Schrems v Data Protection Commissioner*; Case C-311/18 *Schrems II* EU:C:2020:559; Opinion 1/15 *PNR Agreement EU–Canada* EU:C:2017:592.

everyone in the community'? The example of article 4(1) of Protocol No 7 to the ECHR, which contains the prohibition of double jeopardy, demonstrates that this is a possibility. There is an expanding line of case law by the CJEU on the prohibition of double jeopardy (or *ne bis in idem* as it is often referred to), which is also protected in article 50 CFR. The question is whether the prohibition of double jeopardy as protected by EU law forms part of the non-diminution commitment.

First, it would need to be established that a right that is included in the RSEO section of the BGFA is engaged. While the prohibition of double jeopardy is part of the ECHR, the UK is clearly not bound by article 4 Protocol No 7 as it has not even signed the protocol, let alone ratified it. At the same time, it can hardly be denied that, given that it is a procedural right, the prohibition of double jeopardy is a 'civil right'. It is also protected in article 14(7) of the International Covenant on Civil and Political Rights, which the UK has ratified. There is thus a strong argument to be made that the prohibition of double jeopardy constitutes a 'civil right' within the scope of the RSEO section of the BGFA.

Second, this right was given effect in Northern Ireland as part of the common law[81] (subsequently modified by the Criminal Justice Act 2003).[82] Third, it was underpinned by EU law: article 54 of the Convention Implementing the Schengen Agreement (CISA) contains the prohibition of double jeopardy and the UK had opted into this particular provision of the Schengen Agreement.[83] Additionally, article 3(2) of the Framework Decision on the European Arrest Warrant mandates that a European arrest warrant must not be executed if 'the requested person has been finally judged by a Member State in respect of the same acts'[84] and the UK was bound by that particular provision until 31 December 2020.[85] Hence there are good grounds in favour of a finding that the non-diminution guarantee covers the prohibition of double jeopardy at least in a cross-border context. Fourth, that underpinning has been removed following withdrawal from the EU as neither article 54 CISA nor the European Arrest Warrant Framework Decision continue to apply to and in the UK.

---

81 See *Re Cranston's Application for Judicial Review* [2002] NI 1 (NIQBD), 9e, per Kerr J (as he then was). For the wider principle at common law, see also *Connelly v DPP* [1964] AC 1254 (HL).

82 See Criminal Justice Act 2003, pt 10.

83 See Council decisions 2000/365, 2004/926, and 2010/779 as amended by Council Decision 2014/854/EU [2014] OJ L 365/1.

84 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

85 It is also found in art 50 CFR, but that provision is only applicable in the scope of EU law.

The key difference between the protections against double jeopardy in EU law (article 54 CISA and article 50 CFR) and the protection in domestic law is that the former has a potentially broader scope in that it protects individuals who have been finally convicted or acquitted anywhere in the EU and not just in the domestic legal order of the state concerned.

This can have far-reaching consequences as the recent CJEU decision in Case C-435/22 PPU *Generalstaatsanwaltschaft München* demonstrates.[86] Here a Serbian national, who had been finally convicted of an offence in Slovenia, had been arrested in Germany on foot of an international arrest warrant issued by the United States (US). The US requested extradition on the basis of the US–German extradition treaty, which contains a more limited double jeopardy clause allowing refusal of extradition only if the requested person had been convicted or acquitted in Germany. Hence a refusal to extradite on the part of the German authorities in this case would have been in breach of the extradition treaty. However, the requested person successfully invoked EU law to protect him: the CJEU held that article 54 CISA 'read in the light of Article 50 of the Charter' had to be interpreted as precluding the extradition in such a case.

WHY DOES THE CFR STILL MATTER? THE CFR'S ADDED REMEDIAL VALUE AND BROAD CONCEPTION OF HUMAN RIGHTS

The preceding sections have sought to a) show that the CFR still applies in Northern Ireland in broadly the same way as it did before Brexit; b) illustrate how this happens through the existing legal framework; and c) offer a series of representative examples of areas of EU law that remain applicable to Northern Ireland, in which the CFR retains applicability. But what does the CFR change, in practical terms, for the individuals or groups who may invoke its protection in line with the foregoing analysis, for instance in the examples highlighted in the previous section? In this section, we aim to show that the continued operation of CFR rights in Northern Ireland under the Windsor Framework is important in at least two respects: first, remedies remain stronger under EU law than they are under domestic withdrawal legislation and the Human Rights Act 1998 (HRA), which gives litigants who can rely on the CFR an advantage compared to those whose situation does not fall within its scope. Second, the CFR offers the prospect of using certain rights, such as the right to an effective remedy and the right to

86 Case C-435/22 PPU *Generalstaatsanwaltschaft München* EU:C:2022:852.

human dignity, which have no other easily identifiable iteration within domestic law.

EU law remedies and article 4 WA

As far as the CFR applies via article 4 WA, it follows from that provision that it produces 'in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This means that the usual EU law remedies of disapplication (resulting from the primacy of EU law), consistent interpretation, and state liability apply if a CFR right can be invoked. While it is not the purpose of this article to rehearse the nature of these remedies in detail, it is essential to briefly explain what they mean for Northern Irish courts, so as to demonstrate why their use makes the CFR especially significant.

Disapplication

First – and perhaps most strikingly – the principles of primacy and direct effect require a Northern Ireland court to disapply, when in conflict with EU law, any domestic primary or secondary legislation, whether specific to Northern Ireland or UK-wide (albeit only in respect of the Northern Ireland dimension). The possibility to disapply primary law is not normally available to domestic courts outside of EU law (it is not provided for, eg, under the HRA), and has been excluded from the statute books in the rest of the UK under the EUWA and REULA, as discussed earlier. Thus, using the CFR has an immediate advantage for claimants because it offers the prospect of an effective remedy in situations where none would otherwise exist.[87] Of course, as with other provisions of EU law, the possibility of disapplication is not automatic under the CFR, as it must first be established that the provision being invoked meets the conditions for direct effect (namely, that the provision in question be clear, precise and unconditional).[88] Nevertheless, in a similar fashion as with the other remedies discussed below, the CFR's entry into force has led over the last decade to useful clarifications and restatements of the applicability of this remedy in the fundamental rights context, thus improving legal certainty for litigants and domestic courts, particularly in certain fields. For example, since the CFR's entry into force, the CJEU has attributed direct effect

87 In these situations, if addressed under the HRA, the analogous tool available before domestic courts would be a declaration of incompatibility – an uncertain and, as the European Court of Human Rights has confirmed, not in itself effective, remedy for victims: *Burden and Burden v UK*, Application No 13378/05, ECtHR 29 April 2008, [40]–[44].

88 Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1.

(and, with it, the prospect of disapplication) to a range of provisions that are key to the EU withdrawal arrangements, as explored in the preceding section, such as: privacy (eg articles 7 and 8 CFR);[89] non-discrimination (eg article 21 CFR);[90] effective judicial protection and the rights of defendants (eg articles 47 and 50 CFR);[91] and workers' rights (eg article 31 CFR).[92] In respect of these rights, it is not essential for claimants to establish afresh the conditions for direct effect. In turn, in these fields, claimants have a straightforward option to have CFR-incompatible legislation disapplied, and this option is available both in disputes with the state and with other private actors (who are also bound to observe the CFR, even in the face of incompatible legislation).[93]

Consistent interpretation

Second, even where disapplication is not deemed essential or possible (eg in the context of provisions considered by the CJEU not to meet the direct effect conditions),[94] it is worth noting that EU law still gives rise to a strong interpretive duty for domestic courts. This duty is variously known as 'indirect effect', 'consistent interpretation' or the 'Marleasing principle'.[95] As shown in our analysis of the *Caisse pour l'avenir des enfants* judgment above, all provisions of the CFR – even if they do not have direct effect – engage a strong interpretive duty on the part of domestic courts to read national legislation compatibly with the CFR as far as it is possible to do so. Notably, the duty of consistent interpretation under EU law is more extensive than ordinary canons of interpretation under domestic law.[96] It applies to all litigation before domestic courts, both against the state and against private actors, and is particularly broad. In *Pfeiffer*, for example, the CJEU found that consistent interpretation required a national court to do 'whatever lies within its jurisdiction' to find a compatible reading, thereby treating the 'whole body of rules of national law' as a potential source of such

89 See, eg, Case C-362/14, *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

90 See, eg, *Küçükdeveci v Swedex GmbH & Co KG* ECLI:EU:C:2010:21.

91 See, eg, *Egenberger* (n 61 above) and *Åklagaren v Hans Åkerberg Fransson* (n 3 above).

92 See, eg, Joined Cases 569-570/16, *Bauer and Willmeroth* ECLI:EU:C:2018:871.

93 Case C 684/16, *Cresco Investigation v Achatzi* ECLI:EU:C:2019:43.

94 Examples of such provisions are arts 27 CFR and 33 CFR: see, respectively, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT* ECLI:EU:C:2014:2; *Caisse pour l'avenir des enfants* (n 73 above).

95 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* EU:C:1990:395

96 Even the far-reaching interpretive canons in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at [30]–[33], per Lord Nicholls.

a reading, rather than sectionally reviewing a single piece of domestic legislation.[97] The only limit to the duty is that it falls short of requiring domestic courts to adopt a *contra legem* interpretation.[98] The strength of consistent interpretation has been affirmed more recently in the *Dansk Industri* judgment, demonstrating its continuing relevance under the CFR.[99] Combined, the strength of the direct and indirect effect mechanisms cannot be overstated: they mean that all provisions of the CFR can be invoked in domestic disputes (including in disputes between private actors) as strong interpretive obligations for courts and, in respect of the rights for which direct effect is available, even in the face of primary legislation.

State liability

Finally, like all other provisions of EU law that confer rights on individuals, the CFR gives rise to the possibility of state liability in damages. Where the actions of the state (including through rights-incompatible legislation) violate the CFR and a private party sustains damage displaying a direct causal link and proximity with that violation, domestic courts must award financial compensation, under the so-called *Francovich* principle of state liability in damages.[100] Crucially, state liability not only functions as a remedy for human rights violations – a function that has less relevance due to the expansive use of article 47 CFR by the CJEU, as discussed below – but also as a secondary remedy. State liability in damages can be invoked subsequently by a private violator of a fundamental right in order to recover from the state any losses they incurred because of the operation of direct effect in the context of non-implementation or seriously erroneous or incomplete implementation of EU law in domestic legislation.[101] This means that the Charter is not only significant remedially for *victims* of human rights violations in the strict sense, but also for other actors harmed by the legislative or policy choices of the state, if these have caused them to sustain serious and quantifiable damage. A typical example of this would be the case of employers being held directly liable to pay compensation to victims of discrimination, even though their discriminatory conduct was mandated by legislation.[102]

97 Joined Cases 397/01-403/01, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* EU:C:2004:584, [118].

98 Case C-334/92 *Wagner Miret* EU:C:1993:945, [20]; *Pfeiffer* (n 97 above) [112].

99 Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278.

100 Case C-6/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, [33]. See also Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v SS for Transport, ex parte Factortame* EU:C:1996:79.

101 This was eg affirmed in *Cresco* (n 93 above).

102 Ibid.

EU remedies and non-diminution

Do these remedies apply in Northern Ireland whenever the scope of the CFR is engaged, under the same conditions as they did under EU law? As discussed above (in the section on interpretation), it is clear that this question must be answered affirmatively, particularly to the extent that the CFR is brought into Northern Irish law through the WA, as stipulated by section 7A EUWA. Still, a possible counter-argument could be that a narrower reading is required for situations that are not governed directly by EU law *qua* EU law, namely where the CFR is not relevant as a result of the application of an annexed measure but as a result of the wider, frozen-in-time guarantee against diminution made in article 2 of the Windsor Framework. This view could be supported by analogy with domestic case law on retained EU law, which draws a line between EU law *qua* EU law and retained EU law, such as retained general principles. Courts have tended to view retained general principles as relevant to judicial interpretation, but without recognising the applicability of the remedies of state liability and disapplication in situations where that interpretation is insufficient, unlike EU law applicable in itself, which comes with all of its associated remedies.[103]

Nevertheless, the disaggregation of state liability and disapplication from the protection of EU rights under the terms of the EUWA would be difficult to operationalise within article 2 of the Windsor Framework, which – as already highlighted above in the interpretation section – commits the UK to ensuring in respect of Northern Ireland 'that no diminution of rights, safeguards or equality of opportunity … results from its withdrawal from the Union'. In this context, while the analogy with the approach to retained EU law may seem attractive from the perspective of ensuring a homogenous approach to the question of remedies, there is an important distinction. There is no mention of retained EU law in the WA and Windsor Framework. Article 2 of the Windsor Framework, however, *obligates* the prospective lack of diminution from a baseline which existed on 31 December 2020. It follows that the temporal reach of the remedy presupposed by this obligation must be further forward in time as compared to the baseline. Moreover, as the annex 1 directives in article 2 are a *subset* of matters to which the non-diminution guarantee applies, it would be incongruous to conceive of two versions of remedies for breaching the same guarantee: the stronger version for breaching current EU law (the annex 1 directives) and the weaker version for breaching the baseline.

103 *Adferiad Recovery v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC), [120]; *Secretary of State for Work and Pensions v Beattie and Others* [2022] EAT 163, [140].

Proceeding on the basis of the six-part test for engaging article 2 that was set out in *SPUC* (analysed in the previous section), references to the CFR must be viewed as remaining relevant alongside the remedies they engaged, since the non-diminution commitment relates to a snapshot of all the applicable EU law immediately prior to the entry into force of the Windsor Framework. Indeed, in this context, any solution other than a full application of the remedies of disapplication and state liability could result in considerable aberrations in the type and breadth of the reparation offered to victims in like cases in Northern Ireland, thereby undermining the non-diminution guarantee. Reliance on the CFR enables individuals in Northern Ireland to benefit from a range of remedies rendered unavailable in the rest of the UK as a result of EU withdrawal.

A broad substantive conception of human rights

Being a relatively new instrument, the CFR contains a long list of rights compared to most human rights treaties and is innovative in its inclusion of employment rights alongside classical freedoms and procedural guarantees. In this sense, the CFR is by its nature more protective of victims than the UK's principal human rights legislation (the HRA). But two specific provisions of the CFR not otherwise present in domestic legislation are especially worth highlighting in order to show its potential of offering a higher standard of human rights protection: the right to an effective remedy protected in article 47 CFR as an actionable claim both alone and in conjunction with other rights; and the right to human dignity protected in article 1 CFR as a vehicle for the attainment of minimum welfare standards, also as an actionable element of EU human rights law.

Article 47 CFR

The examples provided in the previous section have already shown that article 47 CFR (the right to an effective remedy) is becoming a prominent feature of CJEU case law. The CJEU has started to rely extensively on the right to an effective remedy and effective judicial protection, thus justifying consideration of article 47 CFR as an additional remedial tool for applicants invoking breaches of procedure, delays, or ineffectiveness by domestic authorities in the application of their EU rights. Indeed, earlier research has shown that article 47 CFR is, by a large margin, the most frequently invoked provision of the CFR, being used in a range of disputes spanning across different areas of EU law.[104] The provision has been found to have direct effect and

104 E Frantziou, 'The binding Charter ten years on: more than a "mere entreaty"?' (2019) 38 Yearbook of European Law 73, 79–84.

has been used both on its own[105] and in conjunction with substantive rights, such as non-discrimination, even where these rights also enjoy direct effect.[106]

The possible benefits of the CJEU's keen use of this provision for individuals are twofold. First, article 47 captures process-based violations of fundamental rights that may not be fully detailed in the substantive provisions. For example, in its judgment in *Braathens Regional Aviation* the CJEU derived from article 47 CFR the need to have a judicial pronouncement that race discrimination had occurred as part of the remedies required to address discrimination, even though neither the Race Equality Directive nor article 21 CFR expressly require this.[107] Similarly, in *Fuß* the CJEU found a violation of article 47 CFR in a situation that was substantively occupied by another provision (article 31 CFR)[108] due to the lack of dissuasive penalties contained in the Working Time Directive. Second, article 47 CFR imposes an obligation on domestic courts to *find* effective remedies for the substantive violation of a fundamental right through direct and indirect effect in order to avoid a further, procedural violation of the right to an effective remedy. This is best highlighted by the *Egenberger* case, already discussed above, where judicial review of the religious ethos exception to religion and belief discrimination[109] was severely limited to a review of the plausibility of such a decision on the basis of the church's self-perception.[110] In addition to finding an incompatibility with article 21 CFR, which is directly effective and must be adequately protected in domestic law, the CJEU found that the narrow judicial review protection offered in domestic law was also incompatible with the CFR – this time article 47. The possibility to rely on article 47 in addition to or in lieu of another provision can thus be viewed as a defining feature of the application of the CFR. Crucially, it is a field that exceeds the protection offered by the right to an effective remedy under article 13 ECHR, which is dependent upon the violation of another substantive provision and, in any event, has not been incorporated in the HRA and cannot, therefore, be invoked before domestic courts.

---

105 Case C-243/09 *Fuß* EU:C:2010:717.

106 *Egenberger* (n 61 above).

107 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* EU:C:2021:269, [33]–[34] and [45].

108 Fuß (n 105 above) [66].

109 Directive 2000/78, art 4 (1).

110 *Egenberger* (n 61 above), [31]; a similar question arose in *Food Standards Agency* (n 55 above) though in that case the limited judicial oversight of certain veterinary assessments was held to be compatible with art 47 CFR.

Article 1 CFR

In addition to article 47 CFR, the right to human dignity protected in article 1 CFR offers a useful illustration of how the CFR can sometimes impose state obligations with important social/resource implications, such as the allocation of welfare to vulnerable groups. For example, in *CG*, the CJEU found that Northern Irish authorities were under an obligation to disburse universal credit to a Croatian national who had been granted a temporary right to reside in the UK, despite the fact that they could have refused the application based on the absence of sufficient resources under article 7 of the Citizens' Rights Directive (Directive 2004/38/EC).[111] According to the CJEU, since the permit was granted, it was essential to ensure that an individual lawfully residing in a (then) member state could benefit from a dignified standard of living, in line with the protection of human dignity in article 1 CFR.[112] This use by the CJEU of the right to human dignity shows that EU human rights law can be particularly onerous for the state in terms of the allocation of its priorities, including its financial resources. This stance can be contrasted with the approach taken by domestic courts in welfare cases under the HRA and may, therefore, be preferable for human rights claims falling within this sensitive area.[113] More generally, the case law on human dignity is representative of a broader tendency in EU law to safeguard the *essential* core of all substantive rights (as exemplified in the right to human dignity, but not necessarily confined thereto), even where this has budgetary/policy repercussions.[114]

The CFR as a rights-based counterweight

Cases such as *Dillon*, the aftermath of the *Rwanda* litigation[115] and the enactment of the Illegal Migration Act 2023 all demonstrate a

111 Case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602, [78].

112 Ibid [89].

113 See, eg, *Re S and Re W (Care Orders)* [2002] 2 AC 291; and more recently, *R (on the Application of SC, CB and 8 Children) v Secretary of State for Work and Pensions and Others* [2021] UKSC 26, [2022] AC 223.

114 Koen Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU' (2019) 20 German Law Journal 779.

115 *R (AAA and Others) v Home Secretary* [2023] UKSC 42. The aftermath of this judgment, in which the UK Supreme Court found that the UK Government policy of deporting certain asylum seekers to Rwanda to have their claims processed there was unlawful, is the Safety of Rwanda (Asylum and Immigration) Act 2024, which generally prohibits the scrutiny of Rwanda as a safe country for asylum seekers, but the new UK Government has formally announced that it will not proceed with this plan, see Sam Francis, 'Starmer confirms Rwanda deportation plan "dead"' (*BBC News* 6 July 2024) .

certain style of law-making. Not content merely to narrow the scope of existing rights, certain statutes now openly assault such rights by disregarding[116] or all but extinguishing them.[117] In this context, where a favourable parliamentary majority weighs heavily against the rights of certain individuals or groups, the CFR and the general architecture of the WA and EUWA act as a counterweight – limited in its scope but powerful in its impact. *Dillon* demonstrated this impact by disapplying 10 provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 which breached not only the ECHR but also the corresponding rights in the CFR.[118] The Illegal Migration Act 2023 has been challenged before the Northern Ireland High Court[119] and disapplied in *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35 – and this statute's susceptibility to disapplication via the CFR and article 2 Windsor Framework has already been explored elsewhere.[120]

The wider impact of the CFR, however, may go beyond the legal effects of Acts of the UK Parliament. Let us consider, for example, the Illegal Migration Act 2023. Although not yet authoritatively answered, let us assume for the sake of argument, that any disapplication of the statute is jurisdictionally limited to Northern Ireland. Given that asylum is not a devolved matter,[121] the disapplication of any provisions of the Illegal Migration Act only within Northern Ireland would necessitate the establishment of dual asylum regimes – one in Great Britain and one in Northern Ireland. The added cost of such a reality may itself discourage future statutes of this kind.

The key point here is that the UK committed to protect the BGFA 'in all its parts', in respect of which Parliament subsequently incorporated legal obligations into the domestic legal order. The CFR's continued application therefore ensures that the UK honours its commitments to their fullest extent.

---

116 Ibid cl 3 (disapplication of the Human Rights Act 1998) and the Illegal Migration Act 2023, s 5(1)(b) (disregard of human rights claims).

117 The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s 43(1) (the extinguishment of actions relating to the Troubles brought after the first reading of the Bill in the House of Commons).

118 *Dillon* (n 15 above) [541] and [613].

119 *Re JR295's Application for Leave to Apply for Judicial Review* [2024] NIKB 7, [4] and [69].

120 Anurag Deb and CRG Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?' (2023) 6 European Human Rights Law Review 608, 618–621.

121 See the Northern Ireland Act 1998, sch 2, para 8; the Scotland Act 1998, sch 5, pt II, s B6; and the Government of Wales Act 2006, sch 7A, para 29.

CONCLUSION

It follows from our analysis that the CFR has not only remained relevant in Northern Ireland after Brexit but that it is indeed likely to continue to be applied in much the same way as it applied whilst the UK was in the EU. Thus, despite successive attempts to expunge EU fundamental rights under the EUWA and, more recently, under the REULA, the application of the relevant provisions of the WA and the Windsor Framework, translated into domestic law through section 7A of the EUWA, have kept Northern Ireland almost entirely shielded from the domestication of rights – and related attempts to revise them – that has been ongoing in the rest of the UK. As we have argued in the preceding sections, holding out against such revision is legally valuable because the CFR's remedial strength and broad conception of rights have neither been replicated under domestic withdrawal legislation in the rest of the UK nor can they be viewed as interchangeable with domestic human rights protection under the HRA.

The downside of this state of affairs, of course, is that it may evoke a sense of exceptionalism for Northern Ireland or the sentiment that Brexit is being prevented from being delivered uniformly across the UK. More importantly still, as a result of the application of the WA/Windsor Framework, Northern Ireland is now likely to serve as a case study of the CFR's added significance and material benefits to citizens, showing whether and to what extent the substantive rights and remedial prospects of residents of other parts of the UK are diminished as a result of its removal. So, for how long could this unusual situation hold out? There is no better way to answer this question than through the words of Chief Vitalstatistix: 'The sky may fall on your head tomorrow, but tomorrow never comes.'

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 522–549
Articles DOI: 10.53386/nilq.v75i3.1131

Social rights under article 2(1) of the Protocol on Ireland and Northern Ireland

Oliver Bartlett
Maynooth University
Tamara Hervey*
City University of London
Correspondence emails: ollie.bartlett@mu.ie and tamara.hervey@city.ac.uk.

ABSTRACT

The impact of Brexit upon the protection of social rights has received comparatively little attention, both in the public media and the academic literature. Social progress achieved on the island of Ireland since the conclusion of the Good Friday/Belfast Agreement can be seen as a product of that Agreement and Irish and British European Union (EU) membership – the former has generated the stability necessary for citizens to enjoy the opportunities and protection afforded by the latter. Brexit has put this social progress at risk and has already led to rights backsliding in social contexts. However, the mechanism created by the Protocol on Ireland and Northern Ireland to address diminutions of rights flowing from Brexit – article 2(1) – is not, we contend, suitable for preventing diminutions in social rights. We demonstrate in this article that the test for breach of article 2(1) focuses on specific breaches of individual rights and therefore does not cover situations in which regression in rights protection cannot be tied empirically to individual circumstances. The enjoyment of social rights on the island of Ireland is often facilitated by horizontally applicable EU law, and changes in levels of protection of social rights are often best observed at the population level over time. Using several case studies, we demonstrate how social rights backsliding on the island of Ireland that is attributable wholly or mainly to Brexit likely cannot be litigated through the application of article 2(1) of the Protocol, and we reflect upon the inadequacy of this situation.

Keywords: Good Friday Agreement; Ireland; Northern Ireland; Protocol; article 2(1); social rights; health; housing; education; children's rights.

* We are grateful to the organisers of and participants in the Maynooth Centre for European Law, Inaugural Workshop, 22 June 2023, and to the anonymous reviewers.

INTRODUCTION

Politicians who advocated for Brexit almost unanimously proclaimed that the 1998 Good Friday Agreement/Belfast Agreement (henceforth the Agreement) was sacred ground. No politician wanted to suggest that the exit of the United Kingdom (UK) from the European Union (EU) should or could be allowed to damage the shared peace on the island of Ireland. Numerous declarations assured us that the Brexit process would preserve and protect the Agreement in its entirety.[1]

It is now clear that these assurances were given without full consideration for the true extent of Brexit's impact upon daily life on the island of Ireland, and especially in the border communities that were always going to be impacted the most. The problems caused for trade in food and medicines, for identity, and constitutional status, amongst other things, have all received a great deal of attention and continue to do so.[2] Other problems caused by Brexit, not resolved by the various international agreements between the UK and the EU that followed the UK's departure from the EU, have not received comparable attention. This article focuses on one such issue: the impact that Brexit continues to have upon the enjoyment of social rights on the island of Ireland, and on the role of the Protocol on Ireland and Northern Ireland (hereafter the Protocol)[3] in protecting those rights.

The Agreement led to the removal of infrastructure and checks at the border between Ireland and Northern Ireland. Since its creation, and despite both Ireland and the UK being in the EU single market from 1973, the border had served to 'cage' communities in Northern

1 See, for example, Council of the European Union, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, XT 21016/17 ADD 1 REV 2, Brussels, 22 May 2017; UK Government, Northern Ireland and Ireland: Position Paper (London 16 August 2017); UK Government Prime Minister's letter to Donald Tusk triggering article 50 (London 29 March 2017); UK Government, The United Kingdom's exit from and new partnership with the European Union, CM 9417, 2 February 2017; see also G Parker, 'Major and Blair warn Brexit could harm peace in Northern Ireland' *Financial Times* (London 9 June 2016).

2 For example: J Webber, 'Northern Irish farmers face supply chain risks over Brexit deal warn Lords' *Financial Times* (London 30 April 2024); P Inman, 'Brexit food trade barriers have cost UK households £7bn, report finds' *The Guardian* (London 24 May 2023); D Davidson, 'For Northern Ireland, Brexit borders are more about identity than markets' (*Global Council* 5 February 2021); A Kramer, 'Brexit, Northern Ireland, and Devolution' (*Centre on Constitutional Change* 1 October 2018).

3 The formal title for the Protocol is now the Windsor Framework. However, for readability, we refer to the Protocol.

Ireland in particular, especially disadvantaged ones,[4] and had a deeply negative impact upon the community through which it passed.[5] The achievement of the Agreement in making the border freely passable for individuals has not resolved the multitude of detriments that resulted from the political division of an island with complex social, economic, cultural and religious structures.[6] However, the Agreement was largely successful in ending the violence that had pervaded daily life in Northern Ireland. This relative stability has enabled a greater level of cross-border social cooperation to emerge, with some beneficial effects for social rights. EU law and policy contributed significantly to making this cooperation a reality, providing a framework to facilitate social cooperation[7] and practical resourcing.[8] Taken together, the Agreement and EU law may therefore be seen as beginning the process of healing the depleted social capital of the island of Ireland:[9] the

4 L O'Dowd and C McCall, 'The significance of the cross-border dimension for promoting peace and reconciliation' IBIS Working Paper 55 (University College Dublin, Institute for British–Irish Studies 2006).

5 C Nash and B Reid, 'Border crossings: new approaches to the Irish border' (2010) 18(3) Irish Studies Review 265.

6 A Hall, 'Incomplete peace and social stagnation: shortcomings of the Good Friday Agreement' (2018) 4(2) Open Library of Humanities 1.

7 D Schiek, 'Legal frames for socio-economic cooperation on the island of Ireland: incrementalising approximation through using the "Protocol"?' (2021) 16 Journal of Cross Border Studies in Ireland 215.

8 For example, the Peace IV and Peace Plus programmes, funded by the European Regional Development Fund. See Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal OJ 2013 L 347/259; Regulation (EU) 2019/491 of the European Parliament and of the Council of 25 March 2019 in order to allow for the continuation of the territorial cooperation programmes PEACE IV (Ireland-United Kingdom) and United Kingdom-Ireland (Ireland-Northern Ireland-Scotland) in the context of the withdrawal of the United Kingdom from the Union OJ 2019 L 85I /1; Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments OJ 2021 L 231/94.

9 There is some literature that discusses the accumulation or deterioration of social capital in Northern Ireland and the border region: D Morrow, 'Sustainability in a divided society: applying social capital theory to Northern Ireland' (2006) 2(1) Shared Space 63; C McCall and A Williamson, 'Fledgling social partnership in the Irish border region: European Union "community initiatives" and the voluntary sector' (2000) 28(3) Policy and Politics 397; A Campbell et al, 'Social capital as a mechanism for building a sustainable society in Northern Ireland' (2008) 45(1) Community Development Journal 22.

former by providing the stability for citizens to enjoy the opportunities or protections generated by the latter.[10]

Such social progress as has been achieved is put at risk by Brexit. Withdrawal from the EU means the withdrawal of the legal framework that has facilitated social opportunities and protections. This article considers whether these changes to a process of *social progress through collaboration* potentially violate the *social rights* enshrined in the Agreement, and covered by article 2(1) of the Protocol. The article proceeds in two parts. First, it will establish that social rights are part of the Agreement as an integral part of the peace-building process, and that article 2(1) should apply to the withdrawal of the structure provided by EU law for the enjoyment of those rights. Second, it will illustrate, using selected case studies, that the test for breach of article 2(1) was not designed with social rights backsliding in mind. The consequence is that, in practice, it may be tricky to rely on article 2(1) to protect against the various ways in which Brexit is compromising the enjoyment of social rights on the island of Ireland.

THE RELATIONSHIPS BETWEEN SOCIAL RIGHTS, THE AGREEMENT AND EU LAW

Literature and jurisprudence suggest three important facets of social rights, each connecting to questions of their enforceability.[11] First, social rights are not superficial or secondary rights: they are concerned with the very foundations of human well-being, human capacity or flourishing,[12] equality of opportunity, and social

10 'For Peace and Prosperity: The Economic and Social Benefits of the Belfast/Good Friday Agreement' (IBEC 2023).

11 For an early discussion see, for example, E W Vierdag, 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69–105. This section of the article draws on T Hervey, *Brexit, Health and its Potential Impact on Article 2 of the Ireland/Northern Ireland Protocol* (Northern Ireland Human Rights Commission March 2022).

12 See, for example, P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012); K Young, *Constituting Economic and Social Rights* (Oxford University Press 2012); A Sen, 'Why and how is health a human right' 372 (2008) The Lancet 2010.

justice.[13] Social rights connect with human dignity, and with full participation in society, including exercise of democratic rights. Human rights are 'indivisible' in that 'civil and political' rights are intertwined with 'economic, social and cultural rights': all must be protected within a democratic society.

Second, respect for social rights means both a minimal level of social protection and non-discriminatory access to social benefits. Minimal levels of rights protection are often contested in international and domestic human rights law. For example, the substantive content of a 'right to health' is typically understood as including both the social determinants of health and the right to healthcare: to access at least a minimum core of healthcare services, and the medicines, medical devices, equipment, consumables, and human blood, organs, tissues or cells associated with the relevant medical treatment, provided by reference to patient safety and dignity.[14] Healthcare systems and services are themselves social determinants of health.[15] But the right to health does not mean that a state has a duty to provide everyone with

13 M Tushnet, 'Civil rights and social rights: the future of the reconstruction amendments' (1992) 25 Loyola of Los Angeles Law Review 1207; D Beetham, 'What future for economic and social rights?' in David Beetham (ed), *Politics and Human Rights* (Blackwell 1995); K Ewing, 'Social rights and constitutional law' [1999] Public Law 105; A Eide and A Rosas, 'Economic, social and cultural rights: a universal challenge' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001); T Hervey, 'The right to health in European Union law' in T Hervey and J Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003); T Hervey, 'We don't see a connection: the "right to health" in the EU Charter and European Social Charter' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 305–335; E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart 2007); Sen (n 12 above); N Daniels, *Just Health: Meeting Health Needs Fairly* (Cambridge University Press 2008); D Borges, 'Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views' (2011) 7 International Journal of Law in Context 335; Young (n 12 above); O'Connell (n 12 above); A Ely Yamin, *When Misfortune Becomes Injustice: Evolving Human Rights Struggles for Health and Social Equality* (Stanford University Press 2020); A Ely Yamin, 'The right to health' in J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights* (Edward Elgar 2021); O Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge University Press 2021).

14 See, seminally, on the 'minimum core' approach, from an international human rights perspective, B Toebes, *The Right to Health as a Human Right in International Law* (Intersentia 1999); and B Toebes, 'The right to health' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001).

15 World Health Organization Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health* (WHO 2008) 26.

whatever health intervention they might need or desire: rather, it is more complex, related to the resources available to a state, and perhaps better expressed as a 'right to equitable access' to healthcare.[16] As such, to secure social rights, national social systems must be organised so that access is available on a non-discriminatory basis, without differentiating on 'forbidden grounds', such as race, gender, sexuality, age or disability. To continue with the 'right to health' example, non-discriminatory provision of healthcare services is a fundamental aspect of the right to health. This is reflected, for instance, in the Council of Europe's European Social Charter 1961 and Revised European Social Charter 1996 (ESC),[17] and the United Nations (UN) International Covenant on Economic Social and Cultural Rights (ICESCR).[18]

Third, social rights imply an obligation on all governments, irrespective of the level of development in their countries or the consequent resources available to them, to continually improve the social rights of their populations. It is recognised that all governments must engage in resource prioritisation, but this necessity should not prevent governments from neglecting to use the whole of their financial capacity for social rights protection: hence, a government's obligation is one of 'progressive realisation' undertaken 'to the maximum of its available resources'.[19] International and domestic human rights law recognises that different states have different capacities to protect social rights among their populations. However, having insufficient resources, or indeed, at least arguably, reference to a range of other

16 Ferraz (n 13 above) 19, 143–146, 284.

17 1961, preamble, para 4: 'Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.' See European Committee on Social Rights, Conclusions XVII-2 and 2005 Statement of Interpretation on Article 11, para 5.

18 1966, article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; article 3: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.'

19 See, for example, CESCR General Comment No 3, *The Nature of States Parties' Obligations* UN doc E/1991/23 (1990) para 9; C Sunstein, 'Social and economic rights: lessons from South Africa' (1999) 11 Forum Constitutionnel 123; L Chenwi, 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 De Jure 742; S Skogly, 'The requirement of using the "maximum of available resources" for human rights realisation: a question of quality as well as quantity?' (2012) 12(3) Human Rights Law Review 393–420.

(non-economic) contextual factors,[20] is not a lawful justification for a government failing to take active steps towards respecting, protecting and fulfilling social rights. The principle of progressive realisation is reflected, for instance, in the ESC[21] and the ICESCR.[22]

An important aspect of progressive realisation is the concept of non-retrogression. Non-retrogression has been described as follows by the UN:[23]

> Non-retrogressive measures. States should not allow the existing protection of economic, social and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure. For example, introducing school fees in secondary education which had formerly been free of charge would constitute a deliberate retrogressive measure. To justify it, a State would have to demonstrate that it adopted the measure only after carefully considering all the options, assessing the impact and fully using its maximum available resources.

---

20 E Brems, 'Human rights: minimum and maximum perspectives' 9(3) Human Rights Law Review (2009) 349–372.

21 European Social Charter 1961, preamble, para 5: 'Being resolved to *make every effort* in common to *improve* the standard of living and to promote the social well being of both their urban and rural populations by means of appropriate institutions and action'; European Social Charter 1966, preamble, para 4: 'Considering that in the European Social Charter opened for signature in Turin on 18 October 1961 and the Protocols thereto, the member States of the Council of Europe agreed to secure to their populations the social rights specified therein in order to *improve* their standard of living and their social well-being' (emphasis added). See European Committee on Social Rights, 'Conclusions 2005 Lithuania' 336–338.

22 Article 2 ICESCR: '1. Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'; article 12: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. *The steps to be taken* by the States Parties to the present Covenant to achieve the full realization of this right shall include …'; article 16: '1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted *and the progress made* in achieving the observance of the rights recognized herein' (emphasis added).

23 Office of the UN High Commissioner for Human Rights, 'Frequently asked questions on economic, social and cultural rights' Fact Sheet 33 (nd) 16. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights for the realisation of these human rights 1986; CESCR General Comment No 13, para 45; CESCR General Comment No 15, *The Right to Water* UN doc E/C12/2002/11 (2003), para 19; CESCR General Comment No 18, para 21.

Retrogressive measures resulting in a reduced or lower level of support for social rights, must thus be *justified* as necessary. Different possible standards for necessity include reasonableness, proportionality and 'least restrictive alternative' tests.[24] A necessity test might be satisfied, for example, where a change in policy puts provision of social rights on a better footing for the population as a whole (even if retrogressive for some groups), or achieves greater equity for vulnerable groups. To determine necessity, alternative approaches should be examined; the effects of apparently justified measures on acquired rights, especially on marginalised or vulnerable groups,[25] should be considered; and groups affected should participate in decision-making.[26]

Important sources of social rights, applicable to the UK and to Ireland, include the UN's ICESCR 1966; the Council of Europe's human rights instruments; and EU law. The UN ICESCR has been binding on the UK since 1976 and on Ireland since 1964.[27] Likewise, both the UK and Ireland are bound by the ESC.[28] Some provisions of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), which takes effect in the UK through the Human Rights Act 1998 and in Ireland through the European Convention on Human Rights Act 2003, are also relevant for social rights.[29] The European Union's Charter of Fundamental Rights and Freedoms 2000 (EU CFR) contains a range of social rights,[30] such as the right to social security and social assistance, including housing[31] and the right to health,[32] plus provisions on equality before the law[33] and non-discrimination.[34]

---

24 Brems (n 20 above).

25 See, eg, S Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta & Co 2010) 190; Chenwi (n 19 above).

26 CESCR, General Comment No 19, para 42.

27 Although the UN CESCR is not a source of justiciable rights in the UK or Ireland – a matter of concern for the UN CESCR, see, for example, UN CESCR, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, 2016, paras 5 and 6; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, 2015, para 7.

28 See Council of Europe, Social Rights, Ireland; Council of Europe, Social Rights, United Kingdom.

29 For example, the right to privacy and family life, article 8 ECHR.

30 Although note that the EU CFR contains both 'rights' and 'principles' in the social policy field, which generate different obligations and hence differ in their level of justiciability. See T Lock, 'Rights and principles in the EU Charter of Fundamental Rights' (2019) 56(5) Common Market Law Review 1201–1226.

31 EU CFR art 34.

32 Ibid art 35.

33 Ibid art 20.

34 Ibid art 21.

These provisions embody the minimal rights and non-retrogression principles approaches to social rights noted above.[35]

When entering into the Agreement, Ireland and the UK must be presumed to be intending to comply with their long-standing respective obligations to protect social rights under these international/EU law instruments. Equally, within the limits of their powers, the EU institutions are obliged to comply with human rights protected in the EU CFR in all their activities.[36] These obligations include, as a minimum, progressive realisation and non-retrogression. The introduction of retrogressive measures would constitute a breach of obligations in international and European human rights law. Such a breach is not justiciable in domestic courts on the basis of the treaty obligations in the UN ICESCR or the Council of Europe's ESC. But international obligations must be taken into account when interpreting provisions of domestic law, including those which are directly enforceable before the courts, especially where, as is often the case with human rights norms,[37] the language of that domestic law is ambiguous.[38] The text of the Agreement (agreed *inter alia* by the UK and Ireland) and of the Protocol (agreed by the EU and UK)[39] must therefore be construed with that presumption of compliance in mind.

The Agreement reflects the understanding of the indivisibility of rights, not only through the wording chosen for the text of the Agreement, but also through its choice to explicitly protect the right to equal participation in society. The first section of part 6 on rights,

35 See, eg, Case C-571/10 *Kamberaj* EU:C:2012:233; O Golynker, 'Article 34', and T Hervey and J McHale, 'Article 35' both in S Peers et al (eds), *Commentary on the European Union Charter of Fundamental Rights* 2nd edn (Hart 2021) 1553–1610 .

36 Art 51(1) EU CFR; Cases C-8-10/15-P *Ledra Advertising and Others v Commission and ECB* EU:C:2016:701; see A Ward, 'Article 51' in Peers et al (n 35 above) 1553–1610.

37 All human rights norms are inherently contestable, in terms of the meanings and implications of legal textual embodiments of human rights principles, and especially their effects on the distribution of resources in society and on ethical implications, including dignity, equality of opportunity and justice.

38 See, for example, *Belhaj v Straw* [2017] UKSC 3, para 252, per Lord Sumption; *Assange v The Swedish Prosecutor 4* [2012] UKSC 22, para 122, per Lord Dyson at [122]; *R v Lyons* [2003] 1 AC 976, para 13, per Lord Bingham. On the interpretative presumption that UK domestic law is compatible with international obligations that are binding on the UK, see further, S Fatima, 'The domestic application of international law in British courts' in C A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).

39 Ireland is not a formal signatory to the Withdrawal Agreement, as the EU has exclusive competence to enter into agreements under art 50(2) of the Treaty on European Union (TEU), see Case C-621/18 *Wightman v Secretary of State for Exiting the EU*, EU:C:2018:999, para 53.

safeguards and equality of opportunity is entitled 'Human Rights'. Rights listed in that section are preceded by the phrase 'in particular': they are not intended to be exhaustive.[40] The Northern Ireland Human Rights Commission is invited to suggest 'additional rights' for codification in UK law that 'reflect the principles of mutual respect'. Nothing in the Agreement text explicitly excludes the possibility that it should protect social rights – rather, the Agreement text suggests that there are rights beyond the listed civil and political rights which are worthy of protection under the Agreement. Indeed, repeated use of the phrase 'human rights' indicates a desire to protect all rights. The preamble to the international agreement between the Government of the UK and the Government of Ireland, annexed to and part of the Agreement, explicitly 'reaffirms' a commitment to 'the protection of civil, political, social, economic and cultural rights'.[41] Given the painstaking manner in which the Agreement was drafted, if the intention had been to exclude social rights from protection, a narrow way of defining the desired rights would have been found.

Moreover, the drafters made an explicit choice to protect the ability of everyone living in Northern Ireland to participate equally in social activity. This choice must, we argue, also imply the protection of specific social rights. Human rights are acknowledged to be an ingredient of community cohesion and common culture,[42] so it is difficult to accept that the Agreement drafters wished to recreate a more equal and respectful society without intending that the social rights of citizens should be protected. Indeed, it is more plausible that all rights are important to the building of a shared community in (Northern) Ireland founded upon a lasting peace, and that codification of social rights remains desirable, a position for which there is evidence across the political spectrum.[43]

The ambition of the drafters was to formally include economic and social rights alongside civil and political rights at the heart of the

40 See, for example, *John McEvoy In the matter of an application by Martina Dillon, and Lynda McManus for judicial review; in the matter of an application by Brigid Hughes to apply for judicial review; in the matter of an application by Teresa Jordan for judicial review; in the matter of an application by Gemma Gilvary for judicial review; and in the matter of an application by Patrick Fitzsimons for judicial review; and in the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023* [2024] NIKB 11, [540].

41 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 1998, preamble, recital 5.

42 N O'Brien, 'Equality and human rights: foundations of a common culture?' (2008) 79(1) Political Quarterly 27–35.

43 A Renwick and C Kelly, 'Perspectives on the Belfast/Good Friday Agreement: examining diverse views, 1998–2003' (The Constitution Unit, University College London 2023).

Agreement.[44] This did not come to pass, but nevertheless the ambitions of the drafters for peace to be built upon social cooperation and social progress grounded in a respect for the social rights of all is reflected in the text, in the multiple references to social policy in the Agreement, and in the explicit protection given to equality of social participation.

Taking all of the above into account, it is therefore our contention that article 2(1) of the Protocol should be understood to cover not only rights explicitly included, but also the rights implicitly included in the Agreement, and that the correct interpretation of article 2(1) involves compliance with social rights obligations, including the obligations of securing minimal levels of protection; non-discrimination; and non-retrogression. The relationship between this general obligation of 'non-retrogression' and the 'non-diminution' rights of article 2 of the Protocol is as yet unclear, but we would argue that, as a minimum, 'non-diminution' must include 'non-retrogression' and may go further.[45]

APPLICABILITY OF PROTOCOL ARTICLE 2(1) TO SOCIAL RIGHTS DIMINUTION CASE STUDIES

Article 2(1) of the Protocol reads as follows:

> The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

We argued above that the reference to 'rights' should be interpreted to include social rights. Using four case studies, we now consider how the legal test for a breach of the UK's article 2(1) obligation might be applied to the possible diminution of social rights on the island of Ireland resulting from UK withdrawal from the EU.

The test set out by the Northern Ireland Court of Appeal in *SPUC Pro-Life Limited*,[46] reads as follows:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged

---

44 R O'Connell et al, 'The Belfast Good Friday Agreement and transformative change: promise, power and solidarity' (2024) 57 Israel Law Review 4–36.

45 For an argument to the effect that 'non-diminution' has a different meaning to 'non-retrogression', see C Murray, A O'Donoghue and B Warwick, *Discussion Paper on Brexit* (Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission 2018) 12.

46 *SPUC Pro-Life Limited v Secretary of State for Northern Ireland and Others* [2023] NICA 35, [54].

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020

(iii) That Northern Ireland law was underpinned by EU law

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU

(v) This has resulted in a diminution in enjoyment of this right, and

(vi) This diminution would not have occurred had the UK remained in the EU.

In the context of social rights, the trickier elements of the *SPUC Pro-Life* test are points (iii) and (v).

SPUC had challenged the validity of UK regulations which gave Northern Ireland ministers the power to extend the grounds upon which abortion was permitted, particularly surrounding cases of foetal abnormality. SPUC argued that these regulations diminished the protections afforded by the Convention on the Rights of Persons with Disabilities (CRPD), which prohibits abortion on grounds of disability, and that this diminution was unlawful under article 2(1) of the Protocol.

The Court of Appeal explicitly rejected the SPUC's argument that the identified rights were underpinned by an international treaty that was recognised in EU law. Although the EU is a party to the CRPD, the Court held that any disability discrimination rights which might have existed in Northern Irish law could never be 'underpinned by EU law' because 'disability discrimination and the provision of abortion is not a matter within EU competence'.[47] The Court's view of EU competence appears to be a narrow one, focused on legislative competence to harmonise national law of the member states, although the Court is not explicit on this point.[48] If this narrow view of EU competence is accepted, where the EU has no power to adopt harmonising legislation on the topic of a specific (social) right, point (iii) of the *SPUC Pro-Life* test can never be satisfied. Such an interpretation would pose problems in the social field, where the EU has limited or no specific competence to harmonise certain areas of social policy through legislation.

This judgment can be viewed in different ways. One view is that it wrongly conceptualises 'EU law' only as legislation. EU law is wider,

47 Ibid [58].
48 Ibid [58], [59], [68], [69], [71].

incorporating primary treaty law, including the EU CFR;[49] general principles of EU law, found in the CJEU's case law; and also certain international agreements;[50] and even – plausibly, as we explore below – various forms of soft law. Since the EU has become a party to the CRPD, it can be considered a part of EU law as an agreement concluded by the EU institutions. To dismiss out of hand the possibility that disability discrimination rights could be 'underpinned by EU law' is incorrect.

Another view is that the Court incorrectly focuses on specifically and directly worded legislative competences to *harmonise*. The EU has always been able, in the absence of such competences, to draw upon other related legislative and governance powers to achieve its policy objectives. Examples include legislatively mandated coordination of social security systems, legislatively mandated governance mechanisms such as the European Semester system, and the significant disbursement of EU funding.[51] Many of these permit the adoption of soft law, which the EU has used alongside legislation to greatly influence the development of the social policy area.[52] The effective

49 In the context of a relocation of a destitute Eritrean asylum seeker from Belfast to Falkirk, Scotland, the Northern Ireland High Court implicitly accepted that the EU CFR is 'EU law' for the purposes of art 2(1), but found that equivalent protection was available under the ECHR, so no 'diminution of rights' could be said to have occurred: see *In the matter of an application by Aman Angesom for judicial review and in the matter of a decision by the Secretary of State for the Home Department, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland intervening* [2023] NIKB 102. More recently, in the context of applications challenging various provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, the Northern Ireland High Court has explicitly accepted that the EU CFR is 'EU law' for these purposes: see *John McEvoy* (n 40 above) [578]–[582], and has cast significant doubt on the approach taken in *Angesom* concerning where both the ECHR and EU CFR are sources of a relevant right, see [585]–[588].

50 A point made also by A Deb and C R G Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?' (2023) (6) European Human Rights Law Review 608.

51 For an overview, see T Hervey, *European Social Law and Policy* (Longman 1998). Some key legislation, and the 'legal basis' provisions granting the EU legislative competence on which each is based, includes Regulation 883/2004/EC on the coordination of social security systems OJ 2004 L166/1 (based on arts 48 and 352 TFEU); Regulation 2024/1263 on the European Semester system OJ 2024 L1263 (based on art 121(6) TFEU); Regulation 2021/241 establishing the Recovery and Resistance Facility OJ 2021 L57/17 (based on art 175(3) TFEU).

52 For example, see the literature on EU health law: K Purnhagen et al, 'More competences than you knew? The web of health competence for European Union action in response to the Covid-19 outbreak' (2020) 11 European Journal of Risk Regulation 297; T Hervey, 'Telling stories about European Union health law: the emergence of a new field of law' (2016) 15(3) Comparative European Politics 352.

use of soft law to promote integration is a particular characteristic of the EU's activity in the social policy field.[53] Soft law has in fact played an integral governance role in various EU policy areas and plays an important role in CJEU jurisprudence.[54] Consequently, it is neither the case that the EU 'has no competence' in social policy areas, nor that the tools provided by such competence are not part of 'EU law'. EU competence and law take many different forms, so it is incorrect to view 'underpinned by' as narrowly referring to specific and direct competences for command and control harmonising legislation, rather than to a broader conceptualisation of EU competence and governance tools.

The decision of the Court in *SPUC Pro-Life* is of course not the final word in the interpretation of article 2(1).[55] Further cases which might be taken have the potential to end up in the UK Supreme Court, which may take a different view again of how the phrase 'underpinned by EU law' should be interpreted. The decision of the Northern Ireland High Court in *SPUC Pro-Life* illustrates this potential. The High Court accepted that the CRPD could underpin rights in the Agreement by virtue of its status as an international agreement that has become incorporated into EU law through adoption by the EU institutions. However, the High Court then accepted the argument that international agreements can only become EU law to the extent that the EU possesses competence, and that, since the EU had no competence on abortion, the provisions of the CRPD that allegedly prohibited abortion on the grounds of foetal abnormality, argued to be a form of disability discrimination, could never become part of EU law and thus never underpin rights in the Agreement.

The High Court's detailed judgment demonstrates that it also considers competence to mean the power to adopt harmonising legislation. When considering whether there was other EU primary or secondary legislation upon which the SPUC could rely, the court stated that article 168(1) provides limited competence in health, but 'does not provide a standalone basis for EU harmonisation of Member State policies relating to health, including abortion provision, although

53 D and L Trubek, 'Hard and soft law in the construction of social Europe: the role of the open method of co-ordination' (2005) 11(3) European Law Journal 343–364.

54 O Stefan et al, 'EU soft law in the EU legal order: a literature review' (Law School Research Paper, Kings College London 2019).

55 See further on the potential of art 2(1), for example, C McCrudden, 'Human rights and equality' in C McCrudden (ed), *The Law and Practice of the Ireland/ Northern Ireland Protocol* (Cambridge University Press 2022) 143–158; Deb and Murray (n 50 above). We note also the argument of Colton J in *John McEvoy* (n 40 above) [530]–[535], to the effect that a purposive approach to interpretation should be adopted in respect of the Protocol.

the EU does have a role in co-ordination and supplementation of such measures'.[56] Moreover, the Court also relies[57] on the fact that Council Decision 2010/48 authorising EU accession to the CRPD provides that the EU can accede to the CRPD only so far as its provisions 'affect common rules previously established' or if 'rules exist but are not affected'. This does mean that the CRPD can only become EU law to the extent of the EU's relevant competences, but the decision does not appear to specify that the competence must be a specific and direct harmonising competence. This, however, is how the High Court has interpreted the relevant sources. As we argued above, this is not the only interpretation possible. Indeed, a broader interpretation – which is open to the UK Supreme Court to make in future – of EU competence would better fit the realities of the powers provided by the Treaties and how the EU has used them in the social field. For example, the use of 'horizontal' legislation such as the Citizens' Rights Directive[58] and the Regulation on the mutual recognition of qualifications[59] has been hugely impactful in advancing the EU's social policy agenda, as we discuss in more detail below.

Despite the fact that courts are capable of adjudicating violations of social rights,[60] point (v) may also be difficult to satisfy with some social rights violations that arise from retrogressive policy choices because the impact of those violations is felt over time and at the population level. A 'diminution' in the enjoyment of the right must have 'resulted' from the withdrawal of EU law – both of these terms suggest a certain level of empirical proof is necessary before a breach of article 2(1) can be accepted. Such proof can sometimes be hard to supply in the case of a policy decision that does not specifically target any individual or group of individuals.

---

56 *SPUC Pro-Life Ltd* [2022] NIQB 9, [120].

57 Ibid [109]–[111].

58 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77.

59 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ 2005 L 255/22.

60 See, eg, J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights* (Edward Elgar 2021); A Nolan et al, 'The justiciability of social and economic rights: an updated appraisal' in M Kamminga (ed), *Challenges in International Human Rights Law* vol III (Routledge 2014); D Landau, 'The reality of social rights enforcement' (2012) 53(1) Harvard International Law Journal 189; O'Connell (n 12 above); Young (n 12 above); G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005); T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003); A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001).

The problems in satisfying points (iii) and (v) of the test in the context of social rights diminutions are illustrated in the case studies below. Point (iii) can be difficult to satisfy because the underpinning EU law is often horizontal or enabling legislation that creates conditions for the enjoyment of rights rather than providing a right directly, and point (v) can be difficult to satisfy because a diminution in enjoyment of social rights can often be hard to empirically identify or quantify, even if the situation in question is socially damaging.

Problems with proving underpinning of EU law – housing and children's rights

In April 2021, the UK Government decided to revive a policy that permits the deportation from Northern Ireland of non-British and non-Irish nationals who are sleeping rough and who do not accept limited assistance.[61] This is a retrogressive step in terms of the social right to housing. While the UK was an EU member state, even rough sleepers had certain rights of residence if they were EU nationals, and the UK courts found that deporting them while they benefited from those rights was unlawful.[62] Following the revival of the policy after the UK left the EU, EU-26 citizens who are sleeping rough and who do not have settled status[63] now face deportation. Rough sleeping EU-26 citizens in Northern Ireland face reduced opportunities to find accommodation, and moreover if deported they will lose the opportunity to travel across the border to Ireland, where they would be protected by their EU citizenship.

The Agreement sets out a right to freely choose one's place of residence, reflecting a desire to rebuild trust and cooperation in a region in which internal migration is still characterised by sectarian

61 This was first clarified in Home Office guidance on new post-Brexit immigration rules, and then in the Government's strategy on rough sleeping*: Grounds for Refusal: Rough Sleeping in the UK* (Home Office 20 April 2021); *Ending Rough Sleeping for Good* (Department for Levelling Up, Housing and Communities 3 September 2022). The policy was fiercely criticised as 'inhumane' when first made public: C Da Silva, 'UK policy to deport EU rough sleepers condemned as "inhumane"' (*Euronews* 21 April 2021). Although the 2022 document does not mention Irish nationals or the Common Travel Area, the policy does not apply to Irish nationals, who have an unconditional right of residence in the UK under the Common Travel Area. The UK will maintain its policy of only deporting Irish nationals when a criminal court has recommended it, or if the Home Secretary considers that exceptional circumstances require deportation in the public interest: see Written Answer to Parliamentary Question UIN HL14521, tabled on 13 March 2019.

62 *The Queen on the Application of Gunars Gureckis and Others v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

63 It is likely that homeless EU citizens will not have settled status, on account that applications could only be made online.

division.[64] Such a right must arguably be seen as an aspect of the broader right to housing, which represents more than a simple property right to a house.[65] A right to choose one's place of residence could also be linked to non-discrimination rights – the right to choose to live in a different community becomes meaningless if a person is prevented from exercising that right by discriminatory practices.[66]

To determine whether such social rights are 'underpinned by EU law', consider first a broad interpretation of the concept. The EU CFR contains rights to non-discrimination (article 21) and rights to housing assistance (article 34) which, as noted above, were part of Northern Irish law before 31 December 2020. Access to housing is covered in various pieces of EU legislation, including the Citizens' Rights Directive;[67] the Workers' Regulation;[68] the Long Term Residence Directive;[69] the Race Equality Directive;[70] and the Reception Conditions[71] and Returns Directive.[72] These provisions of legislation have been interpreted by the CJEU consistently with the right to housing assistance in article 34 EU CFR, even though that provision of the EU CFR is a social right and is part of the 'principles' section of the EU CFR.[73]

The Citizens' Rights Directive made it possible for EU nationals to be in Northern Ireland (indeed, to move to Northern Ireland from Ireland) even if they temporarily did not have a home. These rights of

64 I Shuttleworth, 'Residential mobility in divided societies: how individual religion and geographical context influenced housing moves in Northern Ireland 2001–2011' (2021) 27 Population, Space and Place e2387.

65 R Rolnik, 'Place, inhabitance and citizenship: the right to housing and the right to the city in the contemporary urban world' (2014) 14(3) International Journal of Housing Policy 293.

66 Evidence shows that Catholics experience inequalities with respect to social housing allocation: A Wallace, *Housing and Communities' Inequalities in Northern Ireland* (Centre for Housing Policy, University of York 2015).

67 Directive 2004/38/EC (n 58 above) art 24 (by implication), see Case C-310/08 *Ibrahim* ECLI:EU:C:2010:80; Case C-480/08 *Teixeira* ECLI:EU:C:2010:80.

68 Regulation 492/2011/EC on freedom of movement for workers within the Union OJ 2011 L 141/1.

69 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJ 2004 L 16/44, art 11, see Case C-571/10 *Kamberaj* (n 35 above).

70 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180/22, article 3(1)(h).

71 Directive 2013/33/EC laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, 96, arts 2(g), 12, 18.

72 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, 98, art 26, see Case C-924/19 *FMS* ECLI:EU:C:2020:367.

73 See, in particular, Case C-571/10 *Kamberaj* (n 35 above). By contrast, see Case C-539/14 *Morcillo* ECLI:EU:C:2015:508.

residence afforded vulnerable individuals valuable protection and the time to search for accommodation suitable for their needs. The Citizens' Rights Directive is not a piece of housing legislation but is essential for facilitating the pursuit of housing and the eventual realisation of housing rights. A report on the scope of article 2(1) published by the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission[74] asserts that 'horizontal' EU law, such as the Citizens' Rights Directive,[75] should be considered to underpin the right to choose one's place of residence, which is an aspect of the right to housing.[76] If 'underpinning' were understood broadly, to mean 'facilitated by', then article 2(1) would apply, as a right to housing falls within the scope of EU law, and thus is 'underpinning law' that would have had to be taken into account when interpreting national law or policy such as the rough sleepers revised guidance, before the UK left the EU. This would be a generous approach to the concept of 'underpinning EU law'.

By contrast, the Court in *SPUC Pro-Life* seemed to suggest a narrower concept. According to the *SPUC Pro-Life* ruling, it seems that 'underpinning legislation' must *directly* relate to the policy area, or even *specific policy*, through which a particular right is protected. Although the Court did not directly address this matter, the Court questions the particular Agreement right being claimed and in the next sentence states that 'in addition, the fundamental question as to how abortion comes within the competence of the EU is not satisfactorily answered'.[77] Applied to the right to housing, the reasoning seems to be that, as there is no specific and direct harmonising EU competence on housing *per se*, there can be no 'underpinning EU law' in this instance. Housing is incidental, rather than central, to the examples of the legislation noted above, which concern human migration. If this narrower approach is taken, demonstrating that EU law underpins

74 Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission December 2022).

75 Directive 2004/38/EC (n 58 above).

76 Similarly, the Northern Ireland High Court seemed to accept in principle that being deprived of access to social or economic benefits consequent upon remaining within the single market/customs union (that is, in Northern Ireland) could potentially be a 'diminution of rights' under art 2(1) of the Protocol, but found that no evidence had been adduced of his 'right to equality of opportunity in social activity' having been diminished because of his removal to Scotland, see *Angesom* (n 49 above) [110]–[112].

77 *SPUC Pro-Life* (NICA) (n 46 above) [71].

these kinds of social rights is tricky, since EU anti-discrimination law does not (yet)[78] fully cover social topics such as housing.[79]

The same difficulty arises with the protection of children's rights, a good example being the movement of children's social workers. Prior to Brexit, children in Northern Ireland who needed specialist care in Ireland, or who moved to Ireland for whatever reason, were commonly followed by their social worker. This practice provided essential stability to the child and was made possible by the fact that the EU Regulation on the mutual recognition of qualifications[80] was directly applicable in both Ireland and the UK, enabling a social worker to travel and practise between the two jurisdictions without hindrance. Following Brexit, qualifications obtained by a social worker in Northern Ireland are no longer automatically recognised in Ireland. Social workers who accompany vulnerable children from Northern Ireland to Ireland may now face significant delays in securing a right to practise professionally in Ireland, which would seriously weaken the care and support that is provided to those children,[81] an aspect of their social rights.

The right to equal opportunity in all social activity on grounds of class and disability should cover the situation described above since the health and disability status of young people in Northern Ireland is linked to socio-economic deprivation,[82] and nearly half of looked-after children are from the most deprived areas in Northern Ireland.[83] This means that structural issues in providing care to Northern Irish children will inherently have a heavier impact upon disadvantaged and disabled children. As discussed above, the EU CFR brought the right to non-discrimination into Northern Irish law before 31 December 2020. Article 24 EU CFR provides that 'children shall have the right to such protection and care as is necessary for their well-being'. Although the Convention on the Rights of the Child[84] has not been wholly incorporated into Northern Irish law, there are specific pieces

78 See, eg, European Commission, Proposal for a Council Directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, COM (2008) 426.

79 But see Council Directive 2000/43/EC (n 70 above) art 3(1)(h).

80 Directive 2005/36/EC (n 59 above).

81 S Graham, 'Warning of Brexit impact on vulnerable children requiring cross-border social work care' *Irish News* (Belfast 25 March 2021).

82 E McElroy et al, 'Exploring the effects of socio-economic inequalities on health and disability in Northern Irish adolescents: evidence from a nationally representative longitudinal study' (2023)14(1) Longitudinal and Life Course Studies 138.

83 *Children in Care in Northern Ireland 2021–22* (Northern Ireland Department of Health 2023).

84 Convention on the Rights of the Child, 1577 UNTS 3, entered into force 2 September 1990.

of legislation that refer to children's rights. For example the Children's Services Co-operation Act 2015 provides that children's well-being involves 'living in a society which respects their rights', and that determinations of well-being should be made with regard to any relevant provisions of the Convention on the Rights of the Child.

For article 2(1) to apply though, these rights must be 'underpinned by EU law'. Again, children's rights feature in several pieces of EU legislation,[85] but in this specific situation, there is no relevant specific EU law. Rather, it is horizontal EU law (the Directive on Mutual Recognition of Qualifications, reinforced by the free movement of services provisions of the Treaty on the Functioning of the EU (TFEU), and perhaps even by article 24 EU CFR, at least for interpretative purposes) that is crucial for facilitating the realisation of this particular aspect of children's rights. Taking a broad approach to the concept of 'underpinned by EU law', it could be argued that, even though the Regulation on mutual recognition of qualifications does not mention children's rights or rights at all, the practical effect of removal of this law directly undermines the protection of children's development rights on the island of Ireland. It certainly weakens society's respect for the rights of children as provided by the 2015 Act. However, in this situation the benefits of EU law are not conferred directly on the children whose rights might have been breached, but on the social workers who interact with the children to help realise those rights. Even if the broader interpretation of 'underpinning EU law' might be accepted for housing rights, as per the example above, it is unlikely that a court would accept the term 'underpinning' to cover a circumstance in which the Agreement rights and the relevant EU law give rights to different individuals.

Problems with proving both diminution and underpinning – education and health

The above case studies examined situations in which it may be difficult to prove that an Agreement right is 'underpinned by EU law', but in which it is at least more straightforward to demonstrate that a right has been diminished. The following case studies illustrate situations in which it is difficult *both* to prove that the right has been diminished *and* to show that the relevant right is 'underpinned by EU law'. These types of situations tend to be those in which high-level policy changes prompted by Brexit are likely to lead to social damage, but in which it is difficult to prove an individual level rights violation. This may be

85 For example, see Directive 2003/86/EC on the right to family reunification OJ L 251/12, Regulation 492/2011/EC (n 68 above) arts 4, 14; see R Lamont, 'Article 24' in S Peers, T Hervey, J Kenner and A Ward (eds), in Peers et al (n 35 above) 1553–1610.

the case for example because overlapping causal factors, distinct from Brexit, are also present in the effects of the policy changes. The first case study concerns the impact of Brexit upon third-level study, and the second concerns access to medicines and the impact on the health and social care system in Northern Ireland.

A series of negative consequences for the higher education sector in both Northern Ireland and Ireland will flow from Brexit.[86] One of the most pressing for Northern Ireland is the anticipated loss of government funding,[87] which Northern Irish universities point out will not only reduce places in the short term but will further increase pressure on universities in the long term when demographic changes (unrelated to Brexit) mean an increase in young people of university age.[88] When this is combined with additional cost-cutting measures, also not directly caused by Brexit *per se*, the result may be a significant drop in quality of education for students at Northern Irish universities.[89] The UK's decision not to continue its participation in the Erasmus+ programme is also another loss for Northern Irish universities. Although the Irish Government has committed to funding Erasmus+ experiences for students in Northern Irish universities, the impact of Erasmus+ went beyond student exchanges. Without the possibility to accept EU students on exchange or the ability to fund staff exchanges, Northern Irish universities are losing a powerful tool of educational diplomacy, which the replacement Turing scheme will not replicate and potentially may even undermine.[90] Brexit will also have a significant long-term impact upon Irish universities. The number of EU students applying for a university place in Ireland trebled after Brexit,[91] and this has led

86 The sector has been vocal about the almost entirely negative impact of Brexit, see, for example: D Butler, 'How Brexit threatens Irish science's cross-border collaboration' (*Nature* 31 January 2019); C Gormley-Heenan, 'What's the likely impact of Brexit on higher education in Northern Ireland?' (*Political Studies Association Blog* 21 February 2019).

87 Government funding is projected to be cut by 10 per cent, see: R Meredith, 'Northern Ireland student numbers will reduce with funding cuts, universities say' (*BBC News* 12 June 2023).

88 'Education cuts will inflict long lasting damage to our economy says Queen's Vice Chancellor' (*Queen's University Belfast* 16 May 2023).

89 J Manley and S McGonagle, 'Students risk becoming Brexit's "collateral damage" as tuition fee hikes and reduction in university places are considered on back of Brussels funding cut' *Irish News* (Belfast 14 January 2022).

90 L Highman et al, 'Higher education and research: multiple negative effects and no new opportunities after Brexit' (2023) 18(2) Contemporary Social Science 216; O Fox and S Beech, 'International student mobility options following Brexit: an analysis of the genesis of Britain's Turing Scheme' (2024) 30 Population, Space and Place e2727.

91 K Donnelly, 'Applications from EU for places in Irish universities treble since Brexit' *Irish Independent* (Dublin 2 August 2022).

to warnings from Irish universities that they may have to cap places to preserve quality of education, unless their own government funding is increased.[92] The burdens created by Brexit for universities on both sides of the border will not help the underlying and ongoing concern to raise the currently low level of cross-border student mobility on the island of Ireland, an objective which is noted to be important for promoting higher levels of social cohesion.[93]

A reduced ability for third-level institutions across the island of Ireland to cater for the collective student population of the island will at least arguably result in a diminished ability for some students to enjoy a right to higher education.[94] A right to education is not explicitly included in the text of the Agreement, although – as we noted earlier – the list of protected human rights under the heading 'Human Rights' is qualified by the phrase 'in particular', indicating that the list in the Agreement is not exhaustive. A possible way of engaging the text of the Agreement is to argue for the applicability of the right to equal opportunity with a focus on social class. In a similar manner to the children's rights case study above, the burden of reduced educational capacity will fall more heavily on socio-economically disadvantaged students – more socially advantaged students tend to benefit from experiences and preparation that will help them compete more effectively for a more limited number of places, and these students are also more likely to have resources at their disposal to allow them to pursue higher education away from the island of Ireland.

Even if it is accepted that the right in the Agreement to non-discrimination on grounds of social class is relevant to the reduced educational capacity of universities on the island of Ireland caused by Brexit, to be successful in an article 2(1) claim, one must still also demonstrate that this right was 'underpinned by EU law' and that it was diminished by the removal of EU law. As with the housing example above, numerous provisions on access to education are found across

92 Ibid.

93 E Smyth and M Darmody, *Student Mobility in Ireland and Northern Ireland* (Economic and Social Research Institute 2023).

94 Scholars point out that the right to education includes a right to higher education and is not only a right to primary and secondary education: H Gilchrist, 'Higher education as a human right' (2018) 17 Washington University Global Student Law Review 645.

EU internal migration law, including in the case law of the CJEU.[95] But if a narrower approach to 'underpinning EU law' is adopted, these are insufficient. The Erasmus+ Regulation that established the programme for the period 2014–2020[96] notes in recital 7 that it is adopted pursuant to article 21 EU CFR, that the Erasmus+ programme should promote 'inter alia equality between men and women and measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', and that 'there is a need to widen access for members of disadvantaged and vulnerable groups'. However, it is difficult to connect the specific withdrawal of this EU legislation with the reductions in soft power mentioned above, and then to the educational experience of any one particular student, making it extremely difficult to prove a specific diminution in rights in the article 2(1) sense. Conversely, it might theoretically be possible to quantify which students applied and missed out on the number of university places that would have been available if budget cuts were not made in Northern Ireland; however, it is impossible to point to one specific piece of EU law which underpins such a diminution of educational rights – the budget pressures facing the Northern Ireland Government have been caused by a combination of factors, only some of which stem from Brexit, and the demographic changes are unrelated. The key problem is that the test for breach of article 2(1) is geared towards the enjoyment of rights at an individual level. This is something that *SPUC Pro-Life* made clear – the Court needed to be convinced that the applicant's particular enjoyment of rights was particularly diminished by the withdrawal of a specific piece of EU legislation. In practice, it would be virtually impossible to quantify *in individual terms* the impact which Brexit is having upon universities on the island of Ireland, and even more so to provide concrete evidence for the unequal nature of this impact on a particular rights-bearing individual.

Our final case study concerns the right to health. Supply of medicines to the whole of the UK has worsened since Brexit, with particular

95 See, for example, Regulation 492/2011/EC (n 68 above) arts 7(2) and 10; Directive 2004/38/EC (n 58 above) art 24; Case 39/86 *Lair* EU:C:1988:322; Case C-184/99 *Grzelczyk* EU:C:2001:458; Case 209/03 *Bidar* EU:C:2005:169; Case C-147/03 *Commission v Austria* EU:C:2005:427; Case C-46/12 *LN* EU:C:2013:97; Case C-158/07 *Förster* EU:C:2008:630; Cases C-11&12/06 *Morgan and Bücher* EU:C:2007:626; Case C-73/08 *Bressol* EU:C:2010:181; Case C-542/09 *Commission v Netherlands* EU:C:2012:346; Cases C-523&585/11 *Prinz and Seeberger* EU:C:2013:524; Cases C-401-403/15 *Depesme* EU:C:2016:955.

96 Regulation 1288/2013/EU establishing 'Erasmus+': the Union programme for education, training, youth and sport [2013] OJ L 347/50.

challenges for supply to Northern Ireland.[97] Research by the Nuffield Trust[98] showed an alarming spike in notifications of supply shortages for Northern Ireland in 2021, at the end of some 'grace periods' for full implementation of the terms of the Withdrawal Agreement, because 80 per cent of medicines used in Northern Ireland arrive from Great Britain, yet Northern Ireland remains in the EU's single market for regulatory matters for products including medicines. That immediate crisis was averted; and the Windsor Framework puts medicines supply on a steadier legal footing.[99] But the fundamental position remains: the EU does not automatically recognise the UK's regulatory processes for authorisation of medicines. That means that, over time, the market in Northern Ireland will become more difficult to supply than that in Great Britain. It is unclear exactly how this will play out in terms of industry behaviour, but it is likely that there will be some medicines, or some specific delivery mechanisms for a medicinal product, or some patient groups, or specific medical conditions, for which there is no authorised medicine for Northern Ireland, whereas there is for Great Britain. Access to medicines is part of the right to health, and so the changes consequent upon the regulatory position for medicines in Northern Ireland are likely to result in a diminished ability for some patients to enjoy that right, or a different ability from the enjoyment of that right by patients in Great Britain. Different availability of products will mean that a different approach to patient treatment and care would have to be taken in Northern Ireland, in comparison to Great Britain. As with the right to education, the right to health is not explicitly included in the text of the Agreement, although, again as noted above, the list of protected human rights under the heading 'Human Rights' is qualified by the phrase 'in particular', indicating that the list in the agreement is not exhaustive. Could the diminished access to medicines, and consequent different approach to medical care in Northern Ireland, in comparison to Great Britain, be a discriminatory breach of the right to health, on the basis of nationality? Again, as with the right to education, it is difficult to see how one could prove an *individual* diminution of rights as a result of the kinds of systemic change, in industry behaviours and in actions of those operating in the

97 M Dayan et al, 'Parallel, divergent or drifting? Regulating healthcare products in a post-Brexit UK' (2023) 30(11) Journal of European Public Policy 2540–2572; H Yusufi, T Hervey, A Bloemink, A Cavanagh and H Shaw, 'The NHS in Northern Ireland post Brexit: the legal position on product supply' (2021) 29 European Journal of Health Law 165–193.

98 M Dayan et al, 'Protocol politics mean hard times ahead for health in Northern Ireland' (Nuffield Foundation 6 July 2022).

99 'Nuffield Trust response to Windsor Framework on Northern Ireland' (Press Release 27 February 2023); M Dayan et al, *The Future for Health after Brexit Research Report* (Nuffield Trust 2024) 8.

health and social care system in Northern Ireland, flowing from the regulatory environment for medicines supply consequent upon Brexit.

In addition, although some of the regulatory environment for health and social care, and the product supply within it, was 'underpinned by EU law' when the UK was a member state of the EU,[100] not every aspect of the health and social care system was. Rather, health care provision is a shared responsibility between the EU and its member states, and indeed the TFEU explicitly states that 'organisation and delivery of health services and medical care' is a national competence. Although the licensing of medicines, so that they may access the market, is an EU competence, the decision as to whether a particular medicine is available within a national health system (sometimes known as 'health technology assessment') remains at national level. Even if, therefore, it could be shown that a right to health had been diminished, it would be tricky to show that a relevant right is 'underpinned by EU law'.

CONCLUSION

The EU has played, and continues to play, a significant role in facilitating the enjoyment of social rights. Social rights are found across the body of EU law,[101] most prominently in the EU CFR. The EU CFR has the same legal status as the EU Treaties.[102] It contains rights that address a wide range of social issues, including education, gender equality, children and elder protection, social security, housing and health.[103]

100 See, for example, Directive 2001/83/EC on the Community code relating to medicinal products for human use OJ 2001 L 311/67; Regulation 726/2004/EC laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency OJ 2004 L 136/1; Regulation 141/2000/EC on orphan medicinal products OJ 2000 L 18/1; Regulation 1901/2006/EC on medicinal products for paediatric use OJ 2006 L 378/1; Regulation 1394/2007/EC on advanced therapy medicinal products OJ 2007 L 324/121.

101 A significant literature addresses the protection of social rights within EU law, see, for example: G Katrougalos, 'The implementation of social rights in Europe' (1996) 2 Columbia Journal of European Law 277; Hervey and Kenner (n 60 above); de Búrca and de Witte (n 60 above); S Coppola, 'Social rights in the European Union: the possible added value of a Binding Charter of Fundamental Rights' in G Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011); K Lenaerts and P Foubert, 'Social rights in the case-law of the European Court of Justice' (2001) 28 Legal Issues of Economic Integration 267.

102 Art 6(1) TEU.

103 For detailed analysis of the significance of various social rights being included in the Charter, see the relevant chapters in Hervey and Kenner (n 60 above); and S Peers, 'Article 4 – prohibition of torture and inhuman or degrading treatment or punishment' in Peers et al (n 35 above).

In the Treaties, article 9 TFEU provides that EU law should promote high levels of protection in various social fields including education, employment, social exclusion and health. As these rights have evolved, from their early emergence in sectoral or horizontal legislation and case law to their codification in the EU CFR, the EU's ambition in, and contributions to, the social policy field has grown. The Commission recently adopted an Action Plan[104] to specify the supranational and national level actions that should take place to work towards the rights identified in the 2017 European Pillar of Social Rights. The Pillar[105] is a catalogue of social rights and policy aspirations which the Commission hopes will inspire a programme of action that will transform social outcomes in the EU. The Pillar is not binding in the same way that the EU CFR is, and its transformative potential has consequently been questioned by some.[106] Nevertheless, the Pillar provides a direct political mandate for legislation within the EU's fields of competence that will contribute to improving social outcomes, and others have shown that this purpose is already being realised.[107] The Pillar is now referred to in several pieces of EU legislation,[108] many of which are 'horizontal' in nature. This illustrates the point that the EU does not need to adopt specific, harmonising, social rights legislation to promote the enjoyment of social rights. Even if EU legislation, or even potentially soft law, is not directly connected to the Pillar, it can still create the conditions that are necessary for enjoying social rights, for example by securing freedom of movement, mutual recognition or non-discrimination. No one doubts the EU's competence to take such actions under the Pillar.

We contend that social rights are protected by the Agreement. Social rights are integral to peace-building on the island of Ireland, and to redressing the harms that flow from the geopolitical divisions that have beset the island, and its people(s). The wording of the Agreement indicates that the rights it encompasses must be understood inclusively,

104 The European Pillar of Social Rights Action Plan (European Commission 2021).

105 European Pillar of Social Rights (European Commission, Secretariat-General 2017).

106 S Benedi Lahuerta and A Zbyszewska, 'EU equality law after a decade of austerity: on the Social Pillar and its transformative potential' (2018) 18(2–3) International Journal of Discrimination and the Law 163.

107 C Kilpatrick, 'The roaring 20s for social Europe: the European Pillar of Social Rights and burgeoning EU legislation' (2023) 29(2) Transfer: European Review of Labour and Research 203.

108 For example: Regulation 2021/1057 establishing the European Social Fund Plus, OJ L 231/21; Regulation 2019/1149 establishing a European Labour Authority, OJ L 186/21; Directive 2020/2184 on the quality of water intended for human consumption, OJ L 435/1; Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, OJ L 198/13.

not narrowly. The implication is that the Agreement covers not only rights explicitly outlined therein, but also a range of other rights, including social rights.

EU law has contributed to social rights protection on the island of Ireland, in a range of ways, reflecting the various competences enjoyed by the EU: through harmonisation by legislation; mutual recognition of regulatory standards; coordination of national laws, policies and systems; governance via the European Semester system; and strategic deployment of EU resources. The Action Plan under the Pillar of Social Rights is another, recent, example. This role for EU law in the island of Ireland has been significantly diminished by Brexit.[109] The consequent individual loss of opportunity is harmful in itself, but the potential resulting depletion of social capital on the island is also concerning since it risks the erosion of trust and cooperation between stakeholders, which may lead to regression in areas of social policy. Evidence suggests that border change is linked to social and political trust,[110] and that damage to social capital in border regions erodes the possibility for cooperation.[111] To the extent that Brexit damages the social capital that has been painstakingly built on the island of Ireland following the Agreement, further negative policy development and loss of social rights protection will follow.

Article 2(1) of the Agreement was intended to protect people on the island of Ireland from a diminution of their rights under the Agreement consequent upon Brexit. However, as we have shown, especially if the approach adopted by *SPUC Pro-Life* is continued, in practice article 2(1) will be tricky to use to seek to reverse diminutions of social rights, flowing from loss of social opportunities or protections, previously provided or supported by EU law. This is for two main reasons: first, an unnecessarily narrow definition of 'underpinning EU law', based on an unrealistic notion of EU competence in the social field; second, the difficulty of adducing evidence to prove an individual diminution of a right in the context of the practicalities of social policy provision. It will be almost impossible to satisfy the *SPUC Pro-Life* test in situations where depletion of social capital, experienced on a collective basis (with the probable future diminution in collective and individual rights enjoyment), is occurring over time, in circumstances

109 Some aspects of EU law, pertaining mainly to free movement of goods, remain applicable to Northern Ireland under the terms of the Windsor Framework.

110 S Abramson et al, 'Historical border changes, state building, and contemporary trust in Europe' (2022) 116(3) American Political Science Review 875.

111 F Lara-Valencia, 'The "thickening" of the US–Mexico border: prospects for cross-border networking and cooperation' (2011) 26(3) Journal of Borderland Studies 251.

where causal elements flowing from Brexit are accompanied by causal elements flowing from elsewhere.

This legal position is unsatisfactory because it creates a gap in rights protection which was intended to be avoided by the terms on which the UK left the EU: the Ireland/Northern Ireland Protocol annexed to the EU–UK Withdrawal Agreement. Under the *SPUC Pro-Life* approach, rights that are recognised by the Agreement are, in practice, not recognised as worthy of protection from Brexit-inspired rights backsliding by the Protocol. This position not only harms those who lose enjoyment of social rights, but also undermines the basis of the Agreement, namely the respect for all rights. Incidentally, it is also morally or politically unsatisfactory since Brexit was 'sold' to the electorate partly on the basis that it would create an opportunity for levelling up in relatively economically deprived areas of the UK such as Northern Ireland. The difficulty of challenging social rights backsliding achieves the opposite of that promise.

Moreover, the focus of the Protocol is on Northern Irish law, and therefore presumably on impacts felt in Northern Ireland, rather than those felt in the cross-border community, or in Ireland. The test in *SPUC Pro-Life* does not explicitly state that a diminution of rights can only be established if the harm is suffered by people in Northern Ireland. However, it is unclear to what extent a challenge by Irish rights holders harmed by Brexit would be successful. This is legally unsatisfactory since the Protocol was ostensibly created as an instrument to address cross-border issues as well as those experienced only in Northern Ireland. It is also morally and politically unsatisfactory since it abdicates responsibility for the external social impacts of Brexit.[112]

We do not know – and will probably never know – whether the drafters of the Protocol did not look sufficiently deeply at the possible consequences of Brexit for social rights; or thought that social rights were not relevant; or that the Protocol should not protect against diminutions of social rights; or simply found inclusion of social rights too difficult to negotiate in the time available. This inadequacy must raise the question of whether there is a need for other mechanisms that will offer protections for social rights in the face of loss of opportunity, equality and human dignity caused by Brexit.

112 On the concept of external impacts of Brexit in the health field, see T Hervey et al, 'Health "Brexternalities": the Brexit effect on health and health care outside the United Kingdom' (2021) 46(1) Journal of Health Politics, Policy and Law 177.

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 550–583
Articles DOI: 10.53386/nilq.v75i3.1126

Non-diminution, dynamic alignment and cooperation: exploring the potential of the Windsor Framework to protect the environment

Mary Dobbs*
Maynooth University
Alison Hough
Technological University of the Shannon
Orla Kelleher
Maynooth University
Lisa Claire Whitten
Queen's University Belfast
Ciara Brennan
Environmental Justice Network Ireland
Correspondence email: mary.dobbs@mu.ie.

ABSTRACT

Governance arrangements in Northern Ireland (NI) have categorically failed the environment to date, with significant degradation occurring across almost all indicators. Brexit poses fresh challenges, as it impacts a range of environmental standards, rights, safeguards and governance structures internally and on a cross-border basis. The original Protocol on Ireland/Northern Ireland, and subsequent amendments in the Windsor Framework, offered welcome resolution to some of the major NI-related regulatory headaches and uncertainties raised by Brexit. This binding legal framework establishes entirely new governance and regulatory arrangements for NI, uniquely tailored to the historical, political and legal conditions that characterise its devolved and biogeographical shared-island status. Several provisions therein could play a significant role in addressing challenges for environmental governance in NI – and potentially across the island of Ireland.

This article analyses the Windsor Framework's provisions of greatest relevance in the environmental field and that might assist in

* Part of this research is drawn from an extensive research project being carried out by the authors for the NIHRC on art 2 and the environment. The authors acknowledge and thank the NIHRC for their funding and support. The authors would also like to express their thanks for the very helpful feedback from the journal's anonymous reviewers and the participants of the Windsor Framework workshop hosted in Maynooth University in June 2023.

maintaining existing environmental rights, safeguards and standards – in particular, articles 2, 5, 9 and 11 of the Windsor Framework. Of interest are the complementary but differentiated approaches across these provisions, ranging from forms of dynamic alignment (articles 5 and 9), through non-diminution guarantees (article 2) to maintaining the foundations for North–South cooperation (article 11), including how they compare with international human rights non-regression norms. Three aspects are particularly striking: article 2's novel, domestically enforceable, non-diminution mechanism; the complementary, mutually re-enforcing relationship between the 1998 (Belfast/Good Friday) Agreement and the Windsor Framework; and the comparisons between the Windsor Framework's approach and NI's previous relationship with both European Union and Irish environmental law.

Keywords: environmental governance; Windsor Framework; Brexit; environmental standards.

INTRODUCTION

'Brexit', as the process of the United Kingdom (UK) leaving the European Union (EU) is known, requires the unravelling of a decades-long legal, social, economic and political relationship, that had impacted almost every area of life in the UK, and has given rise to highly complex legal and practical problems. These problems are particularly pronounced in relation to the status of Northern Ireland (NI). This is because the arrangements must satisfy the competing demands of allowing NI to completely leave the EU alongside the rest of the UK, but without creating the kind of 'hard' border normally expected at the edge of an entity like the EU. The prospect of a return to a physical hard border on the island of Ireland also raises concerns about the potential breakdown of many years of progress in the peace process and the evolution of cross-border cooperation generally, but also specifically in the area of the environment, which is particularly significant given that the island is a single biogeographical region. Further, substantial concerns arise regarding the potential flowing from Brexit for decreased environmental standards, protections and governance in NI, especially in light of the current state of the environment and NI's record in environmental matters.[1]

The eventually agreed Ireland/Northern Ireland Protocol to the Withdrawal Agreement (hereinafter the Protocol), as later amended

1 Eg Ciara Brennan, Mary Dobbs and Viviane Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland' (2019) 21(2) European Environmental Law Review 84–110. See further below.

by and renamed the Windsor Framework,[2] was the novel legal and political attempt to resolve the particular challenges posed by Brexit and the island of Ireland. It focuses largely on avoiding a hard border and addressing trade issues and peace, doing so via a variety of mechanisms designed to ensure maintenance of common standards on the island and maintaining conditions for cross-border cooperation established by the Belfast/Good Friday Agreement (hereinafter the 1998 Agreement). In doing so, it highlights the broad significance of the 1998 Agreement to today's governance challenges, bringing a new focus and potential role for it. Although the primary focus of the Windsor Framework is not directly on the environment, considerable provisions are of relevance – including those on trade, human rights and cross-border cooperation – raising the question as to their potential usefulness as tools in this field.

Consequently, there is simultaneously a significant practical need and theoretical interest in identifying and evaluating potential tools to support environmental governance in Northern Ireland and cross-border environmental cooperation on the island – whether in the underutilised 1998 Agreement or the novel Windsor Framework.

This article therefore examines whether, and to what extent the Windsor Framework, in conjunction with the existing provisions in the 1998 Agreement, can provide an avenue to help guard and potentially enhance environmental standards and governance mechanisms, both in NI and on a cross-border basis. It explores the Windsor Framework's novel approaches (in conjunction with the 1998 Agreement) regarding the interrelated issues of standards and cross-border cooperation. To achieve this, the article first outlines the broader foundations for cross-border environmental cooperation in the 1998 Agreement and EU membership and Brexit's impact on this. The remainder of the article then analyses the Windsor Framework and 1998 Agreement and the relevant provisions therein. It sketches out the basis for a generous, purposive interpretation of the provisions in light of principles of treaty interpretation. It then examines in turn articles 5 and 9 of the Windsor Framework, article 2 of the Windsor Framework and, finally, article 11 of the Windsor Framework.

As shall be seen, the provisions take differentiated approaches, ranging from forms of dynamic alignment (articles 5 and 9), through non-diminution guarantees (article 2) to maintaining the conditions for North–South cooperation (article 11). Of particular interest is the unique brand of non-diminution created by article 2 of the Windsor

2 The EU–UK Withdrawal Agreement Joint Decision 1/2023 amended the Protocol, such that, as amended, it would be known as the Windsor Framework. This is the term used throughout this article, except when referring to the original Protocol, as unamended by the Windsor Framework in February 2023.

Framework to support the 1998 Agreement's 'Rights, Safeguards and Equality of Opportunity' (RSEO) section. Article 2, it is argued, encompasses a wide range of environmental human rights and safeguards, including through the 1998 Agreement's references to environmental protection and its commitment to the incorporation of the European Convention on Human Rights (ECHR).

THE 1998 AGREEMENT, BREXIT AND THE ENVIRONMENT IN CONTEXT

This section outlines the foundations provided by both the 1998 Agreement and EU membership for environmental governance in NI and especially cross-border environmental cooperation. While some elements of the 1998 Agreement operated in tandem with the EU frameworks, significant elements were left underutilised due to the availability of EU structures, institutions and mechanisms. Brexit thereby has the potential not just to affect EU-derived environmental governance, but also to impact the operation of the 1998 Agreement in an environmental context, simultaneously creating extra hurdles and demands for its effective functioning.

The challenges in the area of trade were front and centre to the debate and negotiations surrounding Brexit. However, environmental non-governmental organisations[3] highlighted early on that NI leaving the EU created unique issues for the delicate structures of shared environmental governance and cross-border environmental cooperation on the island. These structures arose out of the 1998 Agreement cooperation arrangements which included extensive provision for cooperation on environmental issues.[4] The fabric of environmental governance in both jurisdictions as well as cross-border environmental cooperation came to depend largely upon the supporting structures arising out of EU membership.[5]

The 1998 Agreement is first and foremost a peace agreement; it is also a multi-level political agreement and an international treaty, which was unusual in that it was signed by political parties/stakeholders as

3 Northern Ireland Environment Link and the Environmental Pillar, 'Joint Briefing: Brexit and cross-border environmental cooperation on the island of Ireland' (2017).

4 Alison Hough, 'Brexit, the Good Friday/Belfast Agreement and the environment: issues arising and possible solutions' (A Report Commissioned by the Environmental Pillar in conjunction with Northern Ireland Environment Link 2018).

5 Sharon Turner and Ciara Brennan 'Modernising environmental regulation in Northern Ireland: a case study in devolved decision-making' (2012) 63(4) Northern Ireland Legal Quarterly 509–532.

well as state representatives. It was given some immediate domestic effectiveness in the UK/NI primarily through the Northern Ireland Act 1998, but with supporting provisions in the Human Rights Act 1998, and later in Ireland through the European Convention on Human Rights Act 2003. It was also put to referenda in Ireland and in NI, passing by popular majority in both. This took place after 30 years of 'the Troubles' and against the backdrop of a desire for peace, stability and improved quality of life. Tailored to the specific context of NI, it contains unique provisions on governance mechanisms – with its three Strands regarding NI, North–South relationships and relationships between Ireland and the UK (including its devolved administrations and crown dependencies). Alongside these more institutional elements, there is content on the fields of cooperation, on disarmament, justice etc and key provisions on 'rights, safeguards and equality of opportunity'. The 1998 Agreement is not a comprehensive treatise of rights. Rather it reflects the desire not just for peace in the immediate term, but for a shared or common quality of life and cooperation within and between communities that would ensure peace and harmony in the long-term. As such it should not be thought of in terms of coercive compliance and enforcement, but rather in terms of what it facilitates and enables.

From an environmental perspective, the 1998 Agreement contains numerous important provisions aimed at creating the conditions for cross-border environmental cooperation.[6] The environment (understood therein as 'environmental protection, pollution, water quality, and waste management') is one of the expressly listed areas for cooperation/joint action under Strand 2 and is thereby within the remit of the North–South Ministerial Council (NSMC), but it is also directly relevant to 7 of the 11 other listed areas, for example regarding waterways, agriculture and EU programmes. Likewise, Strand 3 provides for the British Irish Council (BIC) to endeavour to cooperate in a range of areas, including 'environmental issues' and other areas directly relevant to the environment. This is supplemented by the content and environmental gloss that can be applied to the RSEO section of the 1998 Agreement (discussed below).

Since the 1998 Agreement was adopted, significant milestones have been achieved in implementation, including establishment of the devolved institutions specified in Strand 1, the elaborate all-island, inter-governmental and regional governance structures of the NSMC, the BIC, and the British–Irish Intergovernmental Conference. The six cooperation bodies nominated under Strand 2 supervised by the NSMC have been established with varying degrees of success, including the Loughs Agency and Waterways Ireland to undertake relevant

6 Hough (n 4 above).

environmental tasks on a day-to-day basis; the NSMC[7] and BIC[8] have also engaged in considerable discussions and facilitated cooperation across a range of environmental areas.[9] In contrast, the consultative Civic Forum that was to be established regarding economic, cultural and social issues was only briefly realised.[10] In general terms, it is reasonable to conclude that, while the 1998 Agreement has considerable potential regarding the environment, only some elements have been utilised – and these to a limited extent to date.[11] Challenges therefore remain in both achieving full implementation of the breadth of vision of the 1998 Agreement and in achieving high standards of environmental protection in NI – even before one considers the impacts of Brexit. For example, the repeated collapse of the government in NI has undermined the effectiveness of the NSMC (since its members are drawn from the governments in both Ireland and NI) and the other Agreement bodies (as they have similarly suffered from a lack of political leadership and impetus). The fact also remains that much of the cross-border cooperation achieved outside of the structures outlined above was a function of the informal initiative of business, local government and civil society, and has been inherently driven by extensive EU funding for integration made available through the Interreg (and later Peace Plus) funding.[12]

Prior to Brexit, this unmet potential was not a major concern from an environmental perspective – despite being desirable and beneficial. This was because the EU provided broad, strong foundations for shared minimum environmental standards and governance in both Ireland and NI, meaning that full realisation of the 1998 Agreement environmental provisions was not absolutely necessary.[13] These shared EU foundations included a general 'direction of travel' via the continuously developing EU environmental law 'acquis' (including the Treaty on the

---

7 Eg as reflected in the NSMC work packages for environmental areas.

8 Eg BIC, 'Home page'; BIC, 'British-Irish Council Annual Report 2017'.

9 Alison Hough, 'The potential of the Good Friday Agreement to enhance post-Brexit environmental governance on the island of Ireland' (2019) (2) Irish Planning and Environmental Law Journal 55–65.

10 CAIN Archive (nd), 'Members of the Civic Forum 2000–2002'.

11 Hough (n 9 above); and Michael D'Arcy and Frances Ruane, 'The Belfast/Good Friday Agreement, the island of Ireland economy and Brexit' (British Academy and Royal Irish Academy 2018).

12 Caroline Creamer and Katy Hayward, 'Research for REGI Committee – impact of Brexit on the development of Irish regions and their cross-border cooperation' (European Parliament, Policy Department for Structural and Cohesion Policies, Brussels 2023); and Katy Hayward and Milena Komarova, 'The border into Brexit: perspectives from local communities in the central border region of Ireland/Northern Ireland' (Report prepared for ICBAN 2019).

13 Hough (n 9 above).

Functioning of the EU (TFEU) objective and Charter principle of a high level of environmental protection and environmental principles; human rights protections; a raft of EU secondary legislation; and the jurisprudence of the Court of Justice of the EU (CJEU), with knock-on effects on domestic case law), the broad EU governance mechanisms (including the European Commission's watchdog role and enforcement by the CJEU) and EU funding (including on a cross-border basis and largely dispensed through the Special EU Programmes Body).

This ensured (in principle) a minimum level of environmental protection across a wide range of areas, as well as facilitating cross-border cooperation, for instance, through regulatory alignment and funding for transboundary projects.[14] In some contexts, the EU mandated cooperation between Ireland and Northern Ireland (and/or the UK as a whole), for instance regarding transboundary river basins[15] and marine bodies,[16] invasive alien species[17] and more generally in the context of environmental impact assessments where there was a chance of significant transboundary impacts.[18]

Notwithstanding the supporting structures incidental to EU membership outlined above, it should not be thought that environmental protection in NI, Ireland or on a cross-border basis was flawless pre-Brexit. The significant environmental governance challenges in NI are well documented and long standing, for example in relation to the 'Cash for Ash' scandal, illegal dumping, ammonia pollution and the lack of an independent environmental agency.[19] Indeed, the UK, NI and Ireland have been the subject of

14 Ciara Brennan et al, Linking the Irish Environment (Report Commissioned by NIEL and IEN 2023).

15 Art 13 of Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy [2000] OJ L327/1.

16 Arts 5 and 6 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.

17 Art 22 in particular of Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species [2014] OJ L317/35.

18 Art 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1 (as amended).

19 Eg Brennan et al (n 1 above); Ciara Brennan, Peter Hjerp and Ray Purdy, 'Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures' (2017) 68(2) Northern Ireland Legal Quarterly 123–157; and Richard Macrory, 'Environmental law in the United Kingdom post Brexit' (ERA Forum 24 September 2018).

several enforcement actions[20] regarding failure to comply with EU environmental obligations. Furthermore, the state of the environment in both jurisdictions is concerning, for example, as reflected in the assessments of water bodies and protected sites across the island.[21]

However, until now the EU provided valuable standards, governance mechanisms and regulatory alignment as noted. Brexit now challenges this, with it being likely that there will be an increase in governance gaps,[22] a decrease in environmental protections and standards,[23] and increased regulatory divergence across the island[24] – thereby also making it more challenging to cooperate on a cross-border or all-island basis effectively.[25] Indeed, whereas the EU mandates member states to cooperate with each other regarding elements such as transboundary river basins, it only requires best endeavours regarding cooperating with non-member states and obviously imposes no such obligation on non-member states.[26] Significant concerns arise regarding both the future of environmental protection in NI and on an all-island basis as a result of Brexit.

The EU Withdrawal Act 2018 (as amended) (EUWA) addressed some of the immediate concerns through introducing 'retained EU law' as a new legislative category in the UK system. The EUWA essentially provided for the transposition of secondary EU law as it existed at the end of the agreed UK transition period (on 31 December 2020), in slightly adapted manners to adjust for the UK not being an EU member state any more and, for instance, not having access to EU authorisation procedures. In conjunction with the subsequent raft of

---

20 Eg see Case C-664/18 *Commission v UK (Limit Values – Nitrogen Dioxide)* ECLI:EU:C:2021:171; and Commission Infringement notification against Ireland for water quality in 2023 – INFR(2007)2238.

21 Environmental Protection Agency, 'Water Quality Indicators 2022' (2023); Department of Agriculture, Environment and Rural Affairs, 'Northern Ireland Water Framework Directive Statistics Report 2021' (9 December 2021); Turner and Brennan (n 5 above); Brennan et al (n 14 above).

22 Eg Maria Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' (2018) 36(3) Journal of Energy and Natural Resources Law 351; and Andrew Jordan, Charlie Burns and Viviane Gravey, 'Three Brexit governance gaps no one is talking about' (*Inside Track* 6 December 2017).

23 Brennan et al (n 1 above).

24 Mary Dobbs, Sarah Hamill and Robin Hickey, 'Land law and land use' (2023) 34(2) Irish Studies in International Affairs 149.

25 Ibid; Mary Dobbs and Viviane Gravey, 'Environment and trade' in Christopher McCrudden (ed), The Law and Practice of the Ireland–Northern Ireland Protocol 1st edn (Cambridge University Press 2022); and Brennan et al (n 14 above).

26 William Howarth, 'Brexit and the United Kingdom water environment' (2017) 14(3–4) Journal for European Environmental and Planning Law 294. See art 13 of the Water Framework Directive.

statutory instruments, this helped plug the very large substantive gaps that would have arisen otherwise, but some gaps remained (eg treaty provisions or soft law elements not otherwise provided for by EUWA), slight changes could nonetheless be significant (eg through replacing an external, independent oversight body like the European Commission with one that could entail conflicts of interest like the Department of Agriculture, Environment and Rural Affairs)[27] and without the EU governance mechanisms applying (eg the supervisory and enforcement roles of the Commission and CJEU). The UK also developed measures such as the Environment Act 2021 with its provisions for a policy statement on environmental principles and on the Office for Environmental Protection (OEP), but, while generally welcome, these do not equate to what was present as a member of the EU.[28] For instance, the recent introduction of the OEP in NI does not address the governance gap because its powers are limited (particularly with regard to enforcement), and it suffers from resourcing issues.[29] These variations challenge the effectiveness of environmental governance regimes and are already leading to some divergence, for instance through the inability to compel compliance by the UK or through the loss of the interpretative role of the CJEU. This is exacerbated by the new ability of the UK Government to amend, adapt or even revoke retained EU law – as highlighted by enabling provisions within the Environment Act and strengthened, in particular, by the Retained EU Law (Revocation and Reform) Act 2023. While these changes alone do not *necessarily* pose threats to the environment, there have been some concerning indications of the deregulatory preference (in some parts) of the UK's policy in this area and, irrespective of substance, any divergence poses challenges for cross-border cooperation that is essential in environmental matters on the island of Ireland.[30] Simply put, without the shared objectives, regulatory frameworks and governance mechanisms, regulatory divergence between NI and Ireland will increase and this will impact on the ability to cooperate in environmental matters.

---

27 Ciara Brennan and Mary Dobbs, 'Reality bites: the implications of scrutiny-free environmental law reform in Northern Ireland after Brexit' (*Brexit and Environment* 12 March 2019).

28 Eg Helena Horton, 'UK Government "ignoring green watchdog" over air quality rules' *The Guardian* (London 4 August 2023); and Georgina Holmes-Skelton, 'The Government is on the brink of making a mistake over environmental principles' (*Green Alliance Blog* 30 April 2021).

29 See, for instance, regarding the OEP's funding.

30 See, for example, Viviane Gravey and Andrew J Jordan, 'UK environmental policy and Brexit: simultaneously de-Europeanising, disengaging and (re)-engaging?' (2023) 30(11) Journal of European Public Policy 2349–2371.

A need exists to consider what tools might exist to help protect and strengthen environmental standards and governance in NI, including through cross-border cooperation. While there are some relevant components within the EU/UK Trade and Cooperation Agreement (TCA), for example with provisions on animal welfare, sustainable food systems and climate targets of net-zero by 2050,[31] and especially those on non-regression[32] and 'rebalancing measures',[33] these are of limited value;[34] the latter two provisions are found within title XI on the level playing field, focused on impacts on trade and investment, and remain very difficult to enforce.

However, NI (and the island of Ireland as a whole) has two important tools that merit further examination: the underutilised 1998 Agreement with its multifaceted aspirational provisions regarding the environment and cooperation; and the still underexplored Windsor Framework, which contains a range of relevant provisions that may be of assistance. Crucially, these two documents are closely linked, with the Windsor Framework seeking, amongst other things, to uphold the 1998 Agreement in 'all its dimensions'.[35] The remaining sections of this article therefore analyse the shared aims of the two documents, before considering core provisions within the Windsor Framework in conjunction with the 1998 Agreement where relevant.

SHARED AIMS: ENVIRONMENTAL STANDARDS AND TRANSBOUNDARY COOPERATION?

To help understand individual provisions within the Windsor Framework and also its relationship with the 1998 Agreement, it is essential to consider the core purposes of the documents. This draws on the customary principles of international law on treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties (VCLOT), which commence with an examination of the text of provisions but then endorse a purposive interpretation.[36] This was recently acknowledged by the NI High Court in its *Legacy* judgment, where the court stated that it was entitled to take a 'generous and purposive approach' to its interpretation of article 2 of the Windsor Framework and corresponding

31 TCA, pt 2, title I and title X1.
32 Art 7.2 of title XI.
33 Art 9.4 of title XI.
34 Dobbs and Gravey (n 25 above); and Viviane Gravey, 'The Brexit deal and the environment: pretty ambitious yet pretty irrelevant?' (*Brexit Institute News* 16 February 2021).
35 EU–UK Withdrawal Agreement, Protocol, art 1(3).
36 See art 31 of the VCLOT.

provisions in the 1998 Agreement.[37] Consequently, it is valuable to examine the express purposes of the two documents, as well as what information may be gleaned from the general provisions therein.[38]

The central provision is the Windsor Framework's article 1, which outlines the Windsor Framework's objectives as follows:

> 1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
>
> 2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
>
> 3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

This is then complemented by a wide range of recitals in the Preamble, for instance affirming the common goal of protecting the 1998 Agreement 'in all its parts', including cooperation across the island, and likewise 'recalling the commitment of the United Kingdom to protect North–South cooperation and its guarantee of avoiding a hard border'.[39] Of note also is the reference to the EU/UK mapping exercise[40] carried out during the withdrawal negotiations and which demonstrated 'that North–South cooperation relies to a significant extent on a common Union legal and policy framework', with Brexit thereby challenging such cooperation and creating 'the need for this Protocol to be implemented so as to maintain the necessary conditions for continued North–South cooperation, including for possible new arrangements in accordance with the 1998 Agreement'. While the

---

37 *Dillon and Others v Secretary of State for Northern Ireland* [2024] NIKB 11 (the *Legacy* judgment) [533]–[535], with the quotation from [535]. See also, for instance, *Angesom: Angesom's (Aman) Application and In the matter of a decision by the Secretary of State for the Home Department and the Human Rights Commission and the Equality Commission Intervening* [2023] NIKB 102.

38 Art 32 of the VCLOT addresses also the question of supplementary means of interpretation, which merits further consideration but is beyond the scope of this article.

39 It should be noted also that there are likewise recitals (worded with somewhat more caveats) about controls at ports and airports in NI, and unfettered market access from NI to the rest of the UK.

40 See Technical Explanatory Note: North–South Cooperation Mapping Exercise. This was a mapping exercise undertaken by the UK (supported by the NI civil service), the European Commission and Ireland, mapping existing formal and informal North–South cooperation on the island of Ireland and the relationship with EU regulatory frameworks.

environment is not expressly noted in this context, the mapping exercise referred to identified 20 environmental and numerous other environmentally relevant regimes and the environment is also (as already stated) an area for North–South cooperation noted explicitly in the 1998 Agreement. Further, the Preamble continued by highlighting the UK's commitment 'to protecting and supporting continued North–South and East–West cooperation across *the full range* of political, economic, security, societal and agricultural contexts and frameworks for cooperation, including the continued operation of the North–South implementation bodies' (emphasis added). This thereby implicitly includes the environmental regimes.

There is clearly a strong basis for arguing that the Windsor Framework aims to support North–South cooperation, including in the environmental field. This point is further supported by the environmental focus points within the 1998 Agreement and also article 11 of the Windsor Framework (discussed below). First, the joint EU/UK mapping exercise, articles 1(3) and 11 of the Windsor Framework, and the 1998 Agreement support the link between North–South cooperation and the environment as discussed. Second, cooperation and working on a cross-border basis is seen in these three documents (the mapping exercise, Windsor Framework and 1998 Agreement) regarding the 1998 Agreement's implementation and within EU law more generally as a foundation for furthering the goals of specific regimes, including environmental protection. For instance, the EU aims to achieve a high level of environmental protection,[41] but may only act in this area (rather than leaving it to the member states) to the extent necessary to deliver effective environmental protection, due to the principles of subsidiarity and proportionality. Further, the language of the NSMC's environmental work package[42] and meeting

41 Art 191 TFEU.

42 Eg NSMC, 'Environment', where 'The Council meets in the Environment Sector in order to make decisions on common policies and approaches in areas such as environmental protection, pollution, water quality management and waste management in a cross-border context.' The work programme includes 'Identification of strategies and activities which would contribute to a co-operative approach to the achievement of sustainable development', 'The development of catchment-based strategies in relation to water quality' and 'The scope for improved waste management in a cross-border context taking account of waste policy in the EU, the UK and Ireland including the promotion of a circular economy'.

minutes[43] reflects the shared understanding that cooperation is to promote environmental objectives and standards. It is clear that there is a substantive goal of environmental protection embedded in the reasons for North–South cooperation that reflects the single epidemiological and biogeographical nature of the island.[44] Third, the Windsor Framework expressly recognises that the EU provided frameworks for the (RSEO) provisions outlined in the 1998 Agreement (which are then protected under article 2 of the Windsor Framework – see below). While the RSEO section remains somewhat ambiguous, there are strong environmental elements found therein, as discussed below.

Together, the combined focus on environmental protection and North–South cooperation across the two documents helps inform the interpretation of the remaining provisions therein. For instance, these demonstrate that there is extensive basis in both the 1998 Agreement and the Windsor Framework to protect environmental standards and rights. This supports the argument that environmental standards and rights are captured within the unique and tailor-made flavour of 'non-diminution' created and made directly enforceable by article 2 of the Windsor Framework, outlined in detail below. However, it also creates an expectation that the Windsor Framework as a whole would help guard and potentially enhance environmental standards and governance mechanisms in NI and on a cross-border basis, as mooted in the introduction above and examined in the subsequent discussion.

ARTICLES 5 AND 9: PROVISIONS FOR DYNAMIC ALIGNMENT

As noted above, concerns arise that Brexit will pose extra challenges for environmental governance and standards across the UK and especially in NI, potentially leading to a decline in environmental protections in NI as well as creating increased regulatory divergence (both intra-UK divergence and divergence between parts of the UK and the EU). Such divergence makes cross-border cooperation much more challenging.

43 NSMC, 'Environment Meeting: Joint Communiqué' (21 October 2020), eg at pt 8: 'Ministers noted the ongoing collaboration between officials in both jurisdictions and submission of joint position papers focusing on a range of holistic clean air, water catchment and nature-based solutions to address future pressures from climate change, support sustainable economic recovery and protect the environment to inform emerging PEACE Plus themes.' And pt 14: 'They also noted the ongoing work in Northern Ireland to tackle plastic pollution and the success of Extended Producer Responsibility (EPR) schemes in Ireland and the opportunities for both administrations to share examples of good practice in this area.'

44 HM Government, 'The Windsor Framework: a new way forward' (2023) para 1.

Consequently, this section considers the potential of articles 5 and 9 of the Windsor Framework to offset the environmental concerns to a limited extent, as they enable a form of dynamic alignment regarding specific EU laws.[45] However, as shall be seen, they only have limited applicability in environmental areas and, while that scope could be expanded, it could likewise be further restricted via articles 13 and 18 of the Windsor Framework – the political will and relationships between the EU and the UK, as well as internally between the UK and NI Governments will be key in practice.

Article 5(4) provides for those EU laws listed in annex 2 to apply in NI, as if NI were still part of the EU.[46] Annex 2, as originally agreed, included 288 EU laws, across a diverse range of areas primarily related to trade in goods. There are some important environmental (or environmentally relevant) examples, such as those on alien and invasive species, trade of endangered species, animal welfare, pesticides, organic food production etc. Significantly, 'the EU will continue to play their supervision and enforcement roles here and CJEU judgments will be applicable, including in light of the environmental [objectives and] principles found in the TFEU'[47] – this is due to articles 12 and 13 of the Windsor Framework[48] and despite the treaty provisions neither applying generally under the Windsor Framework nor being part of EU retained law within the UK. However, most of the laws included within annex 2 are linked to trade/industry[49] and those focused on the environment are very limited when one considers the vast range of EU environmental laws or even the areas identified in the earlier joint mapping exercise regarding North–South cooperation. For instance, there are major, notable gaps regarding areas such as water quality, air quality, nature conservation and, significant in the context of the high levels of agricultural production on this island, nitrates.

---

45 See, regarding the continued application of EU law under arts 5 and 9 (pre-Windsor Framework amendments), Viviane Gravey and Lisa Whitten, 'The NI Protocol and the environment: the implications for Northern Ireland, Ireland and the UK' (Environmental Governance Island of Ireland Network Policy briefs 1/2021).

46 In principle, this includes where the EU laws are amended or replaced, courtesy of art 6 of the Withdrawal Agreement and art 13(3) of the Protocol. It can also include new EU laws deemed within the scope of the Protocol – see below regarding art 13(4). It is worth noting that these may now be affected by the Stormont Brake introduced subsequently and discussed below.

47 Ludivine Petetin and Mary Dobbs, *Brexit and Agriculture* (Routledge & CRC Press 2022) 37.

48 Eg arts 12(4), 12(5) and 13(2) of the Protocol.

49 Mary Dobbs, 'Northern Ireland's agricultural quagmire: how to develop a sustainable agricultural policy?' in Irene Antonopoulos et al (eds), *Sustainable Agriculture in Post-Brexit UK* (Routledge 2022).

Article 9 relates to preservation of the Single Electricity Market on the island of Ireland and does similarly, but not identically, with the provisions included in annex 4 of the Windsor Framework.[50] There are fewer laws found here, but some are nonetheless relevant to the environment, for example regarding industrial emissions[51] and greenhouse gases.[52] However, they are only applicable 'insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity'.[53]

Articles 5 and 9 are complemented by other Windsor Framework provisions and especially article 13 (subject to the Windsor Framework's 'Stormont Brake' discussed below). Thus, article 13(3) has the effect that the references in articles 5 and 9 to the EU laws listed in annexes 2 and 4 entail those laws as amended or replaced by the EU. This is further complemented by article 13(4)'s provision for new EU laws, that neither replace nor amend laws listed in the Windsor Framework annexes. Under this, where the EU considers the laws to be within the scope of the Windsor Framework, the EU–UK Joint Committee may (subject to mutual consent) adopt a decision to add these laws to any annex of the Windsor Framework. As Gravey and Whitten have noted,[54] this power has already been used to add the Single Use Plastics Directive[55] (among others) to annex 2.

From an environmental perspective, articles 5 and 9 maintain a minimum level of standards and the applicability of EU governance mechanisms in these limited areas. In light of the EU's general approach to the environment, the treaty objectives and their efforts with the Green Deal, Biodiversity Strategy and so on, one would expect this to be a positive environmental outcome relative to the alternative. Further, due to the continued relevance of ongoing judgments by the

50 Lisa Claire Whitten, Niall Robb and David Phinnemore, 'The single electricity market and the Protocol on Ireland/Northern Ireland' (*Post-Brexit Governance NI* May 2023).

51 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L334/17.

52 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L275/32.

53 Introduction to annex 4.

54 Gravey and Whitten (n 45 above).

55 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJL155/1.

CJEU in interpreting EU law[56] and the ability to include EU legislative developments, the Windsor Framework provides the foundations to maintain dynamic regulatory alignment between NI and the EU (in a specified area of relevant laws) and thereby between NI and Ireland – although not guaranteeing it wholesale. Together, these facilitate continued cooperation in the environmental field, which in itself is a valuable tool in ensuring environmental standards. This is complemented by the provisions within article 11 on North–South cooperation discussed below. However, further caveats apply, as discussed in the following subsection.

Subject to the voice of NI: democratic consent and the Stormont Brake

Article 18 addresses the issue of 'democratic consent' and provides for the NI Assembly to vote on the continued application of articles 5–10 of the Windsor Framework on a periodic basis. The first vote is due in December 2024, with votes subsequently every four or eight years.[57] If at any point there is no majority in favour of their continued application, then these specific articles will cease to apply to NI after a period of two years. During this period, the Joint Committee will be tasked with creating recommendations regarding 'necessary measures' that take into account the obligations of the parties to the 1998 Agreement.[58] Such an outcome would have major multifaceted impacts, including on the environment – likely reflecting a harder form of Brexit for NI, removing the regulatory alignment in the areas covered by articles 5 and 9, and also creating much broader issues, for instance, regarding trade restrictions and (at least potentially) physical barriers on the island of Ireland.

Complementing this, the Windsor Framework has introduced a change in the form of the so-called Stormont Brake in article 13 as amended to include the new article 13(3)(a).[59] The change reflects and follows from concerns regarding the obligation for NI to stay dynamically aligned to EU law, as outlined above (eg through amendments and replacements to the laws in annex 2), without NI or the UK having a voice in their shaping or adoption.[60] Article 13(3)(a)

56 Eg art 12(4) of the Protocol.

57 David Phinnemore and Lisa Claire Whitten, 'Democratic consent and the Protocol on Ireland/Northern Ireland' (*Post-Brexit Governance NI* June 2022).

58 Art 18(4).

59 Viviane Gravey and Lisa Claire Whitten, 'New governance for dynamic alignment under the Windsor Framework' (*Brexit and Environment* 8 March 2023).

60 Although, for new laws being added to the annex, since the Joint Committee must agree to this, this effectively gives the UK Government a veto on its application to NI already.

was therefore introduced into the original Protocol by Joint Committee Decision 1/2023 (regarding the Windsor Framework).[61] Decision 1/2023, along with a UK unilateral declaration appended therein,[62] outlines how the Stormont Brake will function.

While a deep investigation of the Stormont Brake is unnecessary for our purposes, some brief points are useful. There are two avenues where it can be used, and the approach varies somewhat between them – only one of these avenues was jointly agreed between the UK and EU, while the other arises from a unilateral legislative initiative in the UK. With regard to the first, where the EU amends or replaces a law listed in annex 2 of the Windsor Framework,[63] NI Members of the Legislative Assembly (MLAs) have two months to raise any related concerns with the UK Government. Any notification of concern made by 30 MLAs from two or more political affiliations must fulfil several criteria, including effectively that it is a necessary measure of 'last resort'[64] and that they can demonstrate that change would have a 'significant impact specific to everyday life of communities in Northern Ireland' which would be 'liable to persist'.[65] Further, in principle, if Stormont were to collapse again, 30 MLAs could still theoretically use the procedure in this context if they could demonstrate that they are 'individually and collectively seeking in good faith to fully operate the institutions',[66] but how remains very unclear despite the references to nominating ministers and 'support for the normal operation of the Assembly'.

Secondly, the UK Government's Command Paper and subsequent domestic legislation address the issue of new acts being added to the Windsor Framework (in any section). Article 13(4) already gave the UK Government a *de facto* veto on the application of any new EU instrument to NI, but the Command Paper now provides for a formal role for the NI institutions within the domestic procedures and thereby a voice in determining if the veto will be used or not.[67] The procedures for this were outlined in the Windsor Framework

61 Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework (2023) (Joint Committee Decision).

62 Ibid annex I: 'Unilateral Declaration by the UK: Involvement of the Institutions of the 1998 Agreement'.

63 However, those listed under subheadings 2–6 of annex 2 of the Protocol, and which concern trade defence instruments/matters, are excluded.

64 Joint Committee decision (n 61 above) annex I, 1(c)(i). See also annex I, 1(c)(iii).

65 Ibid art 2.

66 Ibid annex I, 1(a).

67 HM Government (n 44 above) para 68.

(Democratic Scrutiny) Regulations 2023;[68] and subsequently given effect by the Windsor Framework (Democratic Scrutiny) Regulations 2024.[69] Confirmation of this aspect of the Stormont Brake followed from the restoration of the NI devolved institutions which came in the wake of an agreement by the Democratic Unionist Party (DUP) to end its protest boycott of the same having secured a series of domestic concessions from the UK Government, laid down in the 'Safeguarding the Union' Command Paper, regarding the implementation of the Windsor Framework.[70] Essentially, a UK minister can normally only agree in the Joint Committee to the addition of a new EU act, where the NI Assembly gives its approval (with cross-community consent); if the NI Assembly is not functioning, the UK minister/Government may make their decisions without its approval. Provision is also made for a UK minister to agree to add a new EU act notwithstanding a lack of cross-community consent in the NI Assembly in the event of 'exceptional circumstances'.

Consequently, the two mechanisms provide controls over the applicability and use of a range of provisions, including where relevant to articles 5 and 9. In providing extra powers within NI, they introduce the possibility that the regulatory alignment (dynamic or otherwise) with the EU in some fields like environmental protection might be curtailed. This makes a decrease in environmental standards in NI more likely and also creates further hindrances for cross-border cooperation in the field. However, the mechanisms are challenging to avail of, and the criteria for triggering (in particular) the article 13(3)(a) Stormont Brake are relatively high due to provisions in the Windsor Framework and also the new mechanisms and timelines introduced domestically. This remains the case even since the UK Government's latest concessions (in the 'Safeguarding the Union' deal) to the DUP in early 2024. Overall, while the novelty and significance of the Stormont Brake mechanisms when viewed in the context of other arrangements for non-EU territories' participation in or relationship to the Single Market ought not to be understated, it is also the case that the practical implications of these new arrangements may be less than initially anticipated. Further, if they are deployed, then articles 2 and 11 of the Windsor Framework may provide some slight comfort to those concerned regarding environmental matters.

---

68 SI 2023/XX (draft).

69 SI 2024/118.

70 HM Government, 'Safeguarding the Union' (Command Paper 1021 31 January 2024).

ARTICLE 2: UPHOLDING RIGHTS AND SAFEGUARDS IN THE ENVIRONMENTAL CONTEXT?[71]

Article 2 of the Windsor Framework is a truly novel provision,[72] with significant potential as a tool to uphold human rights and safeguards, generally and in the environmental context. It is worth including its wording in full here:

> **Rights of individuals**
>
> 1. The United Kingdom shall ensure that no diminution of rights, safeguards, or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

Article 2(1) thereby creates a non-diminution guarantee that covers the RSEO protected in the 1998 Agreement (which is explored in more detail below), prohibiting any such diminution that results from Brexit ('withdrawal from the Union'). Article 2(2) complements this, by requiring that the UK continues to facilitate relevant 1998 Agreement bodies in their related work. There has been some limited

71 This section is drawn from an extensive research project being undertaken by the authors for the NIHRC on art 2 and the environment. The project expands on the issues herein and other aspects in far greater detail. The aim here is to provide an initial sketch of the potential for art 2 to be utilised in this context.

72 Anurag Deb and Colin Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?' (2023) 6 European Human Rights Law Review 608–625.

(but significant) research on article 2 to date,[73] with much still to be explored. Further, there has been some relevant litigation, including the recent *Legacy* and *Illegal Migration Act* judgments of the High Court and also the *SPUC* judgment by the NI Court of Appeal.[74] The latter laid out a six-step test for the application of article 2(1),[75] which has been applied since and can be a useful starting point for considering the provision – we do, however, argue in ongoing research commissioned by the Northern Ireland Human Rights Commission (NIHRC) that a more purposive approach should be taken to the provision than the test would indicate.[76]

---

73 Eg Aoife O'Donoghue, 'Non-discrimination: article 2 in context' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2022); Tamara Hervey, 'Brexit, health and its potential impact on article 2 of the Ireland/Northern Ireland Protocol' (Report on Behalf of the NIHRC March 2022); NIHRC and ECNI, 'The scope of article 2(1) of the Ireland/Northern Ireland Protocol' (Working Paper December 2022); Alison Harvey, 'Human trafficking and article 2 of the Ireland/Northern Ireland Protocol' (Report for the NIHRC March 2022); Sarah Craig and Eleni Frantziou, 'Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments' (2022) 73 Northern Ireland Legal Quarterly 65; Sarah Craig et al, 'European Union developments in equality and human rights: the impact of Brexit on the divergence of rights and best practice on the island of Ireland' (Report Commissioned by ECNI, NIHRC and Irish Human Rights and Equality Commission (IHREC) 2022); Sylvia de Mars and Charlotte O'Brien, 'Frontier workers and their families: rights after Brexit' (Report for the NIHRC October 2023); Alison Harvey, 'Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum' (Report for the NIHRC November 2023); and Deb and Murray (n 72 above).

74 See *Legacy* judgment (n 37 above); *Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023* [2024] NIKB 35; and *SPUC v Secretary of State for Northern Ireland (and Others)* [2023] NICA 35, para 54.

75 The court indicated (at para 54) that for a breach of art 2(1) to occur, there must be: '(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged. (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020. (iii) That Northern Ireland law was underpinned by EU law. (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU. (v) This has resulted in a diminution in enjoyment of this right; and (vi) This diminution would not have occurred had the UK remained in the EU.'

76 The test's set of criteria provides a useful starting point for consideration of the scope of art 2(1) and specifically for establishing when a right or safeguard falls within art 2(1) but, if taken narrowly, it could unnecessarily and restrictively rule out rights or safeguards that are actually included within art 2(1). It may be possible to resolve this textual conflict through a very broad interpretation of the criteria, in a manner that would achieve coherence with the Protocol's provisions and intentions. But great care should be taken with the test. For further detail, see the commissioned research for the NIHRC once published.

This section focuses primarily on two elements of article 2(1): a) the nature of the non-diminution guarantee; and b) the potential applicability in the environmental context (based on the scope of the RSEO section, and related to steps (i), (ii) and (iii) of the *SPUC* test). It remains a brief outline, with far more extensive arguments detailed by the authors in ongoing research for the NIHRC.

Non-diminution guarantee

Article 2(1) constitutes an unqualified obligation to ensure 'no diminution' 'results from' Brexit. The requirement to ensure 'no diminution' occurs is not conditional on the degree or gravity of any diminution, but rather the obligation is absolute.[77] Hence, referring to it as a 'non-diminution guarantee'. A simple comparison is to be made between what protections were present (or ought to have been present)[78] in NI as a result of EU membership at the time of Brexit and the protections present subsequently: if there is any diminution (of a relevant RSEO) that would not have happened but for Brexit, then this would indicate an infringement of the provision. This does not equate to the obligation of continued alignment,[79] dynamic or otherwise, discussed in the context of articles 5 and 9 above. The UK is not obliged to update laws in parallel or even to maintain precisely the same measures – flexibility regarding changes in approach exists in principle, provided that there is no actual diminution.[80]

However, it also contrasts with the non-regression or non-retrogression principles as typically found in international human

77 This appears to be an absolute obligation, contrasting with the more flexible concept of non-regression, eg Northern Ireland Office's 2020 explainer on art 2 at pt 7, stating that the provision is 'preventing *any* reduction' (emphasis added), Northern Ireland Office, 'Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: what does it mean and how will it be implemented?' (nd). See also, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion Paper on Brexit' (Discussion Paper on behalf of IHREC January 2018) 12; and O'Donoghue (n 73 above) 94, noting that '[n]on-diminution has a singular meaning' and does not permit any 'backward movement'.

78 This has the potential thereby to address situations where NI/the UK had faulty implementation or enforcement of EU protections at the time of Brexit and also to encompass the evolving interpretations by the CJEU of EU law, since these are statements/interpretations of existing law. See on the latter point, Craig and Frantziou (n 73 above) 67–68.

79 A limited exception does apply regarding specific anti-discrimination laws listed in annex 1 of the Protocol.

80 Eg NIHRC and ECNI (n 73 above) para 4.8. It must, however, be noted that changes in approach could increase regulatory divergence (eg across the island of Ireland) and that could in itself lead to diminutions in RSEOs in practice.

rights treaties[81] (and other international treaties or agreements with environmental provisions)[82] in two main ways. First, the apparent absolute nature of non-diminution is in marked contrast to the usual approach to non-regression, where concepts such as national sovereignty, subsidiarity and a margin of appreciation act as a limiter and provide some flexibility to states in complying with their obligations.[83] For instance, the International Union for Conservation of Nature (IUCN) World Commission on Environmental Law stated in its 2016 World Declaration on the Environmental Rule of Law that 'States ... shall not allow or pursue actions that have the *net effect* of diminishing the legal protection of the environment or of access to environmental justice'[84] (emphasis added). While the approach to non-regression can vary and be found in stronger terms on occasion,[85] nonetheless it tends not to mandate absolute adherence.[86] This is similarly reflected in the EU/UK trade and cooperation level playing-field provisions, where we discover that the obligation regarding non-regression relates to *overall* levels of protection of the environment.[87] Second, the arrangements in the Windsor Framework including the non-diminution arrangements are made directly enforceable in the domestic courts. The EUWA as amended incorporates it into domestic law and provides arrangements for the NIHRC and Equality Commission for Northern Ireland (ECNI) to take proceedings to prevent diminution in a public sense, and also to assist those affected by diminution to take proceedings, or to take proceedings on their behalf.[88] This also includes the provision in section 10 of the EUWA (as amended)[89] explicitly protecting existing arrangements for cross-border cooperation and the arrangements in the 1998 Agreement.

---

81 Eg Nicholas Bryner, 'Never look back: non-regression in environmental law' (2022) University of Pennsylvania Journal of International Law 555.

82 Eg Andrew D Mitchell and James Munro, 'No retreat: an emerging principle of non-regression from environmental protections in international investment law' (2019) 50 Georgetown Journal of International Law 625–708.

83 Lauren Helfer and Erik Voeten, 'Walking back human rights in Europe?' (2020) 31(3) European Journal of International Law 797–827.

84 IUCN World Declaration on the Environmental Rule of Law (2016).

85 Eg see the environmental non-regression clause in the North American Free Trade Agreement 1994, art 1114, para 2, 17 December 1992, 32 ILM 289.

86 Helfer and Voeten (n 83 above).

87 TCA, pt 2, title XI, art 7.2(2), read in conjunction with art 7.1.

88 Northern Ireland Act 1998, ss 78A–D.

89 European Union (Withdrawal) Act 2018 as amended, s 10.

Applicability in an environmental context? The significance of the RSEO section of the 1998 Agreement

Article 2(1)'s scope is largely determined by the section on RSEO in the 1998 Agreement.[90] It is important to note at the offset that, while the *SPUC* test only refers to rights and 'equality of opportunity protection', article 2(1) itself and the corresponding section in the 1998 Agreement expressly refer also to safeguards. The inclusion of safeguards is recognised in the subsequent *Angesom* judgment in October 2023.[91] Crucially, the RSEO section encompasses a range of environmental rights and safeguards, including through explicit reference to the environment, spatial planning, ECHR rights and human rights in general. This is clearly demonstrated by consideration of individual components within the section and also through examining it as a whole in context.

The RSEO section is a standalone human rights guarantee. Under the further subheading 'Human Rights' it provides:

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm *in particular* [emphasis added]:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation.

A strong case exists to look beyond these listed rights, including through taking a generous and purposive interpretation of the section,

90 Implicitly, the RSEO must likewise have received some support via EU membership, since art 2(1) focuses on a diminution that results from Brexit. Further, the *SPUC* judgment considers it necessary that there be a NI measure giving effect to the RSEO and that such a measure be underpinned by EU law (and therefore that the EU should have competence in the matter) – which would further restrict the scope of applicability. This is developed and critiqued in our commissioned research for the NIHRC, but is beyond the scope of the discussion herein.

91 *Angesom* (n 37 above) [86].

including the term 'civil rights', as adopted by the High Court in its *Legacy* judgment.[92] Thus, the language of the section itself is broad and inclusive (eg the use of the words 'human rights' as opposed to just 'civil rights' in the subheading and the use of 'in particular' in the main body of text), indicating that the section protects more than just the rights listed. The international human rights law concept of the indivisibility of human rights[93] supports the notion that, if the listed rights in the RSEO section are to be given effect to in a meaningful way, they are likely to require other supporting and complementary rights/safeguards like environmental rights/guarantees of a healthy environment. Another justification for a broad reading of rights and safeguards under the RSEO section is an 'eco-systems' approach – which emphasises the interrelated nature of all aspects of ecosystems and therefore the environment, as well as the contribution of ecosystem services.[94] For instance, protecting hedgerows not only protects birds, but also soil and water quality, including for drinking water or for fish and thereby for food and economic activity. Rights regarding life or economic activity can therefore be considered contingent on a healthy, sustainable and resilient environment.[95] The idea that the RSEO section was only the starting point for human rights protections in NI, and would develop further, is also supported by both the RSEO section on the incorporation of the ECHR into NI law and the section which envisages an (as-of-yet unrealised) NI Bill of Rights.[96] These general comments are complemented by a range of specific elements within the RSEO section.

First, we can identify express environmental safeguards in the RSEO section, for example via the obligation on the UK Government to develop a regional development strategy, 'protecting and

92 *Legacy* judgment (n 37 above) para 535.

93 For a recent example, see UN Committee on the Rights of the Child, General Comment No 26 (2023) on children's rights and the environment, with a special focus on climate change, point 13.

94 Eg see Millennium Ecosystem Assessment, *Ecosystems and Human Well Being: Synthesis Report* (Island Press 2005); and the EU's Biodiversity Strategy for 2020.

95 Eg recital 5 of the Council Directive 2009/147 on the Conservation of Wild Birds [2009] OJ L20/7 (2009 Wild Birds Directive) states: 'The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development.'

96 Of note, the UN Human Rights Committee has expressed concern about 'the lack of significant progress in the development of the Bill of Rights in Northern Ireland': see UN Human Rights Committee, 'Concluding observations on the eighth periodic report of United Kingdom of Great Britain and Northern Ireland', adopted by the Committee at its 140th session (4–28 March 2024) CCPR/C/GBR/CO/8 (advance unedited version) para 4.

enhancing the environment', as well as 'developing the … resources of rural areas'. Second, this is complemented by a range of implicit environmental procedural rights. For instance, the right to freedom of political thought, the right to pursue democratically national and political aspirations, and the right to seek constitutional change by peaceful and legitimate means might be understood as democracy and public participation-oriented rights. It is evident that procedural environmental rights – which are important tools for promoting and strengthening environmental democracy[97] – could be seen as a subset of the democracy and public participation-oriented rights listed in the RSEO section. Other aspects such as the right of equal opportunity in all social and economic activity regardless of demographics like race, religion or disability can similarly encompass environmental elements. Third, it is possible to identify indirectly incorporated environmental rights via other texts like the ECHR. The 1998 Agreement committed the UK Government to incorporating the ECHR into domestic law and providing remedies for breaches of the Convention. The Irish Government was required to take comparable steps in its jurisdiction to ensure at least equivalent human rights protections as would pertain in Northern Ireland. This culminated in the UK Human Rights Act 1998 and the Irish European Convention on Human Rights Act 2003, which both provide a conduit through which the ECHR enters these respective dualist legal systems.

The ECHR itself does not explicitly guarantee a right to a healthy environment.[98] However, the European Court of Human Rights (ECtHR) has developed an extensive body of case law on environmental degradation by 'greening' existing Convention rights.[99] Environmental pollution or degradation cases are usually heard by the ECtHR under articles 2 (right to life) and 8 (right to respect for home, private and family life) of the Convention. The ECtHR has identified several positive obligations – principally under articles 2 and 8 – in the environmental

97 Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart 2020) 146.

98 *Kyrtatos v Greece* App No 41666/98 (Judgment of the First Section of 22 August 2003) [52]; *Hatton and Others v the United Kingdom* App No 36022/97 (Judgment of the Grand Chamber of 8 July 2003) [96].

99 Council of Europe, *Manual on Human Rights and The Environment* 3rd edn (Council of Europe Publishing 2022) [34]; see also: Katharina Franziska Braig and Stoyan Panov, 'The doctrine of positive obligations as a starting point for climate litigation in Strasbourg: the European Court of Human Rights as a Hilfssheriff in combating climate change?' (2020) 35 Journal of Environmental Law and Litigation 261, 266–269. Note also the recent ruling of the ECtHR in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, 9 April 2024) where the Grand Chamber extended, and adapted, its existing environmental case law to climate change.

field, including procedural and substantive obligations.[100] These range from procedural obligations around granting access to environmental information,[101] guaranteeing public participation[102] and granting access to justice[103] to substantive obligations like a duty to put in place legislative and administrative frameworks to minimise environmental risk by regulating the licensing, setting-up, operation and control of hazardous activities[104] and monitoring and ensuring compliance with these rules.[105] While states enjoy a wide margin of appreciation in the context of environmental harms at the ECHR level,[106] as noted above, this does not seem to be the case for environmental rights incorporated indirectly via the 1998 Agreement and now protected under article 2(1) of the Windsor Framework; for an infringement of such environmental rights under article 2(1), there simply needs to be a diminution of such a right as a result of Brexit.

Before or on Brexit day, the right to life and respect for private and family life were not just protected (and given effect to) in NI by the ECHR but also by the EU Charter of Fundamental Rights[107] – including applying to EU and domestic (environmental) measures where within the scope of EU law.[108] Article 52(3) of the Charter provides that corresponding ECHR and Charter rights are to be given the same meaning and scope. A strong argument can therefore be made that a 'greened' right to life and respect for private and family life should be afforded at least the same level of protection under EU human rights law as the ECtHR has done in its environmental degradation case

100 Braig and Panov (n 99 above). This list is an adapted and shortened version of Braig and Panov's summary of positive environmental obligations under the ECHR.

101 *Guerra v Italy* App No 14967/89 (Judgment of the Grand Chamber of 19 February 1998).

102 *Hatton* (n 98 above); *Taşkin et al v Turkey* App No 46117/99 (Judgment of the Third Section of 10 November 2004).

103 *Taşkin* et al (n 102 above). Arts 6 and 13 are usually relevant to the right of access to justice.

104 *Öneryıldız v Turkey* App No 48939/99 (Judgment of the Grand Chamber of 30 November 2004) [89]–[90]; *Tătar v Romania* App No 67021/01 (Chamber judgment of 27 January 2009).

105 *Branduse v Romania* App No 6586/03 (Judgment of 7 April 2009).

106 *Hatton* (n 98 above) [97].

107 Art 2 of the Charter guarantees the right to life and art 7 guarantees the right to respect for private and family life.

108 Art 51(1) of the Charter confirms that the Charter is addressed to member states when 'they are implementing EU law' or 'acting within the scope of EU law' as it has been understood. This provides for broad applicability of the Charter in the field of environmental protection, as the EU is the source of most NI environmental law.

law.[109] The 'added value' of reliance on the EU Charter pre-Brexit would have been that it would have come with the full gamut of EU law remedies, including disapplication of the offending national law and state liability.[110]

Consequently, and considering the extensive contribution of the EU to NI environmental standards and governance (including due to the significant oversight and enforcement roles by the European Commission and CJEU)[111] and the real potential for diminutions in these,[112] as well as the changes in the role of the Charter, there also opens up the potential for diminutions in relevant RSEOs as a result of Brexit.[113] Key, obvious examples that could trigger diminutions in relevant RSEOs (eg the right to life or procedural rights) would include changes to air quality, water quality or procedural protections and structures, but scope exists to encompass a much wider range of changes.

While not equating to alignment, article 2(1)'s non-diminution guarantee is a practical and focused expression of the Windsor Framework's broad commitment and purpose outlined in article 1 to maintaining the conditions necessary for cooperation in all areas and upholding the 1998 Agreement in all its dimensions. This is complemented by article 2(2), which is designed to continue to facilitate the related work of bodies set up pursuant to the 1998 Agreement. This has the potential to impose obligations on the UK, for instance,

109 Suzanne Kingston, Veerle Heyvaert and Aleksandra Cavoski, *European Environmental Law* (Cambridge University Press 2017) 166.

110 Tobias Lock, 'Human rights law in the UK after Brexit' (2017) (Nov Supp) Public Law (Brexit Special Extra Issue 2017) 117; Joelle Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' (2019) Public Law 683, 689; Catherine Barnard, 'So long, farewell, auf wiedersehen, adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 Modern Law Review 350, 365; Tobias Lock, Eleni Frantziou and Anurag Deb, 'The EU Charter of Fundamental Rights in Northern Ireland' in this special issue (488–521).

111 Eg Brian Jack, 'Environmental law in Northern Ireland' in Stephen McKay and Michael Murray (eds), *Planning Law and Practice in Northern Ireland* (Routledge 2017) 154–155.

112 Eg in the context of the UK generally (although art 2 only applies to NI): Lee (n 22 above).

113 It should be flagged that the criteria for applying art 2(1) do not end there. Whether per the provision itself or the *SPUC* test, some further elements are required. The provision requires that any diminution must 'result from' Brexit, indicating that there was some degree of protection due to EU membership (eg through laws, institutional or governance structures, or funding) and that the diminution would not have occurred 'but for' Brexit. The *SPUC* test and broader judgment includes focus points on EU competence and 'underpinning' EU law, which are not expressly found within art 2(1) and may prove too restrictive – especially considering the justifications for a 'generous and purposive' interpretation, but even on a textual basis.

regarding facilitating the work of the Loughs Agency, the Waterways Ireland body and the NSMC where it relates to the environment – both in NI and on a cross-border basis. Those obligations could be multifaceted, including adequate funding,[114] political and legal support, and minimising regulatory divergence – since regulatory divergence would lead to increased burdens and challenges for the cross-border cooperation[115] that underpins the roles of the 1998 Agreement bodies. The role of the Commissions noted in article 2, along with the 'constant review' by the Joint Committee under article 11(2) discussed below, will prove essential here in identifying the needs and gaps for the 1998 Agreement bodies to undertake their 'related work' – especially where the RSEO element intertwines with North–South cooperation.

ARTICLE 11: FOUNDATIONS FOR CONTINUED COOPERATION?

This section considers article 11, entitled 'other areas of North-South cooperation', which is core to the aim of continued North–South cooperation enshrined in both the Windsor Framework and the 1998 Agreement. It has the potential to help address ongoing difficulties that arise post-Brexit, as new challenges for cross-border cooperation manifest. Its interactions with the remainder of the Windsor Framework, in particular articles 13 and 18, here are crucial, as the relationship between legal mechanisms and political will is placed in the spotlight.

The main obligation outlined in article 11(1) is to implement and apply the Windsor Framework 'to maintain the necessary conditions for' such cooperation, 'including in the areas of the environment' and other environmentally relevant areas. Yet in doing so it refers to articles 5 to 10, which are characterised by significant gaps in environmental areas – despite the joint mapping exercise highlighting such areas in advance of the adoption of the original Protocol. It is therefore necessary to consider the implications of article 11(1) for other provisions in the Windsor Framework, and also to consider possibilities under article 11, besides an interpretation of the provisions (including article 11 itself)

114 Eg Northern Ireland Office's 2020 explainer on art 2 at pt 30 (n 77 above); O'Donoghue (n 73 above) 99; and Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 28.

115 Eg S Clerkin, 'Working cross-border in nature conservation with regard to different designations, structures and management' (2020) 15 Journal of Cross Border Studies in Ireland 111–122; Hough (n 9 above); and Brennan et al (n 14 above).

wherever possible to facilitate such cooperation. These issues are covered in the latter half of article 11(1) and 11(2).

The second sentence of article 11(1) confirms that the UK and Ireland 'may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North–South cooperation on the island of Ireland'. Although this is restricted by the phrase 'other areas',[116] it nonetheless could encompass other non-environmental but environmentally relevant areas and also more general governance elements or structures supported in the 1998 Agreement. For instance, an argument could be made to support the establishment of the civic forum enabling cross-border and all-island stakeholder engagement. Further, if there are environmental matters that previously have not been the subject of North–South cooperation, arguably these could also be developed via this provision, for example in the context of soil or climate. However, this remains of limited value, especially as the UK and Ireland have this potential irrespective of any provision in the Windsor Framework.

The main element to consider is the review mechanism under article 11(2). This provision requires that the Joint Committee 'keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North–South cooperation'. Further, the Committee 'may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee'.[117] Therefore, if the Joint Committee considers that the Windsor Framework's implementation or application does *not* maintain the necessary conditions for North–South cooperation, presumably in the areas listed in article 11(1) including the environment, then it may make non-binding recommendations to the EU and the UK.

These recommendations are not limited in scope, focus or nature – other than to be 'appropriate'. They therefore could, for instance, include recommendations to amend annexes (eg those relevant to articles 2, 5 or 9 of the Windsor Framework discussed herein), including through adding a wide range of EU environmental laws to any of the Windsor Framework annexes. Since the 1998 Agreement provides for North–South cooperation in environmental matters and this cooperation has been largely enabled, governed and sometimes mandated by EU

116 Thereby excluding those listed in the first sentence, including the environment.

117 The role of the Specialised Committee is important here, as this provides a formal pathway for the NSMC 1998 Agreement Implementation Bodies and Commissions, responsible for overseeing art 2 of the Protocol, to engage and feed into the Joint Committee's review and recommendations. The relationship of the Specialised Committee with the other bodies is provided for by art 14 of the Protocol.

law to date, there is a strong argument to be made that the 'necessary conditions' include continued, dynamic regulatory alignment and/or equivalent – especially in light of the Windsor Framework's related objectives, including to protect the 1998 Agreement in all its dimensions.

Although any such recommendations would not be binding on the UK or the EU, the parties are nonetheless bound by the general objectives of the Windsor Framework and by the obligations outlined in article 11(1). If the Joint Committee considers in light of its 'constant review' that the necessary conditions are not being met, and hence propose an 'appropriate recommendation', this would indicate that to not adopt such a recommendation would in itself breach article 11(1) unless a suitable alternative option could be identified. The non-binding recommendation would thereby nonetheless play a very weighty role that could indicate that the Windsor Framework would be breached if a recommendation were not adopted.

The relationship here with the democratic consent (article 18) and Stormont Brake (article 13) provisions is important, multifaceted and ambiguous. As discussed above, the (UK law-based, article 13(4) related strand of the) Brake could be used to prevent the addition of new EU laws to the Windsor Framework annexes and thereby their application in NI. Further, following the periodic reviews, NI could vote to disapply articles 5–10 of the Windsor Framework, which would counteract any addition of new laws. In this respect, however, it is notable that article 11 is not within the scope of the article 18 democratic consent mechanism. It follows that, even in the event of a vote in the NI Assembly in favour of disapplication of articles 5–10 of the Windsor Framework, the EU and UK acting together in the Joint Committee would still be obliged to accommodate article 11 commitments regarding 'necessary conditions' in any proposals they would make regarding how the objectives and remaining provisions of the Windsor Framework were to be upheld. However, of note, for the Stormont Brake prong that addresses new EU laws, the UK Government's Command Paper, and related legislation, provides, as noted above, that they may override the Brake and approve the application of the new EU laws in the case of 'exceptional circumstances'. What these circumstances entail is unclear, but arguably they should, in view of the overarching (article 1(3)) objectives of the Windsor Framework, include significant impairment to the foundations for North–South cooperation; notably, however, the emphasis in the relevant section of the implementing instrument emphasises the importance of avoiding any 'new regulatory border[s] between Great Britain and Northern Ireland' and does not state corresponding concern for regulatory

borders that would consequentially be created on the island of Ireland in the event of any adoption or non-adoption of a new EU act.[118]

The democratic consent provision does not have a similar internal criterion, which begs the question of whether there are any constraints on its application – since a disapplication of articles 5–10 would clearly undermine the 'necessary conditions for North–South cooperation', in conflict with article 11(1) and also the core objectives of the Windsor Framework. While article 1(1) states that the 'Protocol is without prejudice to … the principle of consent', that was in relation to the constitutional status of Northern Ireland, which is related to but different from the nature of the 'democratic consent' provision in article 18. Consequently, article 1(1) does not provide a legal justification for enabling either article 13 or article 18 to breach article 11(1) or article 1(3). This is not to say that article 18 could not be used, but the Joint Committee's subsequent recommendations over the two-year period would necessarily have to offset any challenges posed by the disapplication of articles 5–10, which would be a Herculean task.

Therefore, articles 13 and 18 could provide some limiters for the role of the recommendations in article 11(2), but while bearing in mind the persistent obligation under article 1(3), and reflected once more in article 11(1), 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions'. Overall, article 11 introduces considerable flexibility and a foundation for restoring and enhancing the conditions for North–South cooperation, including in environmental matters. However, on a practical basis and in light of the current failure to incorporate within annex 2 the majority of EU environmental regimes identified in the mapping exercise, it seems unlikely that the Joint Committee or the UK and the EU are going to suddenly jump at the opportunities provided by this provision. Nonetheless, the provision provides important avenues for reviewing the situation and resolution of any issues that might arise and, where problems do gradually emerge due to regulatory divergence, this might provide motivation to act.

CONCLUSIONS

Brexit poses additional significant challenges to an already problematic approach to environmental governance which has existed in NI and on a cross-border basis to date. Although undeniably flawed, the previous laws and governance structures gained many of their strengths from

118 UK SI 2024/118, s 18.

EU membership, which provided foundations for minimum standards, rights, and protections, including by facilitating and mandating cooperation across the EU and on the island of Ireland. It thereby also supported the provisions within the 1998 Agreement, even while obviating the necessity to fully exploit the potential of the mechanisms therein. However, Brexit fundamentally changed that relationship – removing the basis for what amounted to strict, enforceable (at least in principle) obligations of continued alignment and duties regarding cooperation across the full and extensive breadth of EU environmental law. Increased regulatory divergence and a decline in environmental protection have now become a very real possibility. The Windsor Framework provides several avenues that might help address and mitigate these potential negative consequences, both in Northern Ireland and on a cross-border or all-island basis, in a manner that reflects a new, multifaceted relationship with both the EU as a whole and Ireland.

The Windsor Framework's objectives outlined in article 1 include 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions'. This draws in the various facets of the 1998 Agreement and provides a basis to help further develop its potential, especially in light of a generous, purposive interpretation as supported by the NI High Court in its *Legacy* judgment. Articles 2, 5, 9 and 11 of the Windsor Framework are the key mechanisms for helping achieve the Windsor Framework's objectives and could provide avenues to maintain some environmental standards and protections in NI, as well as maintaining the 'necessary conditions' for North–South cooperation – which could even be through new, alternative mechanisms not in existence prior to Brexit, but contemplated by the 1998 Agreement, for example a civic forum or even a Bill of Rights. However, it is the manner in which they might do so that is truly fascinating, with their complementary but differentiated approaches as noted.

The relevant dynamic alignment obligations in articles 5 and 9, which require keeping pace with the regulatory measures specified in the relevant annexes 2 and 4, are the closest to the obligations and relationships inherent in continued EU membership. By continued alignment with the EU (and thereby Ireland also), the EU's high level of environmental protection is embedded, cross-border cooperation is enabled and regulatory divergence is limited. They also provide for a very precise, specific version of the international law norm of non-regression/progressive realisation in international human rights law. However, these two articles are limited and circumscribed in their application, including through their application to a very limited number of environmental laws as noted, and now with the additional

threat of the Stormont Brake hanging over them.

Significantly, and in contrast, the non-diminution guarantee created in the Windsor Framework's article 2 is a unique and tailored mechanism. While it clearly draws on the concepts of non-regression/retrogression originating from international human rights law, it is a very different expression of that norm. By prescribing 'no diminution' and creating domestic enforcement mechanisms for both individuals and selected bodies such as the NIHRC, it is clear that the intention is to create a high degree of maintenance of the wide range of rights, safeguards and equalities covered by the 1998 Agreement's guarantees. It remains to be seen how the provision will continue to be interpreted by the courts in NI/UK, but this provision may thereby go some way to prevent the problems with environmental governance that persisted even throughout EU membership from worsening through further downward deregulatory pressure. More generally it also provides further support to the 1998 Agreement's implementation of the ECHR in Northern Ireland.

Finally, article 11 and its mechanisms for reviewing and potentially ensuring the foundations for continued cooperation on a North–South basis, read with article 1, provides a further basis not only for justifying expansive interpretations of existing provisions or even adding further laws within the scope of articles 2, 5 and 9, but also for introducing new, alternative mechanisms (eg perhaps those foreseen but left undeveloped by the 1998 Agreement) and even potentially controlling the Stormont Brake's application.

Together, these four provisions (read with article 1) create a new framework for the relationship between NI and the EU and Ireland – one that is not just based (purely) on continued alignment grounded in EU law, but instead combines in varying degrees and areas the three elements of continued alignment, non-diminution and continued cooperation. In particular, where one fails or is not upheld satisfactorily, the non-diminution guarantee and the mechanisms for reviewing the challenges for continued cooperation will be essential to maintaining existing environmental rights, safeguards and standards. In doing so, the 1998 Agreement and the Windsor Framework likewise forge a strong connection, with the two mutually re-enforcing each other as most obviously reflected in articles 1, 2 and 11.

A caveat should be flagged, which relates to the potential response of both courts and politicians. The above discussion highlights the significant potential of these provisions and is a reasonable interpretation, especially based on a purposive interpretation of the two documents – as justified under principles of treaty interpretation and recognised by the NI High Court. However, there is no guarantee

that the courts will be as flexible as this might suggest, as indeed reflected by both the *SPUC* test[119] and the treatment of article 2(2) in the *Legacy* case.[120] This may indicate a reticence to follow through with the purposive approach on all fronts. Further, considerable tensions and disputes have arisen regarding the Windsor Framework and its implementation to date, as well as a reluctance to add further EU laws to the annexes – this would indicate challenges in fulfilling the potential of articles 11 and 13 (vis-à-vis the scope of articles 5 and 9), which are largely dependent on political will. Nonetheless, the restoration of Stormont, the improvement in relationships (reflected in the creation of the revised Windsor Framework), the latest concessions to the DUP and the potential for a different UK Government that may have a more positive attitude towards the EU may also facilitate uptake of these provisions.

Overall, Brexit creates fresh concerns for environmental protection in NI and across the island of Ireland, where standards and governance are already flawed and contested. The Windsor Framework introduces new political and legal avenues, including for challenging the Joint Committee, UK Government or EU for failure to comply with their obligations under the Windsor Framework, individual action for breach of rights thereby bringing a new legal reality and frame to the ambitions and content of the 1998 Agreement. Consequently, the Windsor Framework has the potential to not merely preserve and protect existing environmental standards, protections and governance (including on a cross-border/all-island basis), but to enhance these. How these will function in practice remains to be seen but, given the myriad concerns about declining environmental quality in Northern Ireland and on the island of Ireland more generally, they will undoubtedly be tested in the near future.

119 This test reflects the current legal understanding of the NI courts, as highlighted by the *Illegal Migration Act* judgment.

120 *Legacy* judgment (n 37 above) [614]–[625].

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 584–612
Articles DOI: 10.53386/nilq.v75i3.1116

Northern Ireland's post-Brexit governance crisis: what to do when the post-1998 centre cannot hold

C R G Murray*
Newcastle University
Correspondence email: colin.murray@newcastle.ac.uk.

ABSTRACT

Northern Ireland's post-conflict constitutional order was upended by the Brexit referendum result in 2016. In the aftermath of that vote, both Sinn Féin and the Democratic Unionist Party have collapsed Northern Ireland's power-sharing institutions. Those collapses have differed in the degree to which they were responses to the realities of Brexit, but it suffices to say that the United Kingdom's withdrawal from the European Union (EU) has loomed over these successive crises and that it has proven particularly challenging to make Northern Ireland's constitutional arrangements work without what had been the generally accepted dilution of sovereignty involved in EU membership. The Northern Ireland Protocol, even as amended under the Windsor Framework, has thus far failed to bridge this gap. This article explores the consequent operation of 'indirect' rule over Northern Ireland from Westminster and Whitehall in response to this upheaval. Northern Ireland's institutions have shown themselves to be prone to collapse and difficult to restart, even amid a profound public sector funding crisis which requires urgent attention from elected representatives. This article considers how best to manage Northern Ireland's governance in such circumstances. This involves an assessment of reforms to power-sharing arrangements, the institution of direct rule and enhancements to indirect rule. Notwithstanding the restoration of power sharing in February 2024, the inherent fragility of power sharing has not been addressed, and this article weighs up whether any of these options provides a meaningful solution in place of the shortcomings of indirect rule's sticking-plaster arrangements.

Keywords: Northern Ireland Act; Belfast/Good Friday Agreement; Brexit; direct rule; indirect rule; civil service.

* Professor of Law and Democracy, Newcastle University. My thanks to Ciara Fitzpatrick (Ulster University) and Aoife O'Donoghue (Queen's University Belfast) for their advice and encouragement regarding this article. It has been developed out of contributions to *Fortnight*, the UK Constitutional Law Association blog and the *UK in a Changing Europe* blog. Article prepared 31 October 2023 and updated, including hyperlink checks, 31 March 2024.

INTRODUCTION

Northern Ireland's post-1998 governance order has endured two sustained collapses since the start of 2017, amid the fallout from Brexit. The first of these collapses, between 2017 and 2020, was triggered by Sinn Féin's withdrawal from the Northern Ireland Executive as a result of the Renewable Heat Incentive scandal and prolonged by the Democratic Unionist Party's (DUP) ability to exert outsized influence at Westminster as it controlled the balance of the House of Commons after the 2017 United Kingdom (UK) general election. After the DUP lost this influence over the UK Government following Boris Johnson's 2019 general election victory, power sharing was quickly restored under the *New Decade, New Approach* deal,[1] but the need for the Executive to pull together in the emergency response to the Covid pandemic could not disguise the tensions unleashed by Brexit. A system designed to disguise divisions about Northern Ireland's constitutional status under cooperative approaches to quotidian politics buckled when questions of Northern Ireland's status came to dominate public discourse.[2]

The brief interlude of fully operative power sharing which began in January 2020 ended when the DUP instituted a phased withdrawal from the 1998 Agreement's institutions as part of its opposition to the Brexit deal. First, the party withdrew from North–South bodies in September 2021, preventing their operation under Strand Two of the 1998 Agreement. Then it withdrew from the Northern Ireland Executive in February 2022 and refused to re-enter power sharing in the wake of the May 2022 Assembly Elections.[3] These developments provided the backdrop to the UK Government's efforts to secure amendments to the Northern Ireland Protocol.[4] As a result of the DUP boycott, all of Northern Ireland's government departments came to be managed by civil servants without ministerial direction from October 2022, under increasingly restricted budget allocations imposed by Westminster and skeletal guidance from the Northern Ireland Office. This situation persisted until February 2024 notwithstanding the amendment of the Protocol under the Windsor Framework.

The reliance upon these listless 'indirect' rule (or administrative devolution) arrangements when Stormont is not functional amounts

1 *New Decade, New Approach* (8 January 2020).

2 For an overarching account of the challenges of developing a Brexit deal workable in the Northern Ireland context, see C R G Murray, 'From oven-ready to indigestible: the Protocol on Ireland/Northern Ireland' (2022) 73(S2) Northern Ireland Legal Quarterly 8.

3 See J Tonge, 'Voting into a void? The 2022 Northern Ireland Assembly election' (2022) 93 The Political Quarterly 524.

4 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

to a constitutional aberration, although one which has come to be tolerated for Northern Ireland, even as the region finds itself simultaneously in the grip of a public services crisis resultant from deep funding cuts. This article explores the inherent weaknesses in Northern Ireland's post-1998 arrangements which have been exposed by these overlapping crises and why the UK Government has turned to the civil service to manage Northern Ireland's governance gap in these circumstances, before addressing whether there are meaningful routes out of the trap of governance without accountability into which Northern Ireland has repeatedly fallen.

THE 1998 AGREEMENT, THE BREXIT SHOCK AND THE PARALYSIS OF POLITICS

The devolution arrangements established under the Belfast/Good Friday Agreement of 1998 were easy to disrupt as instituted and have remained so notwithstanding subsequent reforms. This is, indeed, inherent given the consociational nature of these arrangements, which rely upon cross-community power sharing within the Executive body and also provided for legislative mechanisms to defend perceived community interests.[5] Following the St Andrews Agreement, the two largest parties within the Stormont Assembly, which have the sole ability to nominate the First Minister and deputy First Minister respectively, can upend devolution by withdrawing from these offices or refusing to nominate representatives to these offices after an election.[6] Such collapses, under the terms of the Northern Ireland Act 1998, trigger early Assembly elections if the rupture between the major parties cannot be promptly patched up.[7] Notwithstanding the avowed justifications for the repeated institutional collapses which have dogged power sharing, on each occasion the party instituting a collapse has undoubtedly perceived immediate electoral advantage in this course of action.

There have been efforts to limit the impact of such boycotts.[8] The Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, entering into force just before the 2022 Assembly election, amended the Northern Ireland Act 1998 to reflect the recognition in

5 B O'Leary, *A Treatise on Northern Ireland: Volume 3 Consociation and Confederation* (Oxford University Press 2019) 200–201. See also A Lijphart, 'Consociational democracy' (1969) 21 World Politics 207.

6 Northern Ireland Act 1998, s 16B(3).

7 Ibid s 32(3)–(4).

8 See, for example, the amendments to post-election negotiation periods enacted within the Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016.

New Decade, New Approach that the rules for Executive formation needed to be adjusted to ensure that the institutions could 'continue to function throughout periods of political difficulty'.[9] The Act provided that, if the First Minister and deputy First Minister resigned, other ministers could continue to hold office for up to 48 weeks, blunting some of the immediate effect of a withdrawal from the Northern Ireland Executive.[10] This Act also ensured that during a 24-week post-election period ministers would continue to hold office and take decisions within their remit before fresh elections would, in theory, be triggered if a new Executive could not be formed.[11] This extended Executive formation period was intended to prevent what Lord Bingham referred to in the *Robinson* case, which was generated by the earliest rocky spell in post-1998 power sharing, as the risk of a 'persisting vacuum in the conduct of devolved government'.[12] Although legislation on Northern Ireland's governance is frequently rushed through Westminster with unseemly haste, this legislation was not passed until over two years after the *New Decade, New Approach* deal was concluded. Some of this delay was down to the prioritisation of the response to Covid-19 and the management of Brexit. By later 2021, however, the UK Government knew that the DUP boycott was looming, and it made no effort to hurry arrangements into place to tie the DUP's hands. Indeed, ministers in Johnson's Government highlighted the DUP's abandonment of power sharing to generate pressure on the European Union (EU) to come to a new deal over the Protocol,[13] even as they simultaneously made Janus-faced assertions that the DUP should return to power sharing.[14]

The Act's new arrangements provided for a 'cooling-off' period after the heightened tensions of an election campaign, but neither this window, nor the countdown to fresh elections, provided much impetus towards making power sharing work in circumstances in which one of the main parties sees electoral advantage in maintaining a boycott (especially when it can connect a boycott to its stance on Northern Ireland's constitutional status, thereby energising its core electoral support). In such circumstances, fresh elections do not amount to a meaningful threat. The DUP abandoned power sharing

9 *New Decade* (n 1 above) pt 2, para 14.

10 Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 2.

11 Ibid s 2.

12 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [15].

13 Elizabeth Truss MP, HC Deb, vol 717, col 38 (27 June 2022): 'The Northern Ireland protocol is undermining the function of the agreement and of power sharing.'

14 Conor Burns MP, HC Deb, vol 717, col 850–851 (5 July 2022): 'We will deal with the protocol, as we have been clear to the people of Northern Ireland, but we believe that they deserve a functioning devolved Government straight away.'

in February 2022 in protest over the extent to which the Northern Ireland Protocol's arrangements, particularly with regard to the rules for production and trade in goods, differentiate Northern Ireland from Great Britain. The Protocol also involved Northern Ireland continuing to be subject to significant areas of EU law as they developed, with limited direct input from the region's lawmakers. The DUP presented these arrangements as an existential threat to Northern Ireland's place in the UK. In response to these concerns the Protocol was reformed under the Windsor Framework, agreed between the EU and the UK Government in February 2023. The Framework included provisions for mitigating the level of checks necessary where goods are moving between Great Britain and Northern Ireland and a new system, the 'Stormont Brake', which enabled the Northern Ireland Assembly to raise objections to the application of new EU law measures operable under the terms of annex 2 of the Protocol which have a 'significant impact' within Northern Ireland.[15]

The DUP nonetheless remained dissatisfied. In terms of the Stormont Brake, Jeffrey Donaldson maintained that 'the "brake" is not designed for, and therefore cannot apply, to the EU law which is already in place and for which no consent has been given for its application'.[16] He thus asserts that a democratic deficit still exists in the operation of EU law in Northern Ireland, notwithstanding the fact that the terms of operation of these EU rules was explicitly accepted by the UK Parliament in its agreement of the Brexit deal and the provision in the deal for regular Northern Ireland Assembly votes on the underlying operation of the EU Single Market's goods rules under the Protocol's separate 'Stormont Lock' provisions.[17] In terms of trade rules, DUP grandee Lord Dodds has maintained that '[t]he Windsor Framework renders us worse off in terms of the Irish Sea border and creates greater checks and barriers to trade with the rest of the UK compared to what we have experienced thus far'.[18] The party's leadership might have expected, and not without reason given the chaotic implementation of the Protocol in early 2021, that the introduction of the Windsor Framework would involve major

15 For an overview of the Windsor Framework, see C R G Murray and N Robb, 'From the Protocol to the Windsor Framework' (2023) 74 Northern Ireland Legal Quarterly 395.

16 J Donaldson, 'DUP statement ahead of vote on Windsor Framework' (*MyDUP* 20 March 2023).

17 Withdrawal Agreement (n 4 above), Protocol on Ireland and Northern Ireland, art 18. See C R G Murray and C A G Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 Journal of Cross Border Studies in Ireland 17, 25.

18 Lord Dodds, 'Report proves problems have not been settled by Windsor Framework' (*MyDUP* 25 July 2023).

upheavals, helping to justify its stance. The UK Government and the EU had, on this level at least, learned from the earlier debacle and the phased implementation and extended notice periods saw the Windsor Framework start to roll out with little attendant confusion. The first of the rules applicable to goods movements took effect in October 2023. Nonetheless, having convinced its electoral base that these arrangements undermine Northern Ireland's constitutional status, the DUP did not experience significant pressure from its supporters to end its boycott.[19]

As the DUP complained from the sidelines, the Windsor Framework has become operative, bypassing the DUP's stand against it. In the post-Johnson era, Brussels and London have sought to prevent their post-Brexit relationship from continuing to be defined by Northern Ireland as it was during both the Brexit negotiations and the turmoil of 2021–2022. This means that there was no foreseeable possibility of reopening of the deal and no obvious outlet for the DUP's efforts to extract further concessions over its terms. An additional DUP aim, in these circumstances, became the achievement of some measure which alters the extent to which the trade provision of the Act of Union, article VI, has been abridged by the operation of the UK–EU Withdrawal Agreement. This would safeguard, within domestic law, the concept that there will be no fetters on trade between Northern Ireland and Great Britain.[20] The UK Government, however, would ultimately need to have some means of distinguishing which goods qualify as coming from Northern Ireland for the purpose of special arrangements, thereby generating a need for checks. Moreover, any legislative 'guarantee' of access of goods from Northern Ireland which was intended to build upon the 'unfettered access' provision of the UK Internal Market Act 2020 is subject to later amendment or repeal.[21] Given that article VI of the Act of Union has, as the UK Supreme Court has confirmed, been modified in light of Parliament's legislation to give effect to the Protocol, there is no alternate form of statutory protection which cannot be later unpicked or adjusted.[22] The DUP's stated aims were thus irreconcilable with the operation of parliamentary sovereignty.

These constitutional debates over the Protocol's operation became intertwined with claims that its terms disadvantage Northern Ireland relative to Great Britain post-Brexit. A difficulty with analysing such

19 See K Hayward, 'Northern Ireland: the Protocol and the peril' (2022) 13 Political Insight 36.

20 Withdrawal Agreement (n 4 above), Protocol on Ireland and Northern Ireland, art 6.

21 United Kingdom Internal Market Act 2020, s 47(1).

22 *In re Allister* [2023] UKSC 5, [66]–[68] (Lord Stephens)

assertions, however, is that it was hard to adequately compare the special arrangements for Northern Ireland to those applicable to Great Britain post-Brexit. Brexit was always going to generate new trade barriers, but even though the Protocol was only ever partially implemented, the trade disruptions across the Irish Sea stood out because post-Brexit controls on animal and plant products entering Great Britain had yet to be implemented. It is thus impossible to get a full understanding of the Windsor Framework's benefits for Northern Ireland, balanced against the challenges it generates, when such goods continue to flow freely from the EU into all parts of the UK. The implementation of Great Britain's post-Brexit border controls on goods movements from the EU have been repeatedly delayed. They were to come into place in Great Britain in the autumn of 2023, alongside the first of the Windsor Framework changes. These controls, which Northern Ireland will not face, will inevitably bring with them increased costs. The UK Government, however, prioritising its pledges to tackle food price inflation, once again opted to delay the implementation of these controls until early 2024. Only after these new frontier rules, including physical checks, entered full effect would the amended Protocol's benefits for Northern Ireland, in terms of unimpeded flows of EU goods, be able to be properly assessed.

The DUP boycott dragged on into 2024. Indeed, even if the Protocol's benefits were set to become more apparent, having presented the Brexit deal as an existential threat to Northern Ireland's place within the UK, the DUP leadership felt that it had little room to pivot back to power sharing. It has been claimed that the DUP leader, Sir Jeffrey Donaldson, faced a 'Trimble Moment' in the latter half of 2023, when, like David Trimble in 1998, he was confronted with the prospect that acting in the best interests of Northern Ireland might well split his party, with the added piquancy that he had been one of the politicians who abandoned Trimble over the 1998 Agreement.[23] In reality, however, the two moments are very different. Trimble felt the acute pressure of decades of conflict in Northern Ireland. Twenty-five years on, Donaldson did not perceive the same danger of a collapse back into widespread violence, no matter how divided the region remains. The success of the peace process enabled the ongoing political stagnation; the supposed Trimble Moment dragged on for months.

23 J Webber, 'Jeffrey Donaldson faces his "Trimble moment" in Northern Ireland' *Financial Times* (London 10 August 2023).

DIRECT AND INDIRECT RULE

Long before the travails of Brexit, the UK Government became well practised at responding to failures of post-1998 power sharing. When the devolved institutions first buckled under the multiple pressures of the ongoing peace process, including efforts to secure weapons decommissioning and normalise policing, Tony Blair's Government's immediate response was to return to the familiar solution of direct rule, which had operated for much of the Northern Ireland conflict and which involved 'the exercise of all functions of government in Northern Ireland by the UK Government'.[24] The terms of neither the Agreement nor the Northern Ireland Act 1998 envisaged 'a lengthy vacuum of power in Northern Ireland', and a new 'express statutory provision' was therefore necessary.[25] Northern Ireland Office ministers assumed the management of executive functions and Westminster legislated by Order in Council in areas which would ordinarily have been 'transferred' to Stormont's competence under the Northern Ireland Act 2000.[26] For Brendan O'Leary, this unilateral intervention by the UK Government was a breach of the 1998 Agreement, although one excusable in the circumstances of trying to provide some stability as power sharing stuttered.[27] It is worth noting, however, that once the 2002 collapse was acknowledged to be intractable, the UK and Irish Governments concluded an Exchange of Notes to enable Strand Two North–South implementation bodies to continue to operate on the basis of representatives of the Northern Ireland departments attending instead of ministers.[28] This is significant when the operation of Strand Two bodies is ordinarily 'interdependent' with the operation of power sharing under Strand One.[29] The post-1998 arrangements were thus made to accommodate this introduction of direct rule from Westminster and Whitehall, with the Irish Government's acquiescence.

UK governance operates on the basis of a clear divide between the roles of ministers and civil servants. The Cabinet Manual, the document detailing constitutional roles of public actors in the UK, states that the civil service 'supports the government of the day in developing and

24 D Birrell, *Direct Rule and the Governance of Northern Ireland* (Manchester University Press 2009) 1.

25 *In re Hughes* [2018] NIQB 30, [67] (Girvan LJ).

26 B Hadfield, 'The suspension of devolution in Northern Ireland: new story or old story?' (2003) 9 European Public Law 49.

27 O'Leary (n 5 above) 310.

28 Exchange of Notes dated 19 November 2002 Between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning certain Decisions of the North/South Ministerial Council and related matters (2002) Irish Treaty Series 5, 7.

29 *In re Napier* [2021] NIQB 120, [41] (Scoffield J).

implementing its policies, and in delivering public services' and that civil servants 'are accountable to ministers' for their role in the policy and decision-making process of public bodies.[30] As the Civil Service Code further explains, officials must not 'frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions'.[31] This injunction, however, presupposes that such policy decisions have been taken by an accountable minister. The Northern Ireland Civil Service is not, in light of historical constitutional divisions between Ireland and Great Britain, part of the UK's Home Civil Service, but these principles, and the unique agency of ministers to determine overarching policy which officials implement, apply equally to it.[32] Direct rule addressed these requirements by ensuring ministerial authority for decision making in Northern Ireland, with new Orders in Council subject to debates and votes and ministers obliged to take questions from MPs, even if many of these sessions were poorly attended between 2002 and 2007.[33]

The mere fact that Northern Ireland's power-sharing institutions are not functioning does not, of itself, provide a basis for civil servants to step into the policy-making arena. This became evident in the aftermath of the 2017 collapse of power sharing, when a Conservative Government overburdened by the aftermath of the Brexit referendum simply left the Northern Ireland Civil Service to manage governance in the region after the Assembly election of March of that year. It was hoped that all that Westminster would have to do in these circumstances would be to pass an annual budget and that the civil service would administer departmental functions in accordance with its requirements.[34] But this stance made no allowance for the need of departments to take decisions which would ordinarily need ministerial approval. As the Northern Ireland Court of Appeal accepted in *Buick*, 'the devolved constitutional arrangements elsewhere in the UK do not permit civil servants to act without being accountable to Ministers'.[35] There was no legal basis for a more extensive role in the Northern Ireland context; 'any decision which … would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister'.[36] As a result of the *Buick* case,

30 HM Government, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Stationery Office 2011) 56.

31 HM Government, *The Civil Service Code* (16 March 2015).

32 NI Department of Finance, 'The Northern Ireland Civil Service Code of Ethics' (2023) paras 2 and 13.

33 Birrell (n 24 above) 43–45.

34 A Evans, 'Northern Ireland, 2017–2020: an experiment in indirect rule' [2021] Public Law 472, 473-474.

35 *In re Buick* [2018] NICA 26, [62] (Treacy LJ).

36 Ibid [56] (Morgan LCJ and Stephens LJ).

the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 was enacted, with section 3(1) providing that the

> absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period.

The Constitution Committee, reviewing the legislation, adopted an 'only in Northern Ireland' stance in relation to this provision:

> We accept, reluctantly, that an exceptional response is justified to protect the people of Northern Ireland from a potentially significant damaging impact on the provision of services. We emphasise that in any other circumstances provisions such as these which challenge established constitutional principles would not be acceptable.[37]

The statute thus amounted to an abject admission of the profound weakness of Northern Ireland's governance order. In order to circumvent further legal challenges, these new powers were made retroactively applicable to any civil service activity since the March 2017 Assembly election. A tincture of ministerial involvement was provided by the Secretary of State issuing a framework of guidelines for the use of these new powers. Under this new dispensation the governance of Northern Ireland could be kept ticking over, but civil servants remained reluctant to take any far-reaching actions without ministerial authority. After *Buick*, moreover, this legislation provided no meaningful cover for civil servants to act in the context of 'cross-cutting' decisions which in ordinary circumstances would need the approval of the Northern Ireland Executive as a Committee, not merely of the individual minister.[38]

Indirect rule between 2017 and 2020 was therefore a deeply problematic arrangement which, the courts concluded, did 'not provide good governance for Northern Ireland'.[39] It nonetheless held three singular advantages for the UK Government over the alternative of direct rule at the time. First, the operation of direct rule on a basis of 'rigorous impartiality' was not a practical possibility when the Conservative Government relied on the votes of the DUP for its parliamentary majority. Second, Conservative ministers baulked at the prospect of the increased consultation obligations with Dublin over public policy affecting Northern Ireland which would accompany

37 Constitution Committee, *Northern Ireland Bill* (2018) HL 211, para 24.

38 *Buick* (n 35 above) [58] (Morgan LCJ and Stephens LJ). See Northern Ireland Act 1998, s 20 and s 28A. See also A Deb, 'The legacy of Buick: Northern Ireland's chaotic constitutional crucible' (2019) 23 Edinburgh Law Review 259.

39 *In re JR80* [2019] NICA 58, [109] (Stephens LJ).

direct rule. This was a function of the pivotal role of the DUP in the House of Commons between June 2017 and December 2019 and of fraught UK–Ireland relations in the context of Brexit. Third, indirect rule minimised the degree to which Westminster had to give over time to transacting business which would ordinarily have been transferred to Stormont. Even so, multiple budgets and extraordinary legislative extensions to the timeframe for Executive formation did become necessary as indirect rule dragged on, and campaigns to liberalise Northern Ireland's abortion laws and provide for same-sex marriage broke onto the Westminster agenda in 2019 as the Conservative Party's hold over the House of Commons became ever more tenuous.[40]

Notwithstanding these issues, the general usefulness of indirect rule as a governance tool saw it duplicated, under the Northern Ireland (Executive Formation) Act 2022, when power sharing once again collapsed. This legislation was rushed onto the statute books in December 2022, just over a month after the period of caretaker ministries following the May 2022 Assembly elections elapsed. Up until the statutory deadline of 28 October 2022, the Secretary of State for Northern Ireland had insisted that he was subject to a 'legislative requirement' to call fresh elections and that he 'cannot see the space for any emergency legislation'.[41] As noted above, however, the threat of new elections generated little leverage in the circumstances of the ongoing boycott, and the UK Government thus reverted to allowing civil servants 'to take a limited set of decisions when it is in the public interest to do so'.[42] Section 3 of the new legislation thus recapitulated, almost word for word, the power of the civil service to administer public services in Northern Ireland without direct ministerial involvement. Also in keeping with the 2018 Act, section 4 provided for a bridging provision, retrospectively authorising civil service decision making which had taken place between 28 October and the enactment of the new legislation. This intervention was unlikely to have been particularly useful in practice. As with Acts of indemnity, which Dicey had once extolled as an effective means to retrospectively protect agents of the state for actions taken during an emergency,[43] Northern Ireland's civil

40 Northern Ireland (Executive Formation etc) Act 2019. See Evans (n 34 above) 477.

41 Northern Ireland Affairs Committee, 'Oral evidence: work of the Secretary of State for Northern Ireland' (2022) HC 86, Q334 (Chris Heaton-Harris MP).

42 Chris Heaton-Harris MP, HC Deb, vol 723, col 824 (29 November 2022).

43 A Dicey, *An Introduction to the Study of the Constitution* 8th edn (Liberty Fund 1982, first published 1915) 142–145. See also C R G Murray, 'Shifting emergencies from the political to the legal sphere: placing the United Kingdom's derogations from the ECHR in historical context' in M Saul, A Follesdal and G Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Cambridge University Press 2017) 198.

servants did not regard the prospect of forthcoming legislation which would retroactively authorise their actions with any great enthusiasm, especially given Heaton-Harris's earlier pronouncements that no stopgap legislation would be forthcoming.[44] At best, section 4 provided a basis for authorising urgent decisions which could not be delayed.

This legislation, in sum, highlights how an extensive range of UK constitutional principles works very differently in the Northern Ireland context. The UK Government went through the motions of presenting this return to civil service governance as an unfortunate temporary measure, a 'stopgap' which 'is not intended to be a long-term solution to the issues that Northern Ireland faces'.[45] But as the new Act's extended deadlines for Executive formation were inevitably missed, and with fresh elections as unattractive as ever, the UK Government abandoned the pretence that technocratic governance was a temporary fix. Under the Northern Ireland (Executive Formation and Organ Donation) Act 2023 the next putative deadline for Executive formation was extended until mid-January 2024.[46] Thereafter, in the Northern Ireland (Interim Arrangements) Act 2023, the time limits on civil service administration were removed, enabling indirect rule to continue until 'an Executive is next formed'.[47] The UK Government was thus becoming increasingly adept at pushing Northern Ireland affairs to the margins of Westminster's legislative agenda. The real innovation of this second period of indirect rule was in translating this form of governance from stopgap to Northern Ireland's 'new default alternative to devolution'.[48] But all of these statutory interventions carry a cost. The underlying message of the repeated extensions to the Executive-formation period is that in Northern Ireland legal obligations are very much mutable. This shapes the behaviour of its parties, including the DUP simply ignoring a judicial declaration over the unlawfulness of its withdrawal from North–South bodies.[49]

---

44 Civil servants in the Executive Office confirmed that, even after the legislation had passed the Commons, they continued to be guided by the legal limits on their role identified in the *Buick* judgment: R Sheeran, 'Stormont: who is minding the shop without any ministers?' (*BBC News* 3 December 2022).

45 Chris Heaton-Harris MP, HC Deb, vol 723, col 823 (29 November 2022).

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

47 Northern Ireland (Interim Arrangements) Act 2023, s 1.

48 A Evans, 'From an experiment to a new normal: indirect rule in Northern Ireland' [2023] Public Law 549, 555.

49 As Scoffield J has recognised, in the context of the fragility of constitutional governance in Northern Ireland, 'it is incumbent upon those in political leadership to reflect on the example set when they choose to wilfully ignore clear legal obligations to which they are subject': *Napier* (n 29 above) [82].

A VICIOUS CYCLE OF GOVERNANCE FAILURE

This crisis of governance was exacerbated by a parallel crisis for Northern Ireland's public finances. In mid-October 2022, the Northern Ireland Secretary was downplaying the budget he was preparing to impose on Northern Ireland as 'a small technical piece of legislation'.[50] By late 2022, however, a perfect storm for public finances had been generated by severe inflationary pressures, the need to repay overspending during the months in 2022 when Stormont ministers continued in office without legislative oversight (an unwelcome side-effect of the extended period of ministerial office after an election under the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022), and a more restricted funding allocation by the UK Government by comparison to previous years. The extra funding negotiated as part of the DUP's confidence-and-supply agreement with Theresa May's beleaguered Conservative Government in 2017 had temporarily disguised the underlying weakness of Northern Ireland's public finances, but the end of this one-off boost to public finances only made this drop-off in the block grant more precipitous.[51]

Into this crisis waded the Northern Ireland Secretary, Chris Heaton-Harris, who between mid-October and mid-November 2022 developed a sudden determination to plug the £660 million shortfall in public finances which had opened up during the 2022–2023 financial year.[52] This was no longer to be downplayed as a dry, 'technical' budget; after all, it is rarely harmful for the prospects of an ambitious Conservative minister to be regarded as a bastion of fiscal rectitude, especially when his party has no elected representatives in Northern Ireland to challenge the impact of cuts. A divided society still adapting to the aftermath of a protracted conflict, however, inevitably brings with it additional costs, including those arising from the duplication in the provision of services. These challenges have generated intense difficulties for the Executive for years.[53] UK Government ministers, however, have scarcely acknowledged these structural challenges for efficient

50 Northern Ireland Affairs Committee (n 41 above) Q339 (Chris Heaton-Harris MP).

51 Cabinet Office, 'Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party' (June 2017). The extra funding provided under this arrangement came after a previous round of retrenchment under the austerity measures imposed by the UK Government between 2010 and 2017: see B Dickson, 'Devolution in Northern Ireland' in J Jowell, D Oliver and C O'Cinneide (eds), *The Changing Constitution* 9th edn (Oxford University Press 2019) 239, 260–261 and 264–265.

52 Chris Heaton-Harris MP, HC Deb, vol 723, col 14WS (24 November 2022).

53 See K O'Connor, *Public Administration in Contested Societies* (Palgrave 2014) 64–86.

public service provision in their zeal to constrain public spending in Northern Ireland.[54] And although the Secretary of State maintained that the cuts required by the Northern Ireland Budget Act 2023 and Northern Ireland Budget (No 2) Act 2023 were focused purely on addressing Northern Ireland's budget deficit and were not a means to exert pressure upon the DUP to abandon a boycott which had outlived its usefulness to the Conservatives' post-Brexit agenda, they have undoubtedly provided the UK Government with additional leverage over the party.[55] The intertwining of the boycott and the budget crises, however, potentially distracted from the latter's unique seriousness. Even after decades of stop-start power sharing, the current budgetary pressures are so profound that far from galvanising Northern Ireland's politicians, they rendered the task of governing Northern Ireland as so daunting as to become an additional barrier to restoring Stormont. No local politician would want to take responsibility for cuts on the scale Conservative ministers were requiring. But then, neither did the UK Government, given that it shifted responsibility for the management of this debacle onto the Northern Ireland Civil Service.

The October 2022 imposition of indirect rule, as noted above, mirrors the arrangements instituted during the 2017 to 2020 collapse of power sharing, with civil servants being tasked with managing a form of administrative devolution with limited input from Westminster and Whitehall. The invidious funding picture, however, has made the civil service's task between 2022 and 2024 radically different from the earlier era. Civil servants were not being tasked with temporarily keeping the administration of government ticking over, they were being asked to suddenly halt significant elements of public sector activity. They were moreover required, on an open-ended basis since the enactment of the Northern Ireland (Interim Arrangements) Act 2023, to actively set policy priorities in this funding context. Although it can be tempting to think of Northern Ireland's governance order as being held in stasis by these arrangements, this was not the case amid the funding crisis. Civil servants were constrained, by the absence of direct ministerial authority and concerns over the cross-cutting nature of more extensive reforms to public administration, from undertaking the very work which could address issues such as duplication in public service provision.[56] Every day of such deferred decisions under administrative devolution thereby

54 These issues are occluded in the UK Government's euphemistic framing of 'the systemic issues that are facing public services': Chris Heaton-Harris MP, HC Deb, vol 723, col 16WS (24 November 2022).

55 N Emerson, 'Stormont's budget cut is a manufactured problem' *Irish News* (Belfast 26 April 2023).

56 See, for example, Department of Education, *Annual Report and Accounts 2022–23* (15 November 2023) HC 21, 45.

added to a backlog of structural reforms which the UK Government regards as overdue and further exacerbates cost overruns.

The cuts imposed since late 2022, moreover, had a cumulative impact on many of the most marginalised people in society; the same families affected by the sudden end to holiday hunger payments for school children by the Department for Education lost out as a result of the cuts to youth group funding and the social welfare provision of discretionary support imposed by the Department for Communities.[57] Cuts to programmes which tackled educational underachievement cannot simply be reversed at a later date: they created cohorts of left-behind pupils with long-term societal implications.[58] Civil servants were required to manage the cuts necessary to meet these budgetary constraints under the terms of loose and conflicting guidance supplied by the Secretary of State for Northern Ireland.[59] This Guidance, modelled on that put in place between 2017 and 2020, was inadequate to the straitened budgetary circumstances. Senior officials were informed that the 'primary principle' in determining whether it was in the public interest that they act without ministerial authorisation was that they 'must control and manage expenditure within the limits of the appropriations set out in Budget Acts'.[60] But this was subject to a prior statement that 'major policy decisions' and, specifically, 'a major change of an existing policy, programme or scheme' should ordinarily be left for ministers to decide or agree.[61] The prioritisation of meeting the requirements of the Budget Acts, moreover, necessitated immediate cuts, notwithstanding their long-term implications. The resultant problems that this approach stored up for Northern Ireland are severe and cannot be squared with the countervailing priority in the Guidance 'to maintain the delivery of public services as sustainably, effectively, and efficiently as possible'.[62]

There was, moreover, a logical inconsistency in Chris Heaton-Harris's position that the cuts were nothing to do with generating pressure for a restoration of power sharing, but that more money could be available if Stormont was restored. For all his insistence that funding alone 'will not solve' the challenges Northern Ireland faces,

57 C Fitzpatrick et al, *The Consequences of the Cuts to Education for Children and Young People in Northern Ireland* (Stranmillis University College 2023) 27.

58 Ibid 24.

59 Department of Education (n 56 above) 17–18.

60 C Heaton-Harris, *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 NI (Executive Formation etc) Act 2022 is passed (6 December)* (2022) CP 766, para 10(a).

61 Ibid para 9.

62 Ibid para 10(d). The Guidance was renewed in 2023 to reflect indirect rule being put onto an open-ended footing.

the sudden withdrawal of funding undoubtedly exacerbated them.[63] After more than a year of swingeing cuts, Northern Ireland's public sector remained unable to meet the spending limits imposed by Westminster, with civil servants struggling to both balance the books and recoup previous spending overruns.[64] The UK Government's plans thus belatedly turned to additional avenues for raising revenue within Northern Ireland, from the introduction of distinct water charges to increases in student fees. Such steps replay the sort of pressure applied ahead of the St Andrews Agreement.[65] They also took the Northern Ireland Office more deeply into the task of making active governance choices for Northern Ireland, notwithstanding the limited oversight of its activity.[66] Rather than ramping up pressure on the DUP boycott, however, such proposals further intensified the problem. If efforts to raise additional revenue appear inevitable alongside funding cuts, many politicians in Northern Ireland would rather complain about the Secretary of State's impositions than be responsible for implementing such changes themselves. And even the prospect of a slightly improved financial settlement would not alleviate hard choices over Northern Ireland's public services; it was widely assumed that any new money would come with unattractive strings attached.

ROADS UNTRAVELLED OUT OF NORTHERN IRELAND'S OVERLAPPING CRISES

The DUP adopted and maintained a position of opposition to Northern Ireland's post-Brexit arrangements which could not be satisfied by the EU and UK Government. This position was the core of the party's message, making it difficult for its leadership to adapt its stance towards the Windsor Framework and keep the party and its support base from fracturing ahead of the next UK general election. Added to that, returning to the Northern Ireland Executive meant taking responsibility for administering funding inadequate to the public sector's needs and playing second fiddle to Sinn Féin following the

63 J McCormack, 'NI secretary says funding alone will not solve financial challenges' (*BBC News* 10 July 2023).

64 'Stormont on course for half a billion overspend' (*RTE News* November 2023).

65 See, for example, the promulgation of the Water and Sewerage Services (Northern Ireland) Order 2006 (SI 2006/3336), and the prospect of water charges was accompanied by a ministerial recognition that '[a]n incoming Assembly would be free to reverse the process, but it would have to find the money to keep the investment going into water and sewerage services that they desperately need': David Cairns MP, HC Deb, vol 450, col 282 (11 October 2006).

66 Some proposals, such as those for the continuation of hospital car-parking charges, would involve Westminster overriding recent Assembly legislation: Hospital Parking Charges (Northern Ireland) Act 2022.

latter's electoral success. These realities blunted successive efforts to restore power sharing, no matter how often the UK and Irish Governments paid lip service to the 'critical importance' of this end.[67] That focus on restoring power sharing, however protracted the task, appeared to operate to the exclusion of other options by which to either circumvent a boycott by one of the major parties or, at least, to deliver better governance for Northern Ireland notwithstanding the collapse of power sharing. This section reflects upon these options, and on why the two governments did not pursue them more actively.

Adjusting the operation of consociationalism

The immediate aim of the Northern Ireland peace process has always been modest – to provide for what Rick Wilford described as 'a durable, if interim, political accord'.[68] Within that rubric, the governance arrangements established under Strand One of the 1998 Agreement have been demonstrated to be transitional; they work until they do not. At various points when these arrangements have buckled in the last quarter century, efforts have been made towards addressing the particular impasse, which have included adjustments to significant features of power sharing. In 2006, for example, responses to the issues of weapons decommissioning and support for policing came alongside adjustments to the system of appointments to the offices of First Minister and deputy First Minister within the St Andrews Agreement. In 2020, the *New Decade, New Approach* deal tackled substantive issues, including around language rights and the management of Brexit, but it also modified the petition of concern mechanism and, as we have seen above, the arrangements around Executive formation. Northern Ireland's governance architecture has thus been adaptive to the changing needs of society as the lived reality of the conflict recedes, even if those adaptations have only ever been precipitated by crisis.

Against the backdrop of the dysfunction of power sharing since January 2017, this evidence of transition within Northern Ireland's governance arrangements generates questions over when the 1998 Agreement's consociational provisions can be said to have become obsolete. There is no structured means by which to wean Northern Ireland's system of governance off aspects of consociationalism where these have come to undermine good governance.[69] As John Nagle writes of consociational systems more generally, this is a common problem; '[o]ne of the main problems in relation to zombie power-

67 Northern Ireland Office, 'BIIGC June 2023 Joint Communiqué' (19 June 2023).

68 R Wilford, 'Northern Ireland: St Andrews – the long Good Friday Agreement' in J Bradbury (ed), *Devolution, Regionalism and Regional Development: The UK Experience* (Routledge 2008) 67, 67.

69 See Dickson (n 51 above) 267.

sharing is not just the evisceration of the state; it is its incapacity to reform and transform'.[70] The lack of a structured off ramp puts the issue in the hands of the two governments, and there are various interventions that they could make in response to the boycott by a major party. With regard to the Executive, the two governments have previously agreed adjustments to the system for electing the First and deputy First Ministers in the St Andrews Agreement. On a legislative level, the Assembly could be restored by an intergovernmental agreement to amend the cross-community super majority which the Northern Ireland Act requires for the election of its Speaker. Or, in the more limited alternative Adam Evans suggests, Assembly committees could be enabled to function if steps were taken 'to bypass a Speaker election and go straight to using D'Hondt to determine which party secures which committee chair and to populate the committees'.[71] Even at this more limited end of the spectrum of interventions, which would do no more than restore some level of Assembly oversight of the operation of Northern Ireland departments, the governments could expect concerted opposition.

Neither of Stormont's major parties, both of which have used boycotts, would find such a reform acceptable. Even at the height of the DUP's Protocol boycott, Sinn Féin sidestepped any suggestion that a workable solution lay in reform of power sharing.[72] Any of the prospective adjustments to the rules around the functioning of the Strand One structures amounts to a significant departure from the 1998 Agreement. The Governments of the UK and Ireland undoubtedly could alter the terms of their treaty. Indeed, previous adjustments to the 1998 arrangements have not always resulted from the active participation by Northern Ireland's major parties in negotiations, but instead 'represented the best estimates of the UK and Irish Governments of the terms upon which Northern Ireland's political and constitutional future could evolve'.[73] To address the persistent problem of boycotts, however, the UK and Irish Governments would have to make an obvious abridgement of the post-1998 arrangements without general acceptance across Northern Ireland's major parties. In response to Alliance Party entreaties in July 2022, the UK Government asserted that 'any recalibration or update of the agreements, and of the institutions and mechanisms that flow from them, is best achieved

70 J Nagle, 'Consociationalism is dead! Long live zombie power-sharing!' (2020) 20 Studies in Ethnicity and Nationalism 137, 142.

71 Evans (n 48 above) 557.

72 See J Manley, 'Sinn Féin and DUP fail to support MPs' Stormont reform recommendations' *Irish News* (Belfast 4 December 2023).

73 Wilford (n 68 above) 67.

through cross-party agreement'.[74] Even as late as October 2023, with the DUP boycott seemingly unresolvable, the Irish Government likewise maintained that '[i]t would be premature to talk about reform while the institutions are not up and running'.[75] This gives rise to a paradox in the reform of consociationalism, that pressure for reform is most acute when these institutions are not functioning, but the two governments are often reluctant to make significant interventions in these circumstances. Even if it was generally presumed in 1998 that Northern Ireland would eventually need to scale back, or at least adjust, the operation of consociational arrangements as a post-conflict society emerged, there is no indication that the government or opposition parties in Ireland or the UK regarded this as an appropriate response to the DUP boycott.[76]

Direct rule: the intergovernmental partnership remix

The challenges inherent in reforming power sharing to restrict the impact of boycotts without undermining key tenets of consociationalism have spurred interest in alternative modes of accountable governance. The problem, however, is that most actors disagree with what this might involve; there is a gulf between accounts of direct rule and joint authority when these terms are invoked by unionist and nationalist politicians. There is no provision for an expansive conception of joint authority under the 1998 Agreement, and indeed the intergovernmental development of such arrangements would run counter to the Agreement's undertaking that any changes to the UK's statehood over Northern Ireland require the consent of the people of Northern Ireland.[77] Conversely, however, direct rule would require fresh legislation from Westminster and, as noted above, to be compatible with the 1998 Agreement would require Dublin's assent. Direct rule would therefore undoubtedly bring with it pressure for more substantive operation of the British–Irish Intergovernmental Conference, under Strand Three of the Belfast/Good Friday

74 Conor Burns MP, HC Deb, vol 717, col 852 (5 July 2022).

75 Sean Fleming TD (Minister of State at the Department of Foreign Affairs), Dáil Éireann Deb, Speech 84 (25 October 2023).

76 A Commons' Select Committee suggested the use of a Citizens' Assembly on Stormont reform to reach over the heads of parties seeking to stymie potential reforms: Northern Ireland Affairs Committee, *The Effectiveness of the Institutions of the Belfast/Good Friday Agreement* (2023) HC 45, para 162.

77 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, British–Irish Agreement, Constitutional Issues, para 1. See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [135].

Agreement 1998.[78] This provides a mechanism for intergovernmental cooperation, including the Irish Government being consulted by UK ministers about aspects of Northern Ireland's governance within their remit. The Intergovernmental Conference ordinarily addresses policy issues reserved to the UK Government, but there is scope to extend its operation to address all public policy issues affecting Northern Ireland in periods when power sharing is not functioning, and the UK Government steps into its place.[79] For some unionists, however, the Conference raises dark memories of the operation of the Intergovernmental Council under the Anglo-Irish Agreement and the explicit admission of Northern Ireland's difference from other parts of the UK. Such a prospect also raises uncomfortable questions for a UK Government fixated, amid Brexit, upon maintaining the image of national sovereignty.

By mid-2023 the Irish Government was increasingly flagging the need to consider 'Plan B' in response to the collapse of Northern Ireland's devolved institutions, as efforts to restore power sharing stalled.[80] This term can sometimes seem like a deliberate abstraction; a formulation designed to appear as unthreatening as possible to unionists while nodding in the direction of joint authority to nationalists, but in reality satisfying neither. Plan B, however, dates from the period prior to the St Andrews Agreement when the two governments sought to develop a long-term alternative to direct rule as it had hitherto operated should power sharing not be restored. As a Joint Statement from April 2006 recognised:

> We are beginning detailed work on British–Irish partnership arrangements that will be necessary in these circumstances to ensure that the Good Friday Agreement, which is the indispensable framework for relations on and between these islands, is actively developed across its structures and functions. This work will be shaped by the commitment of both Governments to a step-change in advancing North–South co-operation and action for the benefit of all.[81]

The UK Government promised legislation to give effect to these commitments if power sharing was not restored.[82] Following this Statement, Bertie Ahern, then Taoiseach, explained this step-change in intergovernmental cooperation as follows:

78 See Leo Varadkar TD (Taoiseach), Dáil Éireann Deb, vol 986, no 2, Speech 264 (18 September 2019).

79 O'Leary (n 5 above) 311.

80 G Gordon and R McKee, 'Stormont stalemate: Irish PM calls for Plan B talks if autumn opportunity missed' (*BBC News* 9 August 2023).

81 Joint Statement by Tony Blair and Bertie Ahern on the recalling of the Assembly, Armagh (6 April 2006) para 10.

82 Ibid para 11.

> Plan B ignores the politicians of Northern Ireland and the deals and co-operation and partnership basis between the two governments [sic]. We would have to do that because we're the custodians of the Agreement and we're the stewards of the process – but that is not by a long shot our preferred option.[83]

On these terms, a partnership arrangement is evidently an eventuality that the two governments have historically accepted as being compatible with the 1998 Agreement.[84]

The persistent dysfunctionality of power sharing since January 2017 is comparable to the prolonged breakdown hiatus between 2002 and 2007, if not worse given the shortcomings of indirect rule and the crisis engulfing Northern Ireland's public services. This model of intergovernmental partnership, even though it stops well short of joint sovereignty, would require the UK Government to consult the Irish Government over proposed public service cuts, and even provide the basis for an integrated approach to Dublin providing funding for elements of public service provision or infrastructure of benefit to Northern Ireland.[85] The partnership model also moves beyond the caretaker operation of indirect rule; it allows the two governments to address structural issues in governance and public service provision in Northern Ireland and provides for parliamentary accountability. Such an approach could also have made inroads on some of the backlog of policy issues which have built up since 2017.[86] This model thus provides for a unique protection for Northern Ireland in the context of the UK's other devolution arrangements, and a necessary one given the scale of the cuts being imposed between 2022 and 2024.

The insurmountable difficulty, however, was that the close intergovernmental cooperation which existed in 2006 has been undermined by the acrimony over Brexit.[87] Even if the Irish Government were to explicitly challenge open-ended indirect rule as

---

83 D Keenan, 'Ahern's "Plan B" sidelines North's parties' *Irish Times* (Belfast 10 April 2006).

84 See Peter Hain MP, HC Deb, vol 458, col 1310 (27 March 2007).

85 The Irish Government currently manages this support under its Shared Island Fund: see C Buckler and L-A McKeown, 'Micheál Martin defends Dublin's investment in Northern Ireland' (*BBC News* 8 November 2023).

86 To take just one example, Northern Ireland's legislation on the gender pay gap has never been brought into effect, and the jurisdiction has thus fallen out of step with Ireland and other parts of the UK: Employment Act (Northern Ireland) 2016, s 19. See S Craig et al, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (Equality Commission for Northern Ireland 2022) 47.

87 See C Kelly and E Tannam, 'The future of Northern Ireland: the role of the Belfast/Good Friday Agreement institutions' (2023) 94 Political Quarterly 85, 93.

an affront to the 1998 Agreement's aims and the good governance of Northern Ireland, the current UK Government remains so averse to the possibility of a more substantive role for Dublin that it only began to be mooted by senior Conservative figures as the power-sharing impasse dragged on into 2024. This drew a vitriolic response from David Jones, a senior figure in the European Research Group of Brexit-backing Conservative MPs, that '[a]ny involvement by the Irish government in the administration of Northern Ireland would be unacceptable to most, if not all, Conservative colleagues'.[88] The problem with Plan B thus lies not in the terms of the 1998 Agreement, but in the Conservative Party's absolutist stance towards national sovereignty after Brexit.

Improving indirect rule

If reform of power sharing was unrealisable and the current UK and Irish Governments are unable to cooperate to the degree necessary to make intergovernmental partnership work, then the only option remaining, had power sharing not been restored in February 2024, was to re-evaluate the functioning of indirect rule. In this regard, only the perceived need to generate leverage around the resumption of power sharing tied the possibility of additional funding for Northern Ireland to this end. The Barnett Formula's inadequacies have long been well known.[89] Although it currently allocates more than England's average funding per head to Northern Ireland, it also operates over time to reduce Northern Ireland's level of funding to this average. The 'Barnet squeeze' is exacerbated in the context of prolonged public sector funding cuts in England. This means that Northern Ireland is not being treated comparably to disadvantaged areas of England, which are not currently facing comparable funding cuts, even though its needs are exacerbated by its post-conflict context. The UK Government was long resistant to any needs-based replacement of the Barnett Formula, but, in Wales, a concerted focus on the effect of the Barnett squeeze did see a recognition of the Holtham Commission proposals and an improved funding settlement.[90] As a result of these arrangements for Wales, '[t]he principle of the floor to resist the Barnett squeeze taking you to unreasonably low levels has been conceded'.[91] Comparable

88 'Sir Robert Buckland comments: former NI Secretary Villers says there is no role for Dublin in running NI – as Tory MP calls idea "unacceptable"' (*The Newsletter* 12 January 2024).

89 See Select Committee on the Barnett Formula, *The Barnett Formula* (2009) HL 139, para 49-63.

90 Independent Commission on Funding and Finance for Wales, *Fairness and Accountability: A New Funding Settlement for Wales* (Welsh Government 2010).

91 Northern Ireland Affairs Committee, 'Oral evidence: The funding and delivery of public services in Northern Ireland' (2023) HC 46, Q238 (Gerald Holtham).

adjustments for Northern Ireland, even if they fell short of a genuinely needs-based approach, would do more to stabilise Northern Ireland's public finances than one-off deals of the kind that accompanied the 2017 confidence-and-supply arrangement between the DUP and the Conservatives. The UK Government belatedly recognised the strength of this case in the package for restoring Stormont that it began to unveil in December 2023, but it continued to resist providing this funding unless power sharing is restored, even in the face of widespread industrial action. Extra funding was thus dangled as a carrot within a negotiation process, when in reality it had become generally accepted that public services in Northern Ireland require this funding notwithstanding the dysfunction of power sharing.

Beyond the finances available to Northern Ireland's departments, the way the Secretary of State engages with questions of Northern Ireland's governance could also have been reformed. As explored above, civil service decision making already operates under a rubric of guidance from the Secretary of State, in addition to the requirements laid down in legislation such as the Budget Acts. There is nothing in the nature of indirect rule to say that this guidance has to be as limited and contradictory as it is at present. Indeed, as has recently been the case for the commissioning of abortion provision, the Secretary of State can be provided by Westminster with the capacity to engage in specific areas of policy making.[92] Again, however, the very nature of indirect rule, and the advantages that the UK Government derives from it, militate against any such change in practice. The more the Secretary of State intervenes with specific instruction, as opposed to loose guidance, the more likely he will find himself accountable to Parliament and answerable before the courts for such interventions. Indirect rule will, perforce, become more like direct rule. The abortion provision instructions, after all, were only issued in light of specific statutory requirements and after judicial review.[93]

The restoration of North–South cooperation under Strand Two of the 1998 Agreement, moreover, did not require the operation of full direct rule. In the exchange of notes in 2002, discussed above, the UK Government accepted that Northern Ireland's departments could participate in the North–South bodies developed under the Agreement

92 Chris Heaton-Harris MP, HC Deb, Written Statement UIN HCWS341 (24 October 2022). The courts had previously found the Northern Ireland Secretary's failure to commission these services unlawful: see *In re Northern Ireland Human Rights Commission* [2021] NIQB 91, [115] (Colton J).

93 Northern Ireland (Executive Formation etc) Act 2019, s 9. The slow progress towards operationalising the Identity and Language (Northern Ireland) Act 2022 showcases the degree to which legal pressure is often needed to see the UK Government actualise statutory commitments.

notwithstanding the collapse of power sharing at that time.[94] The Northern Ireland courts have, moreover, recognised, in no uncertain terms, that the withdrawal of the DUP from these bodies was unlawful; '[t]he respondents' decision to withdraw from the North–South Ministerial Council was and is unlawful because it frustrates, is contrary to, and is in breach of the legal duties and responsibilities contained within Part V of the Northern Ireland Act 1998'.[95] In the context of the Withdrawal Agreement's special provisions for the alignment of Northern Ireland with aspects of EU law, this poses particular issues as the operation of North–South bodies has long been particularly valuable in the context of the implementation of EU law.[96] Given the impact and illegality of the curtailment of Strand Two arrangements, an equivalent exchange of notes should have been prioritised as soon as the DUP sought to withdraw their ministerial involvement in September 2021. Admittedly, under indirect rule as operated since 2022, Northern Ireland departments would be unable to advance cross-cutting policy as a result of such cooperation, but it would not have taken a major legislative adjustment to enable the Secretary of State to authorise such activity. Such immediate action in response to this first element of the DUP's boycott plan could have provided a show of resolve which would have faced down the boycott altogether. This, however, would have required the UK Government not to be intent on instrumentalising the DUP's actions as part of its post-Brexit policy.

The intermittent involvement of Westminster in the processes of indirect rule between 2022 and 2024 has not provided for effective management of Northern Ireland's public finances. The processes which have contributed to the Budget Acts, for example, showcase the significant limitations in equality-focused budget setting. The conclusion of the 1998 Agreement was a significant milestone in terms of the substantive equality commitments of Northern Ireland's public authorities, including all of the Northern Ireland departments and the Northern Ireland Office in terms of activity with impacts upon Northern Ireland.[97] Under section 75 of the Northern Ireland Act 1998 these bodies are required to have 'due regard' to promoting equality of opportunity for groups in society with protected characteristics.[98] This duty extends to these bodies having arrangements in place to

94 See Birrell (n 24 above) 176–178.

95 *Re Napier's Application* [2021] NIQB 86, [38] (Scoffield J).

96 See G Lagana, *The European Union and the Northern Ireland Peace Process* (Palgrave 2021) 159–184.

97 1998 Agreement (n 77 above) Rights, Safeguards and Equality of Opportunity, para 3.

98 See C McCrudden, 'Equality' in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart 2001) 75, 86–98.

assess the impact of their policies on equality of opportunity.[99] These legal duties were a radical innovation in the context of UK governance. Indeed, they were perhaps too radical, because the Northern Ireland courts were reluctant to police the operation of equality schemes as a unique aspect of Northern Ireland's administrative law. The Equality Commission for Northern Ireland was left with a gatekeeper role over the enforcement of these duties against public bodies.[100] As a result, the development in other parts of the UK of the public sector equality duty under the Equality Act 2010 has seen Northern Ireland left behind in terms of embedding legally enforceable equality protections in budgetary processes.[101]

The Northern Ireland Office has explained the equality processes currently involved in budget drafting as follows:

> Northern Ireland departments completed indicative assessments with regard to the Section 75 statutory equality duty under the Northern Ireland Act 1998 as part of the 2022–23 budget setting process which informed the budget allocations placed on a statutory footing through the Northern Ireland Budget Act 2023. It was the responsibility of the Northern Ireland departments to consider what further equality impact assessments were required in accordance with the statutory equality duty under the Northern Ireland Act 1998 on the spending decisions which were needed to live within their final budget allocations.[102]

This statement acknowledges that the Northern Ireland departments were expected to provide indicative assessments before they were aware of the budget allocations and that their subsequent substantive assessments can have no impact upon the final allocations which they are required to 'live within'. There is no suggestion that the Northern Ireland Office undertook an overarching equality impact assessment of the budgets as a whole. Instead, the conduct of equality assessments is explicitly treated as resting upon individual departments in Northern Ireland, even though this UK Government department was effectively mandating multi-strand public service reforms operative across Northern Ireland departments.[103]

This approach is particularly inadequate in the context of complex interdepartmental programmes, as illustrated by the example of the School Holiday Food Grant, which was terminated as a result of the Northern Ireland Budget Act 2023.[104] This scheme was an Executive

99 Northern Ireland Act 1998, sch 9, para 4(2)(b).

100 *In re Neill* [2005] NICA 5.

101 Equality Act 2010, s 149.

102 Steve Baker MP, HC Deb, Written Answer UIN 192218 (6 July 2023).

103 J Meers, 'The "cumulative impact" problem in social welfare: some legal, policy and theoretical solutions' (2022) 44 Journal of Social Welfare and Family Law 42, 59.

104 Fitzpatrick et al (n 57 above) 25–26.

policy with an explicit anti-poverty aim. As such, it would ordinarily have rested within the remit of the Department for Communities. In this instance, however, the Department for Education undertook the administration of the programme because it could draw upon the Education Authority's database of Free School Meals recipients to conduct the scheme. As a result, no one department was responsible for assessing the equality impact of the termination of the School Holiday Food Grant. An adequate assessment could only have been conducted by conducting an overview of the relationship between the assessments of the Executive Office, the Department for Communities and the Department for Education. In the absence of such an assessment by the Northern Ireland Office, the equality impact of the removal of funding to support this scheme fell between these actors. All that the Department for Education was thus able to confirm, in its published equality assessment, was that the end of this scheme did not impact upon the provision of Free School Meals during term time.[105]

The section 75 duties engaged by the preparation of a budget for Northern Ireland by the Northern Ireland Office cannot be adequately met by subsequent equality assessments conducted by the Northern Ireland departments and without a cumulative impact assessment having previously been conducted for the budget as a whole. In such circumstances the civil servants responsible for administering the 2022–2023 and 2023–2024 budgets had, in many cases, no meaningful choice over the necessary cuts. When presented with a budget inadequate to cover the full range of departmental programmes, schemes which cover statutory or regulated provision, or which are the subject of contractual obligations, have taken precedence over discretionary or short-term schemes, regardless of the relative societal benefit. Late-stage equality impact assessments by individual departments have no meaningful effect upon such decision making. The operative equality processes have become a superfluous exercise in light of the scale and speed at which the required cuts must be made and the lack of active ministerial involvement in making choices between competing programmes which draw on public resources. This stands in stark contrast to what is now the accepted practice of good governance elsewhere in the UK; cumulative equality impact assessments of draft budgets have become an established feature of what other public bodies consider to be necessary for compliance with public sector equality duties. The UK Treasury, for example, has noted its responsibility for conducting equality assessments in circumstances of funding decisions which cross-cut departmental

105 Department for Education, 'Equality and human rights policy screening for discontinuation of school holiday food grant (SHFG) payment scheme at the end of 2022/23 financial year' (3 August 2023) 4–5.

responsibilities in public statements, accepting that 'it is its usual practice in published distributional analysis to demonstrate the cumulative impact of decisions made since a nominated baseline year', and having published this analysis for budgets and other fiscal events since the 2019 Spending Review.[106]

Indirect rule will never look like anything other than an aberration in the context of a UK constitutional order which supposedly prizes the accountability of executive decision making to elected representatives.[107] It does not, however, have to be as blunt a tool as operated between 2022 and 2024. Efforts could be made to ensure more detailed ministerial guidance from the Northern Ireland Office over decision making, to restart North–South bodies, to undertake the same consideration of the operation of devolution's funding arrangements as has taken place in Wales and to ensure that effective equality impact assessments are embedded within budgetary processes. But perhaps this is very much the point. In the words of Girvan LJ, 'Parliament can legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government.'[108] But between 2022 and 2024 it singularly failed to do so, and other institutions have not been able to push the matter.[109] For all the prominence of parliamentary accountability in the UK Supreme Court's *Miller/Cherry* judgment,[110] it has gone missing in the Northern Ireland context.[111] When Westminster has become so insulated from the need to consider questions of Northern Ireland's governance during indirect rule, there is no meaningful source of pressure upon the UK Government to make this mode of governance any more effective. The inadequacy of indirect rule becomes self-realising.

---

106 Information Commissioner Decision Notice IC-181445-Y2S0 (21 March 2023) para 31.

107 See, for example, *In R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock) and *Bobb v Manning* [2006] UKPC 22, [13] (Lord Bingham).

108 *In re Hughes* [2018] NIQB 30, [69].

109 A challenge to the inadequate equality protections in the indirect rule budgetary processes was given leave for judicial review on the day the UK Government announced its plans to address the DUP's concerns and provide a basis for restoring power sharing: *In re Children's Law Centre* [2024] NIKB 4.

110 *R (Miller) v The Prime Minister* [2019] UKSC 41, [46] (Baroness Hale).

111 What Alison Young recognises as 'inter-woven existence of mutual accountability processes and actors' within the UK's general constitutional order is hollowed out; A Young, 'Accountability, human rights and beyond: lessons from social security law' in M Flinders and C Monaghan, *Questions of Accountability: Prerogatives, Power and Politics* (Hart 2023) 171, 171.

Darkest before the dawn?

Years of indirect rule and austerity have taken a heavy toll on large sections of society in Northern Ireland. By the autumn of 2023 Jeffrey Donaldson appeared to recognise that the longer that governance drift continues, the more public discourse will turn towards the possibility of radical changes to Northern Ireland's post-conflict governance order, and even to its constitutional status; 'having local institutions that succeed in delivering for everyone in Northern Ireland is an essential element in building our case [for maintaining the Union]'.[112] But still he vacillated. There was always the possibility that if the boycott remained in place until after the UK general election, then a new UK Government might take office which would be willing to contemplate general sanitary and phytosanitary (SPS) alignment with the EU, thereby removing further barriers to trade between Great Britain and Northern Ireland without the need to risk party unity or electoral losses. Even as a deal seemed on the cusp of being announced in December 2023, Donaldson put off the decision in the face of sustained opposition. The next statutory deadline for the formation of an Executive arrived and passed in January 2024, with the clock once again being reset with fresh legislation.[113]

This deadline extension, however, was for a matter of weeks, with the UK Government forcing a take-it-or-leave-it moment on the DUP. The offer, made public at the end of January, was for a funding package which would incorporate a new fiscal floor, equivalent to that operative in Wales,[114] together with a relaunch of the Windsor Framework in unionist-friendly packaging in the *Safeguarding the Union* Command Paper.[115] When this moment eventually came, the Assembly and Executive were restored within days. The DUP leadership faced some internal opposition, but for all that Jim Allister raged, there were no thunderous protests on the streets. And yet the mere possibility of such widespread public opposition had delayed the restoration of power sharing for months. The upheavals of 2022 to 2024 have thus exposed how, even after decades of a peace process, constitutional politics in Northern Ireland still has painfully shallow roots. Nor is the future set fair; the Assembly has to legislate for extensive revenue-raising measures in order to secure the new fiscal arrangements offered by the UK Government and the operation of the Stormont Brake and

112 J Donaldson, 'Conference 2023 – leader's address' (*MyDUP* 14 October 2023).

113 Northern Ireland (Executive Formation) Act 2024, s 1.

114 J Campbell, 'Stormont: what is in the £3.3bn financial package?' (*BBC News* 15 January 2024).

115 HM Government, *Safeguarding the Union* (2024) CP 1021. See C R G Murray, 'Saying nothing much at all, to general acclaim – the Windsor Framework relaunch' (*EU Law Analysis* 1 February 2024).

Stormont Lock vote will see Brexit continue to intrude on devolution's day-to-day workings. Notwithstanding the full operation of the measures introduced in the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, the instability inherent in the current power-sharing arrangements remains evident. Another boycott or the expansive use of the blocking mechanisms within the Executive and Assembly remain likely to undermine good governance in Northern Ireland at some point in the future. This means that we cannot cordon off analysis of indirect rule as an unfortunate episode, never again to be repeated. If the operation of the Strand One institutions remains fractious and disjointed, then the time will have come to break this cycle of logjams and pursue substantive reform of how Northern Ireland is governed. Too many good crises have already gone to waste.

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 613–640
Articles DOI: 10.53386/nilq.v75i3.1114

Peter Thiel's oxymoron? The Windsor Framework and exceptional economic governance spaces

Aoife O'Donoghue
Queen's University Belfast
Correspondence email: aoife.odonoghue@qub.ac.uk.

ABSTRACT

Much of the pro-Brexit campaigning focused on the possibility of freeports and/or Singapore on Thames. Yet, it is Northern Ireland that turns out to have the innovative trading space. Globally, there are networks of freeports, complex sovereign spaces such as Hong Kong and a variety of tax havens and charter cities taking a multitude of forms. Some of these have emerged from colonial spaces and others have not. There is also an accelerating trend towards the privatisation of space exploitation. But across many of such spaces there is a dearth of employment protection, of access to human rights, massive gaps in transparency and a lack of substantive democracy, or in some cases no democracy at all. Yet, for some, such as Peter Thiel, this makes them – apparently – the perfect economic space. The Windsor Framework, a response to the specific issues Brexit caused for Northern Ireland, stands in contrast. It includes human rights provisions in its texts and it acknowledges where it sits within a broader transitional framework which aims to embed democracy as core to how the space is run, which is the impetus for it being a unique economic space. This article explores the nature of the current pro and anti-democratic trends in creating exceptional economic governance spaces.

Keywords: Windsor Framework; democracy; international economic law; international trade law; space law; rights; charter cities.

INTRODUCTION

> Since 1920, the vast increase in welfare beneficiaries and the extension of the franchise to women – two constituencies that are notoriously tough for libertarians – have rendered the notion of 'capitalist democracy' into an oxymoron. (Peter Thiel)[1]

The conceit behind Thiel's oxymoron is that capitalism's failings are down to its incompatibility with democracy. While Marxist scholars are likely to agree, Thiel's solution would be at odds with their remedies. For Thiel, curtailing democratic governance and regulation is essential for commerce to thrive and the remedy lies in less public law and more technology, whether in space, on the internet or in sea-steads.[2] In each of these spaces, he sees a new form of exceptional economic space. Yet these economic spaces are not so new. Exceptional territorial spaces, where the laws differ from those of the surrounding areas often within the same country, primarily to facilitate commerce, are not uncommon and are becoming increasingly widespread. Their contemporary forms start with Shannon Airport in 1959 and these exceptional spaces are now so commonplace as to be almost unremarkable. Their acceptance as natural is evident across much of the pro-Brexit campaign, particularly in the possibility of freeports or Singapore on Thames. But it is Northern Ireland that is proclaimed 'the world's most exciting economic zone'.[3] Whether the Windsor Framework, the legal structure regulating trade in Northern Ireland post-Brexit, pushes against Thiel's oxymoron or supports it lies at the core of this piece.

This article uses Northern Ireland and the Windsor Framework to consider two trends observable in these exceptional spaces. First, there is an increase in democratic interventions by national and subnational governments in the creation and management of these spaces. Conversely, there is also an anti-democratic trend that prioritises commerce over democratic norms. In doing so, the article considers whether the Windsor Framework is a model for future exceptional economic spaces. This is a question of particular importance given the acceleration of private companies extending such exceptionalism into space. Not that capitalism and democracy are inevitably tied, always are in congruence or are co-constitutive, but rather that

1 Peter Thiel, 'The education of a libertarian' (2009) *Cato UnBound: A Journal of Debate*. Peter Thiel is the billionaire co-founder of PayPal and Palantir. He is deeply engaged with US politics having served on Donald Trump's transition team and financially supported other libertarian causes. Max Chafkin, *The Contrarian: Peter Thiel and Silicon Valley's Pursuit of Power* (Bloomsbury 2021).

2 Thiel (n 1 above).

3 'Rishi Sunak threatens to push through Brexit deal on Northern Ireland without DUP' *Financial Times* (London 28 February 2023).

the Windsor Framework suggests that there are possibilities in considering how commerce may be facilitated that does not depend on restricting democracy or rights. The question of the relationship between democracy and capitalism forms part of a larger conceptual and political debate that this article does not seek to resolve. Rather, the article queries the ways in which democracy is characterised within international economic law.

There is a tremendous variety amongst the network of freeports, tax havens, private cities and other complex sovereign spaces that exist today. This diversity reflects the intentions of those creating them, whether that is the private city of Próspera in Honduras, the multitude of zones within small geographical spaces in the Emirates, or now Northern Ireland. The objectives behind their creation vary from creating a liberation space free of (some) law, attracting foreign direct investment, or facilitating complex peace settlements. What each share is a specific relationship between commerce and governance, where the barometer of democratic engagement and oversight shifts, and it is this relationship that is the focus here rather than the specific demarcations between these territories.

An inter-relationship between commerce, government and, at times, imperialism is a significant, if an understudied, aspect of legal economic discourse. The Dutch East India Company and the City of London are just two examples of historic exceptional spaces.[4] The colonisation of space, a current focus of several tech billionaires, points to their potential future. This article begins by considering the role of law, both international and domestic, in creating these exceptional spaces alongside a brief discussion of their history. The article then looks at the two current trends before looking at the Windsor Framework. Before concluding, the article considers the current frontiers, particularly as regards to the privatisation of space, and the future of exceptional economic spaces, be they less, or perhaps more, democratic.

EXCEPTIONAL ECONOMIC GOVERNANCE SPACES

Special economic zones (SEZs), export processing zones (EPZs) and charter cities are just three forms of exceptional economic governance spaces (EEGS) that are part of a broader array of aberrant zones of sovereignty.[5] Their function and operation rests in economic interests and now stretches into non-territorial spaces and extending beyond

4 Andrew Phillips and J C Harman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press 2020) 22.

5 Thomas Farole and Gokhan Akinci, 'Introduction' in Thomas Farole and Gokhan Akinci (eds), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (World Bank 2011) 1–21.

the atmosphere into space.[6] In a 2021 special issue of the *Journal of Economic Law* Douglas Zeng outlines both the variations amongst EEGS and the ostensible benefits that accrue including more jobs, innovation in the economy and inward investment.[7] But, as is discussed later, other research is less certain that these benefits truly follow or outweigh their costs. These EEGS rest on several law-based premises, including three outlined by James Nedumpara, Manya Gupta and Leïla Choukroune:

(i) fiscal incentives in the nature of tax incentives and exemption of duties,

(ii) non-fiscal incentives in the form of infrastructural and developmental facilities, and

(iii) regulatory incentives covering lenient and flexible compliance requirements.[8]

With a fourth, outlined by Shreya Bhattacharya and Kyle Allen:

(iv) quasi-sovereign units or Charter Cities that are entirely privately governed not merely construct a separate economic framework for the designated territory, but also establish a legal and political system autonomous from the host state.[9]

These spaces include, both implicitly and explicitly, an inducement rooted in light-touch democratic and/or judicial oversight, or in some scenarios democracy's absence.[10] EEGS run the gamut from entirely private sovereignty (itself an oxymoron), designed to be neither democratic nor representative, to areas where the demarcation is less stark but nonetheless impactful, like freeports, to specific regions like Hong Kong whose sovereignty and economic life are inexorably tied. They include spaces created by functioning democracies that demarcate

6 The World Customs Organization's Kyoto Convention defines SEZs as 'a part of the territory of a Contracting Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory'. World Customs Organization, The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto 17 April 2008) ch 2, specific annex D.

7 Douglas Z Zeng, 'The past, present, and future of special economic zones and their impact' (2021) 24 Journal of International Economic Law 259–275.

8 James J Nedumpara, Manya Gupta and Leïla Choukroune, 'WTO litigation and SEZs: determining the scope of exceptional trade unilateralism' (2021) 24 Journal of International Economic Law 403–422, 403.

9 Shreya Bhattacharya and Kyle Allen, 'Is the charter cities moment here?' (*OXPOL* 30 October 2020); Margaret Kohn, 'The danger zone: charter cities, citizenship, and social justice' (*VerfBlog* 26 January 2020).

10 Free Trade Areas and Customs Unions also raise issues around democracy; however, they are not a key concern for this article.

a territory that is outwith the law that businesses and individuals habitually must comply with. They are also created in low- or mid-income economies which, while democracies, have histories linked to imperialism and whose economic sovereignty is always buffeted by both international law and more powerful economic actors, be they the states of the Global North, global corporations or international economic organisations.[11] Those created in non-democratic states also account for a variation in this trend, while the future lies in less traditionally territorialised spaces such as space. It is the removal of democracy, on a sliding scale from moving decision making upwards to 'private' sovereignty or international governance, that lies at the core of these queries, but also here lie the possibilities of an upscaling of democratic innovation and its deepening.

The legal infrastructures that support these EEGS are various. Underpinning much of international law, most of which is international economic law, is the Lotus Principle, that 'whatever is not explicitly prohibited by international law is permitted'.[12] This lays the foundations for why the World Trade Organization (WTO) does not not regulate these spaces, which, considering its overtly hostile view of inducements of commerce such as subsidies, tax incentives or non-tariff barriers, at first sight seems curious. Neither SEZs nor charter cities, which some describe as next generation SEZs, are mentioned in the WTO Agreements, nor are they present in most regional trade agreements. There are also few complaints made to the WTO Dispute Settlement Body (DSB) about the unilateral incentives within these spaces.[13] One recent case, between the United States (US) and India, suggests some willingness by the WTO DSB to engage with EEGS.[14] But the ramifications of this DSB finding is limited for two reasons:

---

11 Lorenzo Cotula and Liliane Mouan, 'Labour rights in special economic zones: between unilateralism and transnational law diffusion' (2021) 24 Journal of International Economic Law 341–360.

12 *The Case of the SS Lotus* 1927 PCIJ Series A, No 10.

13 WTO Request for consultations, *China—Measures Relating to the Production and Exportation of Apparel and Textile Products (China—Textiles)*, WT/DS451/1, G/L/1004, G/SCM/D94/1, G/AG/GEN/103; WTO Request for consultations, *China—Measures Related to Demonstration Bases and Common Service Platforms Programmes (China—Demonstration Bases)*, WT/DS489/1, G/L/1105, G/SCM/D105/1; WTO Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges (Brazil—Taxation)*, WT/DS472/R, adopted 11 January 2019; WTO, Panel Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia—Textiles)*, WT/DS461/R, adopted 22 June 2016; WTO Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles Apparel and Footwear(Colombia—Textiles)*, WT/DS461/AB/R, adopted 22 June 2016.

14 WTO Panel Report, *India—Export Related Measures (India—Export Related Measures)*, WT/DS541/R, circulated on 31 October 2019.

first, the US's current negative view of the WTO DSB, which lessens the possibility of it, or others, pursuing further cases, and, second, the restricted nature of the specific findings in the case.

Both the absence of disputes and of legal architecture suggest acquiescence by the WTO and its members to these specific forms of unilateralism, even while the EEGS create economic inducements that advantage some WTO members over others.[15] In contrast, measures designed to protect the environment, public health or development consistently run into difficulties at the WTO, which always places them as second priorities behind preventing economic unilateralism.[16] From an international trade law perspective a rationalisation of the difference in approach could be that the distinction between EEGS and traditional economic sovereign spaces is that, in the former, it is deregulation as opposed to, in the latter, where it is increased or altered regulation, at question. Nonetheless, if the aim is freer trade that does not create nation-based inducements, then the WTO should at least look more closely at EEGS and the possibilities of trade distortion. But such a stance chimes with much of the literature of the 1980s and 1990s that pushed toward the then proposed WTO as a mechanism where free trade could be operationalised at a remove from democratic oversight, perhaps recalling Thiel's oxymoron – the franchise interferes with commercial progress.[17] Recent trade law scholarship has returned to this point, with leading figures like Ulrich Petersmann calling for a return to the 1990s, and further back, to pre-First World War lessons where he describes trade as freer.[18] Albeit that the pre-First World War era is an imperial trade era and in many incidences contained thin or fully anti-democratic and imperial trade regimes rarely is highlighted.

Over 80 per cent of EEGS are in low- and middle-income states, with the form they take often reflecting their geographical location and history.[19] For low-income and middle-income countries, creating EEGS

15 Julien Chaisse and Georgios Dimitropoulos, 'Special economic zones in international economic law: towards unilateral economic law?' (2021) 24 Journal of International Economic Law 229–257.

16 For example, DS58: United States—Import Prohibition of Certain Shrimp and Shrimp Products (2001), DS381: United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2017).

17 Adam Tooze, 'Neoliberalism's world order' (2018) 65 Dissent 132, 134.

18 Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford University Press 2022); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 28.

19 François Bost, 'Special economic zones: methodological issues and definition' (2019) 26 Transnational Corporations Journal 141–153, 150; United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019: Special Economic Zones* (UNCTAD 2019) 137.

is regularly connected to World Bank or International Monetary Fund loans and their associated conditionality, which since the 1980s are tied to the Washington Consensus.[20] The Washington Consensus (and its 'new' variation) ties loans to market reforms, including the opening-up of economies to foreign investment, the divestment of national resources, the lowering of taxes and deregulation.[21] Using sovereign debt as a governance tool has a long history, with Haiti providing an example of where debt is exploited by multiple states, there France and the US, to control both the economy and the governance of a state.[22] The enormous cost to Haiti continues to have negative ramifications, long after it was initially required to compensate French slavers for their financial loss following Haiti's revolution and declaration of independence.[23] International investment law also plays a significant role, particularly if there is a dispute, especially one that arises from a change of government that leads to the regulation or ending of an EEGS. Ram and Guo describe the forms of obligations that investors have in these zones and the varieties in which they come.[24] These may include levels of investment, specific job target numbers alongside developmental objectives such as technology transfers, but also, potentially, labour welfare and environment standards. Sometimes these investors are states, for example China in Sri Lanka.[25]

---

20 T Krever, 'The legal turn in late development theory: the rule of law and World Bank's Development Model' (2011) 52 Harvard International Law Journal 288–319; F J Garcia, 'Global justice and the Bretton Woods institutions' (2007) 10 Journal of International Economic Law 461–481.

21 Jennifer Bair, 'Taking aim at the new international economic order' in Philip Mirowski and Dieter Plehweeds, *The Road from Montpelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 147; Dani Rodrik, 'Goodbye Washington consensus, hello Washington confusion? A review of the World Bank's economic growth in the 1990s: learning from a decade of reform' (2006) 44 Journal of Economic Literature 973–987; Katharyne Mitchell and Matthew Sparke, 'The new Washington consensus: millennial philanthropy and the making of global market subjects' (2016) 48 Antipode 724–749.

22 Hans Schmidt, *The United States Occupation of Haiti, 1915–1934* (Rutgers University Press 1995).

23 Robert Knox, 'Haiti at the league of nations: racialisation, accumulation and representation' (2020) 21 Melbourne Journal of International Law 245–274.

24 Joanna Lam and Rui Guo, 'Investor obligations in special economic zones: legal status, typology, and functional analysis' (2021) 24 Journal of International Economic Law 321–340.

25 Dilini Pathirana and Dinesha Samararatne 'The Colombo Port Project' in Matthew Erie (ed), *A Casebook on Chinese Outbound Investment: Law, Policy, and Business* (Cambridge University Press forthcoming).

The International Labour Organization (ILO) undertakes extensive work on the impact of EEGS on labour rights.[26] Informalisation of work regulations is common and, while at times these spaces drive employment up, the quality of those jobs, the conditions (including working hours) and the impact on other sectors of the economy outside the EEGS can be entirely detrimental to employment and regulatory standards.[27] The ILO, with the United Nations Conference on Trade and Development (UNCTAD), issued a report on working conditions across EEGS, linking them to the sustainable development goals.[28] The report states that:

> the history of violations of fundamental rights at work in such zones serves as a reminder of the need for clear and enforceable labour policy. If countries do not protect the rights of workers on whom the EPZs depend, the goal of economic development is ultimately unsustainable.[29]

They do suggest that these spaces could theoretically lead to higher labour standards and rights, and that this form of innovation could expand outwards beyond their territorialisation, rather than creating a lower standard, that in turn lowers the standards beyond. But the report acknowledges that very few were taking such a positive course. There were some examples in Brazil and South Africa. Their presence lends some credit to the possibilities of alternative practices that increase standards, even beyond labour rights to the environment and social policy, though both UNCTAD and the ILO, in their survey of 100 zones, found that the vast majority were not promoting themselves as regulatory innovators to support or develop rights, rather the opposite.

Domestic law plays a significant role, and specific examples are discussed below. From the international law perspective, domestic law is the root of EEGS' unilateralism, but this form of unilateral action is acceptable within international economic law to the extent that it favours rather than discriminates against foreign capital.[30] Unilateralism is problematic in one direction only. But domestic

26 Ramapriya Gopalakrishnan, 'Freedom of association and collective bargaining in export processing zones: role of the ILO supervisory mechanisms' Working Paper No 1 (International Labour Organization 2007); Conclusions adopted by the Tripartite Meeting of Experts to promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones (EPZs) (Geneva 21–23 November 2017).

27 Deirdre McCann, 'Informalisation in international labour regulation policy: profiles of an unravelling' in Diamond Ashiagbor, *Re-imagining Labour Law for Development* (Hart 2019) 77.

28 ILO-UNCTAD, 'Enhancing the Contribution of Export Processing Zones to SDG 8 on Decent Work and Inclusive Economic Growth: A Review of 100 Zones' 24 March 2020.

29 Ibid iv.

30 Chaisse and Dimitropoulos (n 15 above) 326.

constitutional law, and its requirements, including those connected to the judiciary or to democracy, are rarely considered as relevant curtailing factors. Yet, as will be discussed below, often they are important protectors of specific rights, the right to equality throughout the territory, for instance, as well as with regards to concepts of sovereignty over resources and territory.

A BRIEF HISTORY OF EEGS

The modern era of EEGS begins in the west of Ireland at Shannon Airport in 1959.[31] But, there is little to be gained from thinking of these trends as linear trajectories, or waves where one form overtakes the next or where there is a single form of economic space which morphs into another.[32] Rather there are a multiplicity of these spaces operating, contracting and expanding with differing aims and legal structures that overlap and evolve. This also points to the possibility of not one linear future, rather that the trends apparent at this present moment will themselves wax and wane. There are echoes in the past but cognisance of the imperialism of the past, and the non-territorialised aspects of the future, requires caution in drawing lessons or direct comparisons. Looking at what comes before illustrates that what is claimed to be new and innovative often echoes past attempts to create spaces apart where commerce overshadows other priorities.

The history of EEGS runs through, though not in a fixed pattern, from the 1600s to the Dutch East India Company, through the First World War, to 'banana republics' and into the present. The still operational Hudson's Bay Company, founded in 1670 – albeit that it surrendered its sovereign powers in 1869 – is an example of the evolving character of these spaces.[33] As Sharman and Phillips describe in their book *Outsourcing Empire*, charter company states illustrate the complicated history of the handing over of sovereign spaces to commercial interests that is consistent in occurrence if not form.[34] For instance, the nature

31 Sherzod Shadikhodjaev, 'SEZs under the WTO scrutiny: defining the scope of trade issues' in Julien Chaisse and Jiaxiang Hu (eds), *International Economic Law and the Challenges of the Free Zones* (Kluwer Law International 2019) 213–231.

32 Kimberly Hutchings, *Time and World Politics: Thinking the Present* (Manchester University Press 2013) 16; Emily Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (University of Toronto Press 2016) 145.

33 Rupert's Land and North-Western Territory – Enactment No 3: Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870; A Phillips and J C Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press 2020) 130.

34 Phillips and Sharman (n 33 above) 153.

of the territorialisation of economic spaces has repeatedly evolved. Colonialism plays an important role in these contexts, in the histories of the interlink between imperialism and corporations such as the East India Company, across the canons of international law such as Hugo Grotius' focus on trade routes, or the protection of citizens abroad which extended to their commercial interests, to the charters granted by various sovereigns to adventurers for areas of land in the Americas and Pacific.[35]

The continuities extend beyond the Hudson's Bay Company, for instance, in the tax havens of many British overseas territories.[36] Further, both Singapore and Hong Kong are very specific economic spaces and reminders of how colonial history, including economic innovations alongside geographic location, provide for examples that many suggest should be emulated, albeit that neither their histories nor their current policy/legal structures can be recreated. During the Brexit campaign, both Singapore and Hong Kong were identified as spaces to mimic, as Singapore on Thames, albeit absent the forms of social housing, healthcare or educational provision that each provide.[37] These continuities do not just occur in Other places, in the colonial domain. The City of London and its corporation, with its history dating to the early Norman period, is yet another example, especially its enfranchisement of business interests.

The so-called banana republics of Central America also provide iterative connections with the present, particularly with regards to recent neo-imperialist reforms of investor governance spaces. The loss of sovereignty in these spaces holds particular resonance for Honduras. A banana republic is where a capitalist government, operated as a private commercial enterprise for the exclusive profit of the ruling and foreign class, exists. They are, by their nature, undemocratic. Marcelo Bucheli describes banana republics as the 'quintessential representation of American imperialism in Latin America', structured by American fruit companies that profited by 'holding the local governments in

35 For example the First Virginia Charter April 10, 1606; Yale University Project, '1996–2007 The Avalon Project'; Martine Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Brill 2006).

36 Eric A San Juan, 'Fiscal sovereignty: tax havens and the demarcation of the Third World' (2022) 54 George Washington International Law Review 43–101; Ronen Palan, 'Tax havens and the commercialization of state sovereignty' (2002) 56 International Organization 151–176.

37 Quinn Slobodian, *Crack-Up Capitalism: Market Radicals and the Dream of a World without Democracy* (Penguin 2023) 13, 61. Other aspects of their governance, such as draconian policing have also been emulated within the United Kingdom, see Illan Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (Taylor & Francis 2020) 31.

[their] pockets, controlling the local economy of the host countries, and harshly exploiting the plantation workers'.[38] In Honduras by the late 1800s, the United Fruit Company, the Standard Fruit Company, and the Cuyamel Fruit Company controlled the cultivation, harvesting and exportation of bananas and completely managed the road, rail and port infrastructure, while the Government of Honduras had ceded title to vast swathes of the north of the country.[39] Eventually, the US dollar became legal tender in Honduras. Throughout this period, local activists in Honduras maintained their opposition to privatisation of their governance, a battle that continues, as discussed below.

CISKEI

Ciskei, a creation of apartheid South Africa, is a historic example, but a critical one. Ciskei was one of 10 'independent states' or Bantustans. Bantustans were specific territorial spaces set apart as Black tribal homelands, where individuals were forcibly transferred to from South Africa and then stripped of their South African citizenship.[40] Bantustans contained legislative assemblies with a degree of self-rule and nominal independence, albeit no state recognised them and they were condemned on multiple occasions by the UN General Assembly.[41] The rationale for considering Ciskei is its place as an exemplar of EEGS, favoured by Milton Friedman in his advice to South Africa in the 1970s.[42] This form of 'enclave' he described as being like Hong Kong, and as giving freedom without the ballot box, freedom without democracy, where a pure form of libertarian economic governance could prevail.[43] This did not have popular support, with many Black

38 Marcelo Bucheli, 'Enforcing business contracts in South America: the United Fruit Company and Colombian Banana Planters in the Twentieth Century' (2004) 78 Business History Review 181–212.

39 Malcolm D MacLean, 'O Henry in Honduras' (1968) 3 American Literary Realism 1870–1910 36–46.

40 Henry J Richardson II, 'Self-determination, international law and the South African Bantustan policy' (1978) 17 Columbia Journal of Transnational Law 185–220, 186; it has an older history as a former Bantu, the Bantu Authorities Act 1951.

41 James Crawford, *The Creation of States in International Law* (Clarendon Press 2006) 338–349; GA Res 2775, 26 UN GAOR, Supp (No 29) 39, UN Doc A/8429 (1971); GA Res 3411, 30 UN GAOR, Supp (No 34) 35, UN Doc A/10034 (1975); GA Res 31/6, 31 UN GAOR, Supp (No 39) 10, UN Doc A/31/39 (1976).

42 'With Rose Friedman, "Record of a trip to southern Africa, March 20–April 9, 1976" unpublished typescript transcribed from a tape, dictated 7–9 April 1976. Excerpts published in Milton Friedman and Rose Friedman, *Two Lucky People: Memoirs* (University of Chicago 1998) 435–440.

43 Slobodian (n 37 above) 84; Friedman and Friedman (n 42 above).

South African groups organising against them, often followed by brutal suppression.[44]

Ciskei was declared independent in 1981 and aimed to concentrate the Xhosa-speaking peoples into one area, but, more than this, it was created as a form of legal/economic system to attract foreign investment.[45] It contained little by the way of labour, employment or other protections while also having lower taxes, including no corporate taxes, than the rest of South Africa.[46] The Ciskei 'government' heavily subsidised industry to attract foreign investment while also ensuring easy access to capital. It contained a large unorganised workforce. The Bantustans were densely populated, while the state often paid half of factory wages, and wages were pegged at 25 per cent lower than the rest of South Africa. Most international firms operated with little regulation in Ciskei.[47] In stark contrast, the Black South African populations were generally only allowed to run one business, and it had to be one selling necessities.[48]

There was no democracy, but what existed was a society built to attract private capital. Ciskei was described as a 'laboratory experiment', an example trumpeted at the time, and continues to be pointed toward as an exemplar where the extreme form of racialised totalitarianism is brushed over in favour of a whole regime dedicated to commerce.[49] The aim was to create a Hong Kong of Africa.[50] Yet, there was no boon for the population: for example, Ciskei had an abnormally high death rate – infant mortality was 50 per cent.[51] As with broader South African history, protest and strike eventually led to the end of Ciskei, but it has

---

44 'Say no to Ciskei independence' (*South African History Online* 22 February 2016).

45 Status of Ciskei Act 110 of 1981; Republic of Ciskei Constitution Act 20 of 1981; Ciskei Government Gazette, vol 9, no 96 (4 December 1981); John Dugard, 'South Africa's independent homelands: an exercise in denationalization' (1980) 10 Denver Journal of International Law and Policy 11–36, 18.

46 Alan Hirsch, 'Investment incentives and distorted development: industrial decentralization in the Ciskei' (1986) 17 Geoforum 187–200, even as the proponents maintained its success; Leon Louw, 'Ciskei's economic reforms: correcting the critics' (1986) 3 Indicator South Africa 18–21.

47 Laura Evans, *Survival in the 'Dumping Grounds': A Social History of Apartheid Relocation* (Brill 2019) 75.

48 Henry J Richardson II, 'Self-determination, international law and the South African Bantustan policy' (1978) 17 Columbia Journal of Transnational Law 185–220, 188.

49 Slobodian (n 37 above) 97; see also on Chile under Pinochet, Whyte (n 18 above) 156.

50 Whyte (n 18 above) 84.

51 Alan Hirsch, 'Industrialising the Ciskei: a costly experiment' (1986) 3(4) Indicator South Africa 15–18; Meredeth Turshen, 'Health and human rights in a South African Bantustan' (1986) 22 Social Science and Medicine 887.

maintained its place as an exemplar of what is possible amongst those who agree with Thiel's oxymoron.[52] Freedom without the ballot box remains a potent claim.

PRÓSPERA: A CONTEMPORARY CISKEI?

Próspera is a private city located on the island of Roatán in Honduras with its own fiscal, regulatory and legal systems, founded in 2011 by Honduras Próspera Inc, a US company registered in Delaware.[53] Próspera is a charter city that, much like the charter companies of the imperial era, possesses its own judicial, administrative and business practices, its own sovereign authority.[54] Cao describes charter cities as hyperkinetic variants of SEZs.[55] Próspera's owners – and owners is the correct term – describe it as for 'builders, pioneers, and risk-takers who believe in the boundless potential of human achievement and choose to build the future we want'.[56] It is not alone, there is a stalled charter city proposal for Madagascar and a plan, which did not get far, 'in 2020 following discussions between property developer Ivan Ko and the Irish Government, with the former proposing the construction of a safe haven in the form of a semi-autonomous city in Ireland', to be called Nextpolis.[57] Charter cities are becoming a popular proposition: for instance, the idea was floated during Liz Truss's brief sojourn as Prime Minister and by Rishi Sunak.[58]

Próspera was established following a coup in Honduras. The new Government created zones for employment and economic development (ZEDEs). ZEDEs were intended to be part of the newest generation of EEGS, a sovereign space apart from the rest of Honduras. Próspera's design means 'private government decides and adjudicates on all law'. It is not the absence of law, but rather that commercial interests design the law. In 2012, the Honduran Supreme Court found ZEDEs to be unconstitutional.[59] The Supreme Court found ZEDEs to be a threat to Honduras' territorial integrity as they possessed state-like competences (administrative, judicial and financial) thus also undermining Honduran territorial sovereignty. The Court also found

52 Slobodian (n 37 above) 84.
53 Próspera Law Code.
54 Lan Cao, 'Charter cities' (2019) 27 William and Mary Bill of Rights Journal 717–764, 720.
55 Ibid 721.
56 Próspera website homepage.
57 Bhattacharya and Allen (n 9 above).
58 George Monbiot, 'Welcome to the freeport' *The Guardian* (London 17 August 2022).
59 RI-769-11 Casación Constitutional 17 October 2012.

they violated Honduran citizens' freedom of movement as they could not move to Próspera without paying an annual fee and signing the city's social contract.[60]

The findings of the Honduran Supreme Court on its Constitution suggest that endeavours like it are in vain, however, the judges were subsequently replaced (one of the lawyers leading the campaign against the law was also murdered), and the Constitution amended to permit ZEDEs.[61] Huge protest movements and the deaths of activists and journalists across Honduras followed. Honduras' history as a banana republic is important in that context, as is Próspera's own branding. Its website describes how 'legacy systems, poor governance and its cumulative effects trap human potential, leading to economic stagnation', comparing G20 to non-G20 states, arguing that, just as in Hong Kong and Singapore, it can help Honduras prosper through its good governance, which assumes that Hondurans are not capable of this themselves. The imperialism of the context is sometimes quite blatant. When Stanford economist and former World Bank chief economist Paul Romer contemplates the idea of returning to colonialism as a good thing and doing it explicitly via trade, this is one form he is alluding to, and indeed he was involved with Próspera.[62]

A newly elected Government suspended the ZEDE in 2021. Próspera currently stands in legal limbo while its owners, via the International Centre for Settlement of Investment Disputes (ICSID), are seeking nearly $11 billion in compensation, two-thirds of the 2022 Honduran budget, under the Central America Free Trade Agreement and the US–Honduras Bilateral Investment Treaty.[63] Some US members of Congress have called for the US to withdraw from this form of investor dispute specifically because of Próspera.[64] This is a very current example of attempts to create spaces outside of democracy, rights or law and it is a space that appears not to have any difficulties within international economic law. Critically, these spaces are not not compatible with the General Agreement on Tariffs and Trade, General

60 Ibid.

61 George Rodríguez, 'Honduran Supreme Court deems private cities unconstitutional; President warns they will be built eventually' (2012) Latin America Data Base 1–3; Beth Geglia. 'Honduras: reinventing the enclave' (2016) 48 NACLA Report on the Americas 353–360.

62 Paul Romer, 'Why the world needs charter cities' (*TEDTalk* 2010).

63 Próspera is registered as a corporation in Delaware: *Próspera, Honduras Próspera Inc, St John's Bay Development Company LLC and Próspera Arbitration Center LLC v Republic of Honduras* ICSID Case No ARB/23/2.

64 David Lawder, '33 Democrats urge ban on investor-state dispute provisions in all US trade deals' (*Reuters* 3 May 2023).

Agreement on Trade in Services etc, while also paradoxically defended under the terms of international investment law.[65]

THE ANTI-DEMOCRATIC TREND

Economist Garett Jones' 2020 book, *10% Less Democracy: Why You Should Trust Elites a Little More and the Masses a Little Less*, sums up a particular approach to governance where democracy is considered to have failed (to a greater or lesser extent) and something else, often something either elite or commercially driven, should replace it.[66] This is not new, such debates have been a constant since franchises were extended. Quinn Slobodian's book, *Crack-up Capitalism*, describes this trend of legal economic space creation, as does his earlier work, *The Globalists*, across the twentieth and twenty-first centuries.[67] Equally, Jessica Whyte outlines the processes by which human rights discourse and neoliberalism were reconciled, while maintaining an aversion to democratic oversight and, in more extreme cases, supporting 'transitional authoritarianism' to ensure the creation of a neoliberal economy.[68] This is not to suggest a uniformity of approach, much as EEGS vary in form, the anarcho-capitalist, ultra libertarian or neoliberal aims of these theories/political interventions is to create a space where democracy and a rights-based space is secondary to the economic interests of commerce also vary.

Newer iterations, whether that is the discourse on space, which will be returned to, William Rees Mogg and James Dale Davidson's sovereign individual,[69] Mark Zuckerberg's claim that Facebook was more like a government than a traditional state,[70] or Balaji Srinivasan's online secession where he claims a new de-territorial state could emerge, the parameters of where EEGS may move next are both familiar and new.[71] Srinivasan's online state would not have citizens but rather shareholders, nor would they apparently require healthcare or education or even retirement, and, while he describes it as consensual,

65 Nedumpara et al (n 8 above).

66 Garett Jones, *10% Less Democracy: Why You Should Trust Elites a Little More and the Masses a Little Less* (Stanford University Press 2020).

67 Slobodian (n 37 above).

68 Whyte (n 18 above) 178.

69 James Dale Davidson and William Rees Mogg, *The Sovereign Individual: Mastering the Transition to the Information Age* (Touchstone 1999).

70 Maryanne Kelton, Michael Sullivan, Zac Rogers, Emily Bienvenue and Sian Troath, 'Virtual sovereignty? Private internet capital, digital platforms and infrastructural power in the United States' (2022) 6 International Affairs 1977–1999, 1977.

71 Balaji Srinivasan, *The Network State: How to Found a New State* (Kindle 2022).

it is not democratic.[72] Digital iteration form 'Economic Zone 5.0' is described as a 'new unilateral compromise between the state and market'.[73] There are specific digital zones that exist not as separate physical spaces but digital EEGS that have already been created in Korea, Malaysia and China.[74] Charter cities could be categorised both as 1.0 and 6.0, while we have the City of London, and the US state of California that, since the 1870s, allow for the establishment of charter cities and have the 'freedom to set their own rules about elections, salaries and contracts',[75] the newer forms of charter city like Próspera also exist. This in many ways demonstrates the non-linear ways in which the history of the EEGS evolves.

These exceptions are trending toward the routine. Exceptions from generally applicable domestic regulations, legal requirements or democratic norms is the framework on which EEGS are based. Although there is no complete withdrawal of laws, rather they are remarkable in the general adherence to the lessening of democratic ties.[76] As already discussed, they are on a spectrum, with some retaining democratic oversight but with the potential for internationalised investor disputes and large exemptions from tax, employment, environmental and other laws, but others are not and extend to private sovereignty. There are almost too many of them with such variety – even within Dubai there are multiple sub-categories – that capturing an overall trend is difficult, but within each of these EEGS law plays a fundamental role. The EEGS poke holes within sovereign states and create zones outside democracy, employment, environmental and human rights law where commerce holds sway, but this is achieved through law. This is often accompanied by neoliberal economics, or in some places libertarianism and in others neo-imperialism. But they require a lot of law to exist and maintain their operation.

What is important about each of these examples is that each has happened, and each was based on a premise where democracy and traditional sovereignty were and are replaced. The human cost is sometimes recognised; they rarely make claims to create a great place for everyone, albeit there is often a claim to a better future. But the 'cost of freedom' is human misery for the majority achieved through steep deregulation of some laws with the introduction of often draconian

72 Ibid. See also, on Bitcoin, David Golumbia, *The Politics of Bitcoin: Software as Right-Wing Extremism* (University of Minnesota Press 2016).

73 Zeng (n 7 above).

74 Ibid.

75 Cao (n 54 above) 727.

76 Nedumpara et al (n 8 above). Lorenzo Cotula, 'The state of exception and the law of the global economy: a conceptual and empirico-legal inquiry' (2017) 8(4) Transnational Legal Theory 424–454, 441.

policing and the safekeeping of private property above all else, while the evidence that these zones create wealth for a state remains scant, despite decades of examples.

POTENTIAL PRO-DEMOCRATIC TRENDS

There is another trend. The assumption when creating economic spaces is the importance of keeping the negotiations far away from populations lest they ruin them – from the point of view of commerce – but that this is not necessarily correct. Differing forms of democratic engagement, from the subnational to referendums, the involvement of other parts of government, including courts, alongside civil society activism, can be essential to creating EEGS that may be positive in driving regulation in favour of the environment, labour standards and human rights.

Ohio Omiunu documents recent trends that see subnational regions engaging directly in trade negotiations. His primary examples are Canada, Nigeria and Belgium and, by necessary extension, the European Union (EU).[77] Across his work, he outlines ways in which subnational areas input into economic law negotiations and/or influence them. Though the reaction of some to the rejection of a trade agreement by Wallonia, a sub-region of Belgium, was that Wallonia needed to be got around, though, as a mixed agreement, the EU, as a legal and political project, required the region's inclusion.[78] The tendency toward attempting to sideline the troublesome region or to alter the law to remove the necessity of consultation hints towards the anti-democratic trend, but there are hints the opposite trend may be emergent.

Canadian federal states, at the request of the EU, were directly involved in negotiating the Comprehensive Economic and Trade Agreement (CETA),[79] In contrast, Wallonia's rejection of CETA from within the EU is evidence of what potentially happens when there is no consultation. But further, the possibility of improved settlements if more time is taken to undertake democratic engagement is evidenced,

77 Ohio Omiunu, 'The evolving role of sub-national actors in international trade interactions: a comparative analysis of Belgium and Canada' (2017) 6 Global Journal of Comparative Law 105–137; Ohiocheoya Omiunu and Ifeanyichukwu Azuka Aniyie, 'Evolution of subnational foreign economic relations in Nigeria' (2018) 25 South African Journal of International Affairs 365–392.

78 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01; Franz C Mayer, 'European vetocracy? How to overcome the Wallonian CETA problem' (*VerfBlog* 24 October 2016).

79 Stéphane Paquin, 'Federalism and the governance of international trade negotiations in Canada: comparing CUSFTA with CETA' (2013) 68 International Journal 545–552.

especially as regards Quebec. Quebec's participation resulted in issues such as regulatory cooperation, certification, labour mobility and cultural diversity being brought into the negotiations.[80] In contrast, subregions of the EU were excluded from negotiations and, while requiring Wallonia's assent could be regarded as *sui generis*, as will be discussed below, it is not the only part of the EU that requires a more localised international economic law response.[81] The involvement of Canadian federal states resulted in their direct influence on the outcome and, as Stéphane Paquin argues, contributed to its legitimacy.[82] Wallonia's rejection of CETA chimed with much discontent with its content throughout the EU, in some ways representing broader concerns with its substance.

CETA also arises in the Irish context, though, as a non-federal state, the difficulties were less to do with the subnational and more as regards the requirements of the Irish Constitution. In *Costello v Government of Ireland*, the Irish Supreme Court decided that the Irish Arbitration Act 2010 could not be set aside via Treaty negotiations and that pause and consideration of the impact on domestic law was necessary.[83] Specifically, a majority of the Supreme Court held that the quasi-automatic effect of the investor tribunals created by CETA rulings would undermine state sovereignty especially in its legislative and judicial capacity, as well as putting at risk the state's 'general constitutional identity and fundamental constitutional values'.[84] The Irish Supreme Court ruled CETA could be brought within the terms of the Constitution but decided that a Constitution grounded in popular sovereignty and democracy alongside the structures by which domestic law is created meant that it required the involvement of the institutions of state. The Supreme Court decided not that CETA could never be in accordance with the Irish Constitution but rather that the necessities of democratic constitutionalism required more. Ireland offers a complicated example of interactions with international economic law. Since 1987 and *Crotty v An Taoiseach*, there is an embedded legal narrative where the potential alienation of power away from the domestic legal order and the Irish Constitution requires the consent,

80 Stéphane, Paquin 'Trade paradiplomacy and the politics of international economic law: the inclusion of Quebec and the exclusion of Wallonia in the CETA negotiations' (2022) 27 New Political Economy 597–609, 605.

81 Michel Huysseune and Stéphane Paquin, 'Paradiplomacy and the European Union's trade treaty negotiations: the role of Wallonia and Brussels' (2023) Territory, Politics, Governance 1–20.

82 Paquin (n 80 above) 605.

83 *Costello v Government of Ireland* [2022] IESC 44, [230] per Hogan J Eoin Daly; 'From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland' (10 June 2023).

84 *Costello* (n 83 above) [230] per Hogan J.

often by referendum but also via the institutions of state, to do so.[85] In *Crotty*, the Supreme Court defined sovereignty as a set of competencies that the executive cannot alienate without a referendum.[86]

If we return to Honduras and the original 2012 finding of unconstitutionality by its Supreme Court, there you get a similar argument as regards to sovereignty as being beyond the power of the executive to alienate. For Honduras, this includes freedom of movement, and the executive's lack of authority to pass that to a private entity to regulate and commercialise. In Ireland, the altering of dispute settlement processes and the involvement of investment dispute bodies could also not be created via executive, or EU, competence. If we go back to the idea of the charter city for Ireland, Nextpolis, and compare it with Próspera there is a distinct thread of constitutional hesitancy in both states that suggests that Ireland's Supreme Court would likely come to the same conclusion that its Honduran counterpart did. The Irish executive could not create a charter city without a referendum. Charter cities go far beyond Shannon Airport as the originator of modern EEGS. Any referendum would not only be a democratic exercise but also a use of constituent power to alienate a territory running closer to an exercise of self-determination. Ireland has altered its territorial claims via referendum; thus, it is not out of the question, but that was in relation to peace in Northern Ireland, the necessity of consent for unification and not in the service of commerce.[87] Próspera proceeded through the altering of the Constitution, the removal of members of the judiciary, and other forms of intimidation. Alienating executive/legislative/judicial competencies without the exercise of constituent power or at least democratic engagement should provide a moment of pause for any proposition to create an EEGS.

The reactions across Europe and Canada to CETA, in Honduras and historically in South Africa, are examples of how knowledge can be galvanised as resistance. The failure of both megaregional agreements, the Trans Pacific Partnership and the Transatlantic Trade and Investment Partnership (TTIP), were for multiple reasons, but the absence of transparency and the upending of democratic accountability formed part of the resistances across many countries to their

85 *Crotty v an Taoiseach* [1987] IR 713; see also *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

86 *Crotty* (n 85 above); Tom Hickey, 'Popular sovereignty in Irish constitutional law' (2017) 40 Dublin University Law Journal 147–170.

87 C R G Murray and Aoife O'Donoghue, 'Unity in diversity? Constitutional identities, deliberative processes and a "Border Poll" in Ireland' (2023) 34(2) King's Law Journal 340–368.

imposition.[88] Under TTIP, the imposition of child labour standards, common in EU economic agreements with the Global South, was an outside imposition of standards in an unaccountable and problematic way.[89] Bottom-up resistance played an important role in stalling their advance, forming another strand of the pro-democratic trend. Feminist responses, indigenous organising and urban utopianism each offer further examples of bottom-up resistance to undemocratic trends.[90] There are movements in Toronto, akin to sanctuary cities in the US, which are about localising politics and demonstrating that a distinct form of more democratic charter city is possible.

> If the city is to become a site of social citizenship and social justice, we must defend local normative orders that are inclusive and solidaristic. The city should be imagined as both a particular site of shared value and also a nodal point in broader, cosmopolitan networks of exchange and obligation. The right to the city should not be construed as something akin to shareholder value in corporate law. This means that city-zens should not use local institutions exclusively to promote the interests of current residents, and local decisions should be reviewed by constitutional courts or supranational human rights courts for consistency with principles of rights and equity.[91]

The diffusion of knowledge and creation of transnational alliances is not inevitably worth the price that some, especially in Honduras, pay. Contributing progressively to constructing EEGS or forcing their re-imagining may not just make them more legitimate, but also improve their substantive outcomes.[92] It potentially makes it more likely that EEGS could claim higher labour or environmental standards, which the ILO argues is possible, rather than anticipating a rush to the bottom, albeit, as always, with substantive democracy that requires deep political engagement.

---

88 Aoife O'Donoghue and Ntina Tzouvala, 'TTIP: The rise of "mega-market" trade agreements and its potential implications for the Global South' (2016) 8(2) Journal of Trade, Law and Development 181–209.

89 Richard Gibb, 'Post-Lomé: the European Union and the south' (2000) 21 Third World Quarterly 457–481.

90 Casey R Lynch, 'Representations of utopian urbanism and the feminist geopolitics of "new city" development' (2019) 40 Urban Geography 1148–1167.

91 Kohn (n 9 above).

92 C Freudlsperger, *Trade Policy in Multilevel Government, Organizing Openness* (Oxford University Press 2020).

THE WINDSOR FRAMEWORK

Returning to Northern Ireland, the article now moves to the question of what the Windsor Framework tells us about these trends. As already discussed, Rishi Sunak describes the Framework as creating the most exciting economic space in the world, and further, removing barriers, like a border in the Irish Sea, that had become serious sources of tension.[93] But what does Sunak mean by that? Does he mean Singapore on Thames as his erstwhile immediate predecessor and her Chancellor wanted for London, a large form charter city, perhaps? Does he mean the subnational as a new form of democratic intervention within trade law development?

On the positive side of the equation, we have article 2 of the Framework.[94] In contrast to Thiel's oxymoron, article 2 embeds rights and anti-discrimination law as central to how the space is understood. Article 2 ensures that rights will not regress because of Brexit or establishing Northern Ireland as a form of EEGS.[95] Article 2 links human rights that come both from the 1998 Good Friday Agreement[96] and EU equality provisions, explicitly six EU Directives that Northern Ireland dynamically aligns with. Another positive feature is how the rights elements became incorporated. Specifically, the role that civil society, politicians from locale to Members of the European Parliament, alongside the Northern Ireland Human Rights and Northern Ireland Equality Commissions played in ensuring rights did not regress and, further, that these protections were included in the Agreement and the human rights bodies given substantive roles in oversight.[97] When seen in global terms, this is a substantive progression on how EEGS are conceived, albeit from the local level, there is a myriad of responses, as there are to Brexit more broadly. Article 2 has already been the subject of three cases, and thus far has disapplied two pieces of UK legislation

93 R Sunak, HC Deb 27 February 2023, vol 728, col 57, though not all concerns are resolved, see *In re Allister* [2023] UKSC 5.

94 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Official Journal of the European Union, Document 12020W/TXT (L 29/7) (31 January 2020).

95 Aoife O'Donoghue, 'Non-discrimination: article 2 in context' in Federico Fabbrini (ed), *The Law and Politics of Brexit Part IV* (Oxford University Press 2022) 89–106.

96 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.

97 C R G Murray and Claire Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1–28.

that diminished rights within Northern Ireland, albeit both cases are subject to appeal.[98]

Another feature, significant given what occurred in Wallonia, is Michel Barnier's, as the EU chief negotiator, direct engagement with EU members and not just the member states themselves but specific regions within them alongside various groups directly affected by Brexit.[99] This included multiple visits to Northern Ireland and meetings with various representative groups from civil society, as well as politicians and state agencies. While this was not intended to set a precedent for future EU negotiations, yet given what occurred in Wallonia, this form of engagement at the national and subnational level suggests a distinct form of EU negotiation engagement is possible and feasible.

On the negative side, regarding the creation of new laws under the Framework, there is a democratic deficit. Where dynamic alignment is necessary, some oversight through committee structures is in place, but direct engagement in how new law is made remains absent.[100] An easy alleviation, partially at least, would be for the Irish Government to extend the European parliamentary franchise to include those resident in Northern Ireland entitled to claim Irish citizenship. Under both EU and Irish law this would be straightforward, it would not require a referendum and there is precedent amongst EU states for citizens not resident in the country to vote in EU parliamentary elections.[101]

In updating from the Ireland/Northern Protocol and renaming it as the Windsor Framework (itself a response to public dissatisfaction), increased involvement by Northern Ireland's devolved institutions is in place. The Stormont Brake and the Windsor Framework Democratic Scrutiny Committee, two of the sites in which EU law

98 *SPUC* (2023) NICA 35; *Dillon* (2024) NIKB 11; *JR295* (2024) NIKB 35. See Colin Murray, 'We're all trying to find the guy who did this … the disapplication of the Illegal Migration Act in Northern Ireland' (*EU Law Analysis* 15 May 2024); Anurag Deb and Colin Murray, 'The Dillon Judgment, disapplication of statutes and article 2 of the Northern Ireland Protocol/Windsor Framework' (*EU Law Analysis* 8 March 2024).

99 M Barnier, *My Secret Brexit Diary: A Glorious Illusion* (Polity Press 2022) 85, 89, 118.

100 Murray and Rice (n 97 above).

101 Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Continuing EU citizenship "rights, opportunities and benefits" in Northern Ireland after Brexit' (Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission March 2020) 54–55. See also *Spain v United Kingdom of Great Britain and Northern Ireland* Case C-145/04 2017.

changes that impact on Northern Ireland are scrutinised, are important innovations.[102] The Stormont Brake, which enables the Northern Ireland Assembly to object to, albeit not block, new EU laws is particularly noteworthy.[103] To be operationalised, first, the new EU measure must come within the scope of article 13 of the Windsor Framework, it must significantly differ from what it is amending or replacing, it must be significant and specific to the everyday life of communities in Northern Ireland and in a way that is liable to persist. A specific procedure within the Northern Ireland Assembly is necessary including discussions with the UK Government and traders and other interested parties as well as with the EU. Thirty members of the Assembly from two different political parties or one political party and an independent must support the Brake and this invocation is then forwarded to the Secretary of State for Northern Ireland who sits at the UK Government level. It is then for the Secretary of State to decide if the procedures, including quite tight deadlines, have been met. The UK Government decides at that point whether to, and in good faith, notify the EU and then a further procedure commences. Thus far, the Stormont Brake has not been pulled. And it remains to be seen how effective it will be. It does require, for instance, that the Stormont Assembly is operational, and it remains at the UK Government's discretion as to whether it will be pulled. But, set against the other democratic innovations, it does suggest that with some imagination a plethora of democratic oversight options are possible.

While these were not satisfactory to all parties, the Windsor Framework is quite a boutique arrangement, especially in the terms of an EEGS. Direct democratic engagement is far from the norm, and, while it remains to be seen how it will function, the possibilities now that it is introduced is that it could become a new workable norm in economic negotiations.

102 C R G Murray and N Robb, 'From the Protocol to the Windsor Framework' (2023) 74(2) Northern Ireland Legal Quarterly 395–415, 405; A Deb, 'Parliamentary sovereignty and the protocol pincer' (2023) 43 Legal Studies 47–65, 63–64; Windsor Framework (Democratic Scrutiny) Regulations 2023 (SI 2023/XX) para 2.

103 Article 13(3a) Decision No 1/2023 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework [2023/819] PUB/2023/426 OJ L 102, 17 April 2023, 61–83.

SPACE AND THE FRONTIER OF EEGS

In 2022, the space industry was worth $469 billion and will reach $737 billion by the end of the decade.[104] When you consider that $11 billion represents two-thirds of Honduras' annual budget, the sheer size becomes apparent. Not only does the ever-increasing size of the industry make it important, but it is also where a tremendous amount of legal innovation is occurring and where zones of exceptionalism appear to have found their newest locale. This section is not intended to give a full account of the legal and economic questions that space exploration creates, but rather to point to where the debates on EEGS are currently moving toward.

Space is the new wild west, the new spice islands of the Dutch East India Company,[105] the new factories of Ciskei, or, to echo a long-held view, not from *Star Trek* but from proponents of the US space programme of the 1950s, the final frontier.[106] Mary Jane Rubenstein outlines in her work the language of frontiers, of exceptionalism, of rights of extraction, of destiny, of exploration and occupation that are rife in the discourse on space.[107] But she asks a fundamental question: just who is working in the kitchens in the restaurants on Elon Musk's luxury trip to Mars?[108]

A small but important example of the way we conceive of space is found in the Moon Treaty, which, among other things, prohibits sovereignty in any part of space.[109] Albeit other than India, no space-active state has ratified the Treaty. The Moon Treaty declares it to be the common heritage of mankind. But, as with the oceans, this has meant more about licensing for mining than it has about seeing space as a non-economic place to be shared.[110] The history of the moon protected by the Moon Treaty is the history since humanity started to physically interact with it: it does not have a historical existence beyond our interactions with it. It is entirely anthropocentric.[111]

How space is conceptualised in the West is very much as a frontier to be explored and colonised and as a resource to be exploited, and often

104 Space Economy Report 10th edn (*Euroconsult* nd).

105 Amitav Ghosh, *The Nutmeg's Curse: Parables for a Planet in Crisis* (John Murray 2022) 5.

106 Mary Jane Rubenstein, *Astrotopia* (University of Chicago Press 2022) 69.

107 Ibid 4–9, 105–108.

108 Ibid 15.

109 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979 1363 UNTS 3.

110 Karin Mickelson, 'Common heritage of mankind as a limit to exploitation of the global commons' (2019) 30 European Journal of International Law 635–663.

111 Annette Froehlich, *Protection of Cultural Heritage Sites on the Moon* (Springer 2020).

all three at the same time, leading to its conceptualisation as a locale where we naturally and rightfully will expand.[112] If we think of this in terms of Elon Musk's and Jeff Bezos' plans for space or the billionaires 'space race', it is in the context of the privatisation of space exploration and the assumption of those places as ideal sites of capitalist extraction. Musk has published a manifesto about Mars and how he thinks it should be governed and it very much is in line with the articulations of Ciskei, Próspera and forms of digital sovereignty.[113] While space exploration has always included military considerations, as with the imperial histories discussed earlier, it is also about extraction and how we assume that the minerals and resources beyond Earth are ours to use because they are *terra nullius*, they are empty. Just as we assumed this before about *terra incognita Australias*, a creation of emptiness that was to the benefit of economic exploitation.[114] It is once again the creation of an exceptional economic space.

As discussed earlier, international law's Lotus Principle means everything is permitted unless it is prohibited, albeit states often act on the basis that they need a positive basis to proceed. If we accept that extending international law into space is a natural step, which, of course, is not a pregiven, then this principle applies equally there. Paliouras argues that non-appropriation is the '*grundnorm* of *juris spatialis*'.[115] He includes in this the Moon and other celestial bodies. Looking to the current state of the law under the Outer Space Treaty, the issue of attribution in the context of the privatisation of space becomes key. Currently, the Outer Space Treaty attributes the private exploration of space to the host nations of those enterprises.[116] When the behaviour of private actors becomes attributed or imputed to the

112 Cait Storr, '"Space is the only way to go": the evolution of the extractivist imaginary of international law' in Shane Chalmers and Sundhya Pahuja (eds), *Routledge Handbook of International Law and the Humanities* (Routledge 2021) 290.

113 Elon Musk, 'Making humans a multi-planetary species' (*New Space* 2017) .

114 Ruth Houghton and Aoife O'Donoghue, 'Utopias, colonialism and international law' (2024) 27 Law, Text and Culture 204–227; Vasuki Nesiah, 'Placing international law: white spaces on a map' (2003) 16(1) Leiden Journal of International Law 1–35, 3; Shane Chalmers, 'Terra nullius? Temporal legal pluralism in an Australian colony' (2020) 29(4) Social and Legal Studies 363–485, fn 1. See also, Merete Borch, 'Rethinking the origins of *terra nullius*' (2001) 32 Australian Historical Studies 222–239.

115 Zachos A Paliouras, 'The non-appropriation principle: the grundnorm of international space law' (2014) 27 Leiden Journal of International Law 37–54, 38.

116 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 UNTS 205 (1967); see also *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (New Application 1962), Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3.

state, that behaviour itself has law-forming implications. Attribution asserts that lawyers, judges and officials can look to private activity as relevant behavioural building blocks of an emerging rule of customary international law, or the 'subsequent practice' that helps to determine the meaning of Treaty terms. Via attribution, private actors can become initiators of state practice and ultimately become the creators of customary international law, of binding law in much the same way that private imperial companies did through from the 1600s–1800s. That is, private activity can count as relevant state practice, which in theory should rarely happen, but in practice is more complicated.[117] Thus, when a private actor standing in the shoes of a state asserts a legal rule in national and international fora or behaves as though their asserted rule were correct and openly acts accordingly, that it applies to custom formation, and this extends to space.[118]

Durkee suggests that 'it is possible to argue that private companies are themselves developing the international law of outer space' through a variety of means such as pushing for particular practices, or omissions (like lobbying states to not sign Treaties in this area) and their own actions/behaviours which in the absence of states acting differently becomes that state's interpretation of the Outer Space or Moon Treaty.[119] Attributed law-making, as Durkee argues, raises a lot of concerns, and especially here where we have private law-making that suits commerce and downgrades any other affects.

Much of the Treaty language across space law frames its contents as being in accordance with international law, which, as has been evident throughout this piece, is no guarantee of democratic engagement, human or labour rights or environmental standards. Emptiness or the inability to claim sovereign territorial control does not rule out resource exploitation, and, while there is a divide in the commentary, many make a direct analogy with the imperial evolution of the law of the sea.[120] But much of this also chimes with the anti-democratic character of anarcho-capitalist and neoliberal claims. Space is the perfect location to escape state sovereignty, claims to democracy or any labour standards: there is a clear idea that going to space will be to go with no regulatory interference, but that is a decision – it is not inevitable.[121] To return to Rubenstein's question about who will be working in Elon Musk's kitchens, there is an assumption in each of the billionaire assertions to space that there will be an underclass. But

117 Melissa J Durkee, 'Interstitial space law' (2019) 97 Washington University Law Review 423–481, 443.

118 Ibid.

119 Ibid 428.

120 Paliouras (n 115 above) 47.

121 Musk (n 113 above).

more than that, it is (a) space absent democracy, human rights, labour and employment law and that makes it attractive to the billionaires going there. That and the major state-contracts available through the privatisation of the National Aeronautics and Space Administration and other space agencies.[122] It is the future of EEGS, and that future is overlapping with the present enthusiasm for charter cities and online sovereignty, but it is also part of a much longer history of attempts to create spaces away from democracy and regulation. However, there is an opportunity with space to embrace the democratic choice.

CONCLUSION

> a relatively free economy is a necessary condition for a democratic society … I also believe there is evidence that a democratic society, once established, destroys a free economy.[123] (Milton Freedman)

The Windsor Framework may be *sui generis*. There are far more imitators of Shannon Airport and Dubai than there are (yet) of the Windsor Framework. The Framework also comes out of the Exit Agreement, an exit from one EEGS into another, albeit the Framework itself occupies two spaces at once, as it looks both backward to the UK's membership of the EU and Northern Ireland's peace process and forwards into Northern Ireland's and the EU's future. The question this article poses is whether the future of EEGS is closer to the democratic trend that can be observed in the Framework or one that aligns with Peter Thiel's oxymoron.

Zeng argues for the need to focus on 'a sound legal and regulatory framework and an embodiment of sustainability and resiliency towards various external shocks like today's COVID-19 pandemic'.[124] What is missing from these types of suggestions and where the Windsor Framework may be a corrective is that you must also have democratic resilience, and that includes rights, environmental futures and the possibility of creating increasingly better working and living conditions entrenched in democracy. Many EEGS top tables on doing business, but these matrices of 'freedom' do not include democracy and instead reward steep deregulation. Yet, in any table of human misery, many would also come out on top. The apartheid in South Africa, the modern slavery in Dubai, the murder of political, especially indigenous

122 Elena Cirkovic, 'The Earth system, the orbit, and international law' in Margot A Hurlbert, Timothy Cadman and Andrea C Simonelli, *Earth System Law: Standing on the Precipice of the Anthropocene* (Taylor & Francis 2022) 121.

123 Peter Brimelow, 'Why liberalism is now obsolete: an interview with Nobel Laureate Milton Friedman' (*Forbes* 12 December 1988).

124 Zeng (n 7 above).

activists, in Honduras, the past imperial policing in Hong Kong or the present crackdown from Beijing, the misery is as fundamental as is the economic freedom. There are some spaces within EEGS that improved women's labour rights, including non-discrimination and maternity rights. However, these are the exceptions. Often such EEGS focus on women's labour rights because they are the majority employed and there a high levels of risk associated with the work. But standards often also lack enforcement and are accompanied by laws against collective bargaining, making it ever more unlikely that this 'notoriously tough' constituency for Thiel will come on board.[125] Labour conditions ought not to be at the beneficence of commercial interests nor a form of rights-washing to improve a corporate image.

One of the re-occurring arguments against democracy, and this is partially what Thiel is saying about extending the franchise, is that otherwise there is chaos. He creates a binary between order – for Thiel this is the order of the corporation/shareholder and the chaos of democracy. This is very often the anti-democratic trend that pushes against thick democracy and favours authoritarian (including commercial) control. Devolution in the UK mediates towards complication. Northern Ireland and the Windsor Framework are messy. But the messiness that they create builds a form of resilience and engagement with democracy. This may not prioritise commerce, but there is little evidence that it harms it, while the absence of democracy has repeatedly been demonstrated to cause harm. Perhaps this is the real oxymoron, that unfettered commerce is incompatible with the freedom and rights of the masses, particularly their right to direct the laws that bind them.

125 Cotula and Mouan (n 11 above) 358.

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 641–651
Commentaries and Notes DOI: 10.53386/nilq.v75i3.1169

People – the forgotten chapter? From the EU's neighbourhood policy to post-Brexit Ireland (north and south) – and lasting damage to the integrative capacity of the EU Internal Market project†

Dagmar Schiek
University College Dublin*
Correspondence email: dagmar.schiek1@ucd.ie.

ABSTRACT

Following distorted perceptions of the role of people movement in the European Union (EU), the Trade and Cooperation Agreement between the EU and the United Kingdom does not enable people movement to the same extent as other Association Agreements between the EU and its other neighbouring states. Even the much discussed Ireland/Northern Ireland Protocol (also Windsor Framework) largely ignores people movement, whose protection on the island of Ireland remains weak as a result. This note argues that forgetting the people matters, not only on grounds of the principles, but also for practical relations on the island of Ireland.

Keywords: free movement; people; Internal Market; Brexit; EU neighbourhood.

INTRODUCTION

Movement of people has been presented as contributing to 'Brexit' throughout and beyond United Kingdom (UK) academia,[1] culminating in the suggestion that the founders of the European Economic Community (EEC) never truly supported free movement of workers as integral to the Common Market.[2] That scepticism against

† First published in NILQ 75.AD1 15–26 on 21 March 2024.

* This short contribution is informed by research conducted in the framework of the Jean Monnet Centre of Excellence EU Integration and Citizens' Rights (work package 2 and 3). All internet sources were last visited on 19 March 2024. This article will also form part of a *Northern Ireland Legal Quarterly* Special Issue on 'The Windsor Framework' edited by Tobias Lock, Mary Dobbs and Karen Lynch Shally to be published later this year.

1 See, for example, Susanne K Schmidt, Micheal Blauberger and Dørte Sindbjerg Martinsen, 'Free movement and equal treatment in an unequal union' (2018) 25 Journal of European Public Policy 1391, and other articles in that special issue.

2 Catherine Barnard and Sarah Fraser Butlin, 'Free movement vs fair movement: Brexit and managed migration' (2021) 55 Common Market Law Review 203–226.

movement of people is also mirrored in UK-based textbooks, which teach the Internal Market and free movement of people separately.[3] Post-Brexit, socio-legal studies emphasise that European Union (EU) free movement rights for workers systematically destabilised poor neighbourhoods in Norfolk (England) and mainly led to the free movers being depreciated,[4] explicitly contradicting studies highlighting the opportunities of free movement,[5] and underlining the earlier suggestion for the EU to replace free movement by 'fair movement'.[6] The same ideal of an Internal Market without people also informed the draft for a continental partnership with the UK by a group of German and UK authors.[7] The Trade and Cooperation Agreement (TCA) with the UK as well as the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland (also Windsor Framework) mirror this vision, containing at best weak references to people movement on the island of Ireland as a result.

This note argues that forgetting the people matters, not only on grounds of the principles, but also for practical relations on the island of Ireland. The island of Ireland accordingly presents an astute case-study for the inherent problems of economic relationships between states which deprioritise person movements. It will start with summarising the principled relevance of free movement of persons, contextualise the state of affairs on the island of Ireland with the EU's general approach to trade agreements beyond and within its neighbourhood, highlight the complexity of the state of affairs and illustrate its shortcomings through two current examples.

---

3 Most radically, Iyiola Solanke, in *EU Law* 2nd edn (Cambridge University Press 2022) pt III, presents 'Citizenship and migrant workers' under 'Rights of Movement and Residence in the EU', while the Internal Market in pt IV is taught without free movement of workers. Similarly, free movement of workers and EU citizenship are mixed into one chapter by Catherine Barnard, 'Free movement of natural persons and citizens' in Catherine Barnard and Steve Peers (eds), *European Union Law* 4th edn (Oxford University Press 2023) ch 13. At the other end of the spectrum, the Internal Market is taught as the TFEU presents it (goods, workers, establishment, services), and EU citizenship added as a separate chapter, in Paul Craig and Graínne de Búrca, *European Union Law: Text, Cases and Materials* 6th edn (Oxford University Press 2020).

4 Catherine Barnard and Fiona Costello, 'When (EU) migration came to Great Yarmouth' (2023) 18 Contemporary Social Science 150.

5 The article refers to older publications by Adrian Favell, who with collaborators maintains an optimistic perspective: Roxana Barbulescu and Adrian Favell, 'Commentary: a citizenship without social rights? EU freedom of movement and changing access to welfare rights' (2020) 58 International Migration 151; Ettore Recchi and Adrian Favell, *Everyday Europe: Social Transnationalism in an Unsettled Continent* (Polity Press 2019).

6 Barnard and Fraser Butlin (n 2 above).

7 Jean Pisani-Ferry, Andre Sapir, Guntram B Wolff, Norbert Roettgen and Paul Tucker, Europe after Brexit: A Proposal for a Continental Partnership (Bruegel 2016).

PEOPLE IN THE EEC COMMON MARKET AND THE EU INTERNAL MARKET – BETWEEN POSITIVE VISION AND LIMITING REALPOLITIK

There is a normative case for indivisibility of people and products in an internal market, which liberalises economic collaboration through free movement. Free movement in the EU entails the right to demand absence of barriers of movement, be these discriminatory or not. Free movement of goods and freedom of establishment and services enable producers to trade freely across the Internal Market, and thus to optimise allocation of production, which also results in reallocation. For example, agricultural production will follow adequate weather conditions, industrial production will follow concentration of capital, and production requiring highly qualified workers will follow concentration of those.[8] If economic freedoms are not matched by free movement of people, those depending on employment or sole self-employed work are then denied the right to follow the economic moves and demand equal treatment with locals at their destination. Such regimes can be criticised as 'favouring capital over labour',[9] because they reinforce imbalances between those producing based on owning capital and those labouring individually for remuneration.

In a progressive interpretation, the EU Internal Market can be read as a counter-model to such one-sided liberalisation. The Treaty on the Functioning of the European Union (TFEU) lists persons, services, goods and capital as equally relevant elements of the Internal Market (article 26 TFEU), thus guaranteeing free movement of products (goods and services) and production factors (labour and capital, factor mobility). The four economic freedoms include individual rights to move across borders and be treated equally with the resident population if participating in economic activities. This supports the normative vision that creating the Internal or Common Market should serve labour as well as capital, which also explains slightly less generous provisions for those moving outside market activities.[10] There is also the hope that

8 In summary, Dagmar Schiek, Liz Oliver, Christopher Forde and Gabriella Alberti, *EU Social and Labour Rights and EU Internal Market Law* (European Parliament 2015) 20–24; and full textbook coverage by Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* 7th edn (McGrawHill 2022) 234–255.

9 Jukka Snell, 'The Internal Market and the philosophies of market integration' in Catherine Barnard and Steve Peers (eds), *European Union Law* 6th edn (Oxford University Press 2023) 336–365, referring to the 'home country control model' of the Internal Market.

10 Niamh Nic Shuibhne, 'Reconnecting free movement of workers and equal treatment in an unequal Europe' (2018) 43 European Law Review 477; Dagmar Schiek, 'Towards more resilience for a social EU – the constitutionally conditioned Internal Market' (2019) 13 European Constitutional Law Review 611.

movement of people potentially integrates societies, especially if the regime facilitates reverse and multiple movement as opposed to mere one-off migration. While empirical research on integrating people movement signals nuanced optimism,[11] EU free movement is flawed both by excluding non-EU denizens[12] and neglecting adjustment of social structures in order to avoid disadvantage for those who stay in place.[13] Nevertheless, the positive vision retains its appeal. Accordingly, the idea that 'the four freedoms of the Single Market are indivisible'[14] also became a core pillar of the initial Brexit negotiations.

Yet, the EEC's and EU's position on people movement has not been universally supportive of the ideal. The Spaak Report, of 21 April 1956[15] envisaged a Common Market for goods and services, with the perspective of including capital. It remained reluctant to integrate labour markets, only recommending incremental increase of movement of workers under the control of member states. The Conference of Messina went beyond the Spaak Report, reflecting the conditionality of openness to international trade by social-democratic parties in post-war Western Europe.[16] That openness did not embrace a common market for capitalists only.[17] This political orientation was also reflected in the dialogue of management and labour at Val

11 Recently from macro-economic perspectives, see Beata Farkas, Andor Mate and Tamas Racz, 'A contested foundation of European integration: the free movement of labour' (2022) 44 Society and Economy 310; from sociological perspectives: optimistic Barbulescu and Favell (n 5 above) and Recchi and Favell (n 5 above); more sceptical Franziska Buttler, 'Does the Europeanization of daily life increase the life-satisfaction of Europeans?' in Martin Heidenreich (ed), *Exploring Inequalities in Europe* (Edward Elgar 2016) 195; Martin Heidenreich, 'Social cohesion in Europe. between Europe-wide convergence and social and territorial inequalities' in Martin Heidenreich (ed), *Territorial and Social Inequality in Europe* (Springer 2022) 313.

12 Cristina Juverdeanu, 'The different gears of EU citizenship', (2021) 47 Journal of Ethnic and Migration Studies 1596.

13 This can be viewed as the legitimate element in the critique by Barnard and Costello of free movement of workers (n 4 above).

14 European Council (Article 50) Guidelines on Brexit Negotiations of 29 April 2017, EUCO XT 20004/17.

15 The full text of 169 pages is only available in French. A 20-page summary of the most important points in English is also available.

16 Brian Shaev, 'Liberalising regional trade: socialists and European economic integration' (2018) 27 Contemporary European History 258.

17 A contemporary caricature captures the rejection of only capitalists profiting from the Internal Market while keeping their workers firmly behind national borders. Cartoon by Nitro on 'Employers and the European Common Market' (24 January 1957).

Duchesse, which accompanied the conference of Messina.[18] As a consequence, the Common Market as agreed at Messina encompassed factor mobility, with free movement of workers to be realised by the end of the transition period (1965), while free movement of capital was further postponed. Today's EU Treaties are more expansive on free movement of goods than on any other freedom. After Denmark, Ireland and the UK acceded to the EEC (1973), all further enlargements were accompanied by restrictions of free movement of workers.[19] This indicates that the unease over this particular freedom at times infects the integration process. Accordingly, the Brexit process was accompanied by political demands for reducing free movement of people within the EU, and early versions of the draft Ireland/Northern Ireland Protocol already offered to Northern Ireland access to markets in goods only, this being portrayed as the main aspect necessary to overcome physical border controls.[20] The EU has rightly been criticised for betraying the principle of indivisibility of the Internal Market in relation to Northern Ireland.[21]

PEOPLE IN THE EU'S EXTERNAL RELATIONS

In the EU's external relations, a preference for trade over people becomes a normative principle, mirroring the state of affairs in international trade law. Under the law of the World Trade Organization (WTO), rules on trade in goods and tariffs related thereto are elaborated with a long tradition in the GATT (General Agreement on Trade and Tariffs, subsequently supplemented by agreements on Sanitary and Phytosanitary matters and Technical Barriers to Trade), while people movement is merely comprised as far as necessary under the

18 See the historical documents available from the Luxembourg Centre for Contemporary and Digital History under 'Historical events in the European integration process (1945–2009)'.

19 The accession Treaty with Greece (OJ L 291 of 19 November 1979) was the first to 'phase in' free movement of workers, by withholding the right to free movement from Greek workers for a period of six years (art 45). The motivation of this was the fear of high numbers of workers from Spain and Portugal, whose accession was negotiated in parallel, into the EEC. (Arts 55 and 216 Accession Treaties with Spain and Portugal – OJ L302 of 15 November 1985 – contained the same limitation.) The mechanism to post workers relying on the employers' freedom to provide services, while denying them equal treatment, was created in the 1980s after Spanish and Portuguese construction companies became active in the EEC.

20 Sylvia de Mars and Colin Murray, 'With or without EU? The Common Travel Area after Brexit' (2020) 21 German Law Journal 815, 837.

21 Anand Menon, 'The EU and Britain are playing a high-stakes game of chicken' *The Guardian* (London 28 February 2018).

GATS (General Agreement on Trade in Services).[22] In short, article 1 GATS recognises the 'presence of persons … e.g. non-nationals on consultancy or construction tasks' as one mode (mode 4) of service provision, alongside the presence of managers and specialists as part of a commercial presence (mode 3). An annex specifies that members have maximum liberty as to which persons they recognise, as long as no integration into the labour market in the host country is aspired. From this it follows that – in contrast to free movement under EU law – persons moving under WTO GATS mode 4 or 3 have no claim to equal treatment or access to social infrastructure in the host state. They also lack any individual right to move, as people are moved as an accessory to service provision (including goods delivery). Person movement rarely enjoys more comprehensive coverage[23] beyond regional trade agreements, such as that comprised by the EU Treaties.[24]

The EU's association agreements with its neighbouring states are a little more generous, thus classed as deep trade agreements in a recent WTO publication.[25] They all contain WTO-type clauses allowing entrepreneurs and their workers to move into the EU in the context of service provision. In addition, they typically also contain subsections on visa agreements and people movement. These are particularly pronounced in those association agreements with countries which are to become candidates for EU membership. But even in those which were conceived as mere neighbourhood agreements, equal treatment of movers is ensured. For example, the Ukraine/EU association agreement[26] provides for equal treatment of Ukrainian workers in the

22 Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization. Text, Cases and Materials* 5th edn (Cambridge University Press 2022) ch 7, 4.4.1; on the political demand for a 'general agreement on movements of people' at the time when the WTO was negotiated, see Thomas Straubhaar, 'Why do we need a General Agreement on Movements of People (GAMP)?' in Bimal Gosh (ed), *Managing Migration: Time for a New International System?* (Oxford University Press 2000) 105.

23 On some examples of person movement in bilateral trade agreements, see Asa Odin Ekman and Samuel Engblom, 'Expanding the movement of natural persons through free trade agreements: a review of CETA, TTP and ChAFTA' (2019) 35 International Journal of Comparative Labour Law and Industrial Relations 163.

24 On difficulties agreeing on free movement of people, see Clayton Hazvinei Vhumbuni and Joseph Rujema Rudigi, 'Facilitating regional integration through free movement of people in Africa: progress, challenges and prospects' (2020) 9 Journal of African Union Studies 43.

25 Aaaditya Mattoo, Nadia Rocha and Michele Ruta, *Handbook of Deep Trade Agreements* (International Bank for Reconstruction and Development 2020).

26 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part; OJ L 161, 29.5.2014, p 3-2137, lastly amended by decision No 1/2023 of the EU–Ukraine Association Committee in Trade Configuration of 24 April 2023, OJ L 123 of 8 May 2023, consolidated version.

EU and EU citizens in Ukraine (article 17), while the volume of person movement remains strictly under national control (articles 18–19).

The TCA with the UK is exceptional[27] in that it does not contain any specific chapter on person movement beyond the protection of some rights for those who had actively used their movement rights prior to Brexit. Beyond that, provisions on person movement are mainly limited to the WTO GATS mode 4 model,[28] though movement of beneficiaries of EU programmes to which the UK may accede in the future are also provided. Even in relation to Northern Ireland the EU has, in contrast to early declarations, agreed to divide its Internal Market into goods on the one hand – now covered by articles 5–11 of the Ireland/Northern Ireland Protocol (from March 2023 referred to as the Windsor Framework)[29] – and all other freedoms on the other hand.

PEOPLE ON THE ISLAND OF IRELAND POST BREXIT – THE EU REGIMES

The situation of the island of Ireland after Brexit constitutes an interesting case study on asymmetric participation in the people-dimension of the EU integration project.

The case study is intriguingly complex, even if only focusing on EU law and EU agreements, while disregarding the Common Travel Area due to its hybrid character between law and politics.[30] Movement of people onto and off the island of Ireland as well as between its parts is governed by at least three overlapping legal

27 Tobias Lock, 'Citizenship beyond Irish and British' in Christopher McCrudden (ed), *The Law and Practice of the Ireland – Northern Ireland Protocol* (Cambridge University Press 2022) 247, mentioning the EU's more far-reaching proposals at 248 with fn 7.

28 On this Catherine Barnard and Emilija Leinarte, 'Mobility of persons' in Federico Fabbrini (ed), *The Law and Politics of Brexit – Volume 3: The Framework of the New EU–UK Relationship* (Oxford University Press 2021) 134.

29 The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p 7-187) allows adaptation of the Protocol Ireland/Northern Ireland by decision of the Joint Committee (art 5(2)), which was the basis of adding specifications to arts 6 and 13 and also stating that the Protocol will be referred to as 'Windsor Framework' (Decision No 1/2023 of the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023,OJL 102/61 of 17.4. 2023). An updated consolidated version of the Withdrawal Agreement is available on EURLEX.

30 See on this Imelda Maher in the forthcoming special issue.

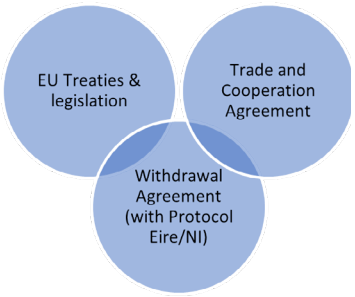


Figure 1: Overlapping regimes on person movements

regimes (Figure 1): first, the EU Treaties remain relevant as far as Ireland is concerned. This also means that Ireland should have to extend advantages offered to non-EU nationals, for example British nationals, to EU nationals as well, in so far as these privileges relate to EU-derived rights, in particular free movement.[31] Second, for Northern Ireland as part of the UK, two agreements between the EU and the UK are decisive: the Withdrawal Agreement[32] with its Ireland/Northern Ireland Protocol (also Windsor Framework) and the TCA between the EU and the UK.[33] The Withdrawal Agreement refers to the EU Treaties, requiring some of its provisions to be interpreted in line with them, or given comparable effects. The TCA is, according to article 50 of the Treaty on European Union, the ultimate successor of the Withdrawal Agreement, whose effects should ultimately dissipate. However, the Protocol (also Windsor Framework) is conceived for unlimited duration, but for the UK's privilege to unilaterally rescind it following a specified process in Northern Ireland (article 18). The TCA dissolves any relationship with the EU Treaties, though from EU perspectives it still qualifies

31 The authority here is the 2002 ruling of the European Court of Justice in Gottardo (15 January 2002, C-55/00, ECLI:EU:C:2002:16), where Italy was considered as violating EU Treaty rights for EU citizens by granting non-EU citizens more favourable social security rights. It retains practical relevance (eg Grega Strban, "Member states' approaches to bilateral social security agreements' (2018) 20 European Journal of Social Security 129). Ireland's EU membership means that it must not provide more support for free movement of UK citizens than for that of EU citizens by treating UK citizens more generously than the latter – while UK citizens may of course be granted the same privileges as EU citizens in Ireland, and even more privileges in areas not governed by EU law, such as voting in national elections or immigration control beyond securing free movement rights. Since the Common Travel Area affects social security, access to education and healthcare, its application by Ireland will have to be constantly monitored for EU rights compliance.

32 See n 29 above.

33 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 OJ EU L 144 of 31 December 2020, p 14-2488.

as EU law. This leaves a confusing picture of partially overlapping spheres (see Figure 1).

Yet, those legal instruments collectively do not encompass people movements to the same degree as elsewhere in the EU neighbourhood. In all its complexity, the overall legal framework only provides very limited dents into the fixation of trade on goods, even though the limited size of both Ireland as a state and Northern Ireland as a very small, devolved region of the UK would have suggested more openness towards people movement. This lack of openness for people movement will continue to create a host of practical problems, which international law instruments or gentlefolk agreements, such as the Common Travel Area, are ill-suited to overcome.

Under the main part of the Withdrawal Agreement, people movements are only protected for those who moved as self-employed or employed persons before Brexit. They retain rights to remain in the place where they have moved but lose the right to move to other EU member states if they only have UK citizenship. Those who have moved to provide services are not so protected (Withdrawal Agreement, part 2, in particular titles II and III). The TCA generally allows some service provision (title II), and also person movement in the understanding provided by mode 4 of the WTO GATS (articles 140–145 TCA).[34] In addition, any UK participation in EU programmes requiring person movement (for example in research) is conditional to people movement enabled reciprocally for these purposes (article 712 TCA).

The Protocol (also Windsor Framework) only mentions people movement indirectly by allowing the UK and Ireland to maintain the Common Travel Area in so far as it does not conflict with EU law (article 3). That provision does not create any obligations to maintain the Common Travel Area, nor rights for citizens. There may be the faint hope to interpret article 2 as including free movement because this provision refers to rights guaranteed by the Belfast/Good Friday Agreement, which again refers to the right to freely choose one's residence. However, choosing one's residence is only a very limited expression of free movement, and in that Agreement probably relates to sectarian divisions within Northern Ireland more than to choosing residence in Ireland.[35] The Protocol (also Windsor Framework)

34 See above text accompanying n 27 and n 28 above.

35 Accordingly, even the Northern Ireland Human Rights Commission and the Equality Commission Northern Ireland, who generally promote the widest possible interpretation of art 2, refer to free movement rights as additional to the protections afforded by the Good Friday/Belfast Agreement, which the UK has committed to protect in art 2, Protocol (Windsor Framework); Equality Commission Northern Ireland, Northern Ireland Human Rights Commission, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (2022) 7.

enables neither movement of workers or self-employed persons nor movement of service providers or the posting of workers by those who provide services into Ireland or the UK. EU Treaties allow Irish citizens resident in the UK, including Northern Ireland, to move back to the EU at large, with the proviso of equal treatment, including equal treatment with UK citizens in Ireland.[36]

INSTEAD OF A CONCLUSION: PRACTICAL PROBLEMS ILLUSTRATING SHORTCOMINGS

The substantial neglect of person movements across the overall legal frameworks can clearly have negative impacts on continuing socio-economic interactions on the island of Ireland. It will also stymy efforts of continuing all-island integration in cultural and civic arenas. Two recent examples come to mind.

First, the Irish Government, in Summer 2023, announced their intent to fund studies for nursing in Northern Ireland. That offer has since been extended to studying medicine, though it is still being finalised.[37] Under EU law, funds to study nursing would have to be extended to EU citizens having moved to Ireland as workers, self-employed or service providers and their families, including children, wishing to study nursing. Thus, under EU law one might question whether Ireland may limit those places to Irish citizens, who have no problem moving to Belfast and taking up work there during their studies or thereafter without violating their Treaty obligations towards other EU citizens.[38] On the other hand, Ireland might argue that as long as EU free movers and their children are given equal opportunity to access funded places for studying nursing or medicine, the equal treatment principle is observed. Ireland would thus give the 'Belfast places' only to Irish citizens or those who can derive rights to work in the UK from pre-Brexit free movement. While this approach may pass muster under EU law, it is undoubtedly very complex, and distorts the envisaged all-island approach by excluding a large proportion of Irish residents who are otherwise integrated into Irish society as EU citizens.

Recent UK legislation offers a second example: section 75 of the UK Nationality and Borders Act 2022 empowers the Government to issue immigration rules requiring an Electronic Travel Authorisation (ETA)

---

36 See n 31 above.

37 As recent as 18 January 2024, a debate in the Dáil exposed that the Government hopes for the scheme in medicine to be finalised for September. The answers of Simon Harris seem to indicate that practical parts of the education would be completed in Ireland, limiting the concerns expressed above: Dáil Debates, Thursday, 18 January 2024.

38 See text accompanying n 31 above.

for anyone entering the UK who is neither a UK citizen nor has a right to abode for other reasons. Entering the UK by crossing the border into Northern Ireland is included in the legislation.[39] Presently, 'only' some non-EU nationals are required to produce the ETA, and permanent exceptions apply by statute for those covered by the Common Travel Area, and enjoying status rights (settled status in UK terminology) resulting from their movement to the UK before Brexit as EU citizens. More exceptions have been promised but not legislated for in favour of those legally resident in Ireland, as well as for travels of less than 24 hours. ETAs will be required of EU citizens who do not fall under the exceptions as announced in the near future. Requiring ETAs for persons requiring a visa to enter the UK will mainly impact on tourism on the island of Ireland, and most specifically on businesses operating out of Ireland. It will become impractical for them to include tours to Northern Ireland outlasting the 24-hour timeframe. Those Northern Irish accommodations booked by Irish providers will suffer alongside their business partners, in the wake disturbing one of the sectors that enjoyed support by all-island initiatives in the past.

These two examples demonstrate that, beyond the principled value of free movement, neglecting persons in the post-Brexit relationships has severe consequences. These will be felt particularly acutely on the island of Ireland. Accordingly, free movement of goods, however relevant, is far from the only area to be safeguarded. Enabling free movement of goods may suffice to avoid physical border infrastructure being required under WTO law.[40] Yet, in order to enable effective socio-economic cooperation and ensuing societal relations, free movement of people in their own right, beyond an attachment to economic services, and with direct legal effect, remains indispensable.

39 Nationality and Borders Act 2022, s 75, amends the Immigration Act 1971 by introducing a pt 1A entitled 'Electronic travel authorisation'. This part enables the Government to issue immigration rules requiring an ETA, though never for British or Irish citizens.

40 De Mars and Murray (n 20 above).

Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 652–658
Commentaries and Notes DOI: 10.53386/nilq.v75i3.1117

Re-bordering the Common Travel Area

Imelda Maher
University College Dublin
Correspondence email: imelda.maher@ucd.ie.

ABSTRACT

The Common Travel Area (CTA) promises – and has delivered – extraordinary benefits for British and Irish citizens for over a century. Here, we briefly outline the scattered and diverse legal norms around the CTA. We then look at how it encapsulates a narrow view of citizenship before briefly outlining the challenges posed by Covid which underline how important political goodwill is to this free movement arrangement.

Keywords: Common Travel Area; EU law; Covid; Brexit.

INTRODUCTION

The Common Travel Area (CTA) promises – and has delivered – extraordinary benefits to British and Irish citizens for over a century.[1] The name undersells what it provides. There is a panoply of rights and benefits conferred alongside the right to move freely between the two states.[2] The experience of Irish citizens in the United Kingdom (UK) and British citizens in Ireland is such that they notice no real difference in their political and social rights with access to social welfare, health and education, as well as statutory rights to vote in parliamentary and local elections.[3]

1 Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 Modern Law Review 855–874; Imelda Maher, 'Crossing the Irish land border after Brexit: the Common Travel Area and the challenge of trade' (2018) Irish Yearbook of International Law 51.

2 Imelda Maher, 'The Common Travel Area' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2021).

3 Silvia de Mars, C R G Murray, Aoife O'Donoghue and Ben T C Warwick, *Discussion Paper on the Common Travel Area* (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission 2018).

This arrangement is not referred to in the Belfast/Good Friday Agreement 1998 but underpins the choice given to those born in Northern Ireland to choose British or Irish citizenship or both[4] and hence is of considerable political importance.[5] It was not legally formalised, being more a result of custom and practice even after it was first mentioned in law in Protocol 20 of the Treaty of Amsterdam 1999, in relation to the UK and Ireland opt-outs from the Schengen arrangements in European Union (EU) law.[6] After a period in the political limelight following the Brexit vote and concerns about how to manage the only land border between the EU and the UK, a Memorandum of Understanding (MoU) between the two governments set down in writing the core framework of the CTA.[7] Here we examine the limitations of the CTA. First, we briefly outline the scattered and diverse legal norms around the CTA. We then look at how it encapsulates a narrow view of citizenship before briefly outlining the challenges posed by Covid which underline how important political goodwill is to this free movement arrangement.

THE CTA SMORGASBORD OF NORMS[8]

The key CTA MoU is non-binding but, in the accompanying declaration, the British and Irish Governments commit to maintain it 'in all circumstances'. Some of the rights and privileges listed in the MoU are supported by law: notably legislation allowing voting in

4 Art 1(iv) and annex 2. At least one parent must be a British or Irish citizen or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence. For Ireland, see art 9(2) of the Constitution. UK law applies a contentious presumption that all are born British: see *Secretary of State for the Home Department v Parker De Souza* [2019] UKUT 355. In that case, following an appeal, the Home Office agreed that British and Irish citizens born in Northern Ireland would be treated as EU citizens up to June 2021, thereby rendering the appeal moot: see F McClements, 'Emma DeSouza withdraws immigration case after British government concession' *Irish Times* (Dublin 21 May 2020). The Tribunal decision served as the basis for rejecting a judicial review concerning the question of that presumption of British citizenship in the High Court in Northern Ireland in *Chuinneagain, Re Application for Judicial Review* [2021] NIQB 79.

5 Michael Dougan, *The UK's Withdrawal from the EU* (Oxford University Press 2021) 264.

6 Maher (n 2 above).

7 The CTA extends to Ireland, the UK and Jersey, Guernsey and the Isle of Man. See the MoU between the two governments, 8 May 2019.

8 Imelda Maher, 'The Common Travel Area: the limits of codification' in Federico Fabbrini (ed), *The Law and Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022).

both jurisdictions[9] and the Social Welfare Convention.[10] Rights to reside, work and be self-employed arise indirectly through legislation on citizenship status,[11] while healthcare[12] and education[13] are addressed through (non-binding) MoUs. There is also a common visa waiver scheme which so far only extends to Chinese and Indian nationals on tourist visas.[14] This smorgasbord shows how, within a legally complex and often non-binding framework, the CTA operates mainly on the strength of political goodwill and good working relations in the operational sphere. This can be seen especially in relation to monitoring of air and sea borders to prevent illegal migration.[15]

The uncertainties surrounding the CTA were apparent in a recent political spat where an Irish Minister controversially claimed that 80 per cent of asylum seekers coming to Ireland came across the land border. The Irish Government pointed to an operational agreement between the two states to return asylum seekers to each other but admitted it had never been used and the then British Prime Minister sought to link any such return agreement to EU returns more generally, especially to France. Within days, emphasis was again being placed on how the CTA rests on good operational relations – thus highlighting

9 Art 13 CTA MoU; the UK Representation of the People Act 1983 and the Irish Electoral Act 1992, s 8. Irish citizens resident in the UK have always been able to vote there: see Neil Johnston, *Who Can Vote in UK Elections?* (House of Commons Library 23 September 2023) 25 for the complex history. The equivalent franchise was only given to British citizens resident in Ireland in 1992, following the ninth referendum to the Constitution allowing those other than Irish citizens to vote: see John O'Dowd and Stephen Coutts, *'Access to electoral rights: Ireland'* Access to Electoral Rights Report (RSCAS/EUDO-CIT-ER 2014/2).

10 Convention on Social Security, 1 February 2019, incorporated into Irish Law by SI No 746/2020 and incorporated into UK law by SI 2019/622 and SSI 2019/93 (for Scotland).

11 The main provisions are: in the UK s 3Za Immigration Act 1971 introduced by s 2 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 and s 2(1) Ireland Act 1949; and in Ireland s 114 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

12 18 December 2020.

13 14 July 2021.

14 Graham Butler and Gavin Barrett, 'Europe's "other" open-border zone: the Common Travel Area under the shadow of Brexit' (2018) 20 Cambridge Yearbook of European Legal Studies 252–286.

15 Known as Operation Gull (UK) or Operation Sonnet (Ireland). About 5000 people trying to enter Ireland were refused entry between 2013 and 2022 inclusive (2800 by land and 2200 by sea – mostly from Britain): see C J McKinney, Michael Potter and Terry McGuinness, *The Common Travel Area and the Special Status of Irish Citizens in UK Law* (Commons Library Research Briefing 16 August 2023) 10.

the legal limits of the CTA for non-Irish and non-UK migrants and especially for those seeking international protection.[16]

WHO BENEFITS?

In Ireland, British citizens are the second largest group of migrants, of whom there are more than 100,000. There are between 377,000 and 447,000 people born in the Republic of Ireland living in the UK.[17] In neither state is there a positive affirmation or recognition of each other's citizens in law. Instead, in the UK, an Irish citizen does not require leave to enter or remain in the state.[18] Under Irish law, a non-national does not include UK citizens.[19] A key limitation of the CTA is that it only applies to individual British and Irish citizens. No status or rights are conferred on family members through association with the citizen so a family member who is not Irish or British cannot avail of the CTA. And, following Brexit, EU members of the family of a British or Irish citizen lost their free movement rights in both Ireland and the UK although EU nationals travelling to Ireland retain their rights under EU Law.[20]

Overall, about 12 per cent of the population of Ireland does not have Irish citizenship and therefore cannot avail of the CTA.[21] This limitation is most acute in relation to the land border which is open and invisible (but for some car number plate recognition cameras).[22] Despite the lack of an obvious land border, they need a passport and possibly a visa to gain entry to Northern Ireland, although Irish citizens and those lawfully resident in Ireland who do not need a visa are excluded from the new British electronic travel authorization programme.[23] Under UK law, business visas are limited to those with three years'

16 'Emergency legislation will allow "operational agreement" between Ireland and UK on return of asylum seekers to come into force, Government says' *Irish Times* (Dublin 30 April 2024).

17 2022 Census of Ireland; John Curtis, Cassie Barton, Georgina Sturge and Maria Lalic, *The Irish Diaspora in Britain* (House of Commons Library CDP 2022/0055 17 March 2022).

18 S 3Za Immigration Act 1971: see n 11 above.

19 S 114 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. See also n 4 above.

20 Tobias Lock, 'Citizenship beyond Irish and British' in McCrudden n 2 above.

21 CSO Ireland, Census 2022 Profile 5 – Diversity, Migration, Ethnicity, Irish Travellers & Religion.

22 Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum* (HC 48 2016-17 26 May 2016) para 71.

23 'Apply for an electronic travel authorisation (ETA)' (UK Government 25 October 2023). Lawful residents are only excluded when entering the UK from other parts of the CTA.

experience who have already worked for their company for 12 months. EU nationals in Northern Ireland can enter Ireland for three months without a visa and continue to avail of the EU free movement rights. And while frontier workers' rights are addressed in the Withdrawal Agreement, there are new constraints on them.[24] In short, the CTA is a cold place for non-EU nationals and not a very warm one for non-Irish EU nationals.

COVID: A FRAGMENTED CTA

The experience in relation to Covid lockdowns and restrictions on free movement highlighted three main challenges for the CTA. First, as public health is a devolved power in the UK, responses across the four nations varied with the lack of coordination across governments leading to introduction of internal borders in the UK. This meant there was not even a common travel area within the UK at times during Covid.[25] For example, travel to Wales from parts of Scotland, England and all of Northern Ireland was restricted in October 2020.[26] Scotland also restricted travel from most parts of Ireland during lockdown.[27]

Second, even though the island of Ireland is treated as a single epidemiological unit for animal health, there is some discussion whether this was the case for human health during Covid.[28] An MoU on Public Health Co-operation was signed within weeks of the first Covid

24 Pt II of the Agreement: see Silvia de Mars and Charlotte O'Brien, 'Inevitably diminished: rights of frontier workers in Northern Ireland after Brexit' (2022) 73(S2) Northern Ireland Legal Quarterly 119–147.

25 The main legislation was the Public Health (Control of Diseases) Act 1984, as amended, and the Coronavirus Act 2020. J Sargeant, 'Co-ordination and divergence: devolution and coronavirus' (*IfG Insight* 28 October 2020).

26 This is in addition to localised restrictions on movement and personal restrictions. Sargeant (n 25 above) 23 and see 'Wales to introduce travel restrictions to prevent the spread of coronavirus' (Welsh Government 14 October 2020).

27 Conor Riordan, 'Scotland lifts travel ban on most parts of Ireland' *Irish Examiner* (Cork 10 December 2020).

28 Sargeant (n 25 above) 18 simply states it is a single unit, but Nolan et al explain that it is so considered for animal but not for human health mainly for political reasons on which they elaborate: see Ann Nolan, Sara Burke, Emma Burke, Catherine Darker, Joe Barry, Nicola O'Connell, Lina Zgaga, Luke Mather, Gail Nicolson, Martin Dempster, Christopher Graham, Philip Crowley, Cliodhna O'Connor, Katy Tobin and Gabriel Scally, 'Obstacles to public health that even pandemics cannot overcome: the politics of Covid-19 on the island of Ireland' (2021) 32(2) Irish Studies in International Affairs 225–246. Dobbs and Keenan also say it is a single epidemiological unit for plants, animals and humans: see Mary Dobbs and Andrew Keenan, 'Territorial approaches to a pandemic: a pathway to effective governance' (2022) 73(2) Northern Ireland Legal Quarterly 202–233. The MoU on healthcare does not declare the island to be such a unit. There seems to be a tension here between political and public health descriptions.

death on the island and, following a meeting of ministers from Ireland and Northern Ireland, public health being a devolved power.[29] Non-binding, it pointed to information-sharing, modelling and a weekly phone call between the respective Chief Medical Officers to ensure 'mutual ongoing understanding'. At the same time, it acknowledged that measures in the two jurisdictions might not be identical but that the executives would seek to ensure consistency. And there were such regular interactions at the level of public health bodies.[30] Within the UK, politics constituted an obstacle to a common public health response to the pandemic, and within Northern Ireland republican parties sought to align with the Covid responses in Ireland while unionist parties sought to align with those in Westminster.[31] Such political responses show how cooperation on public health may be undermined.

Third, in relation to travel, both the UK and Ireland introduced passenger locator forms for travellers who all had to comply with the 14-day isolation period on entering the state. The UK treated all of the CTA as the relevant quarantine area, so anyone who had been outside the CTA for more than 14 days would have to self-isolate. The Irish Government took a different approach and defined the island of Ireland as the quarantine zone, so those travelling from Great Britain had to isolate.[32] The more limited quarantine zone may in part be explained by the fact that even just keeping the land border open was at odds with EU recommendations to ban non-essential travel from non-EU states.[33] The land border is famously porous and, practically, could not

29 MoU between Irish Government and Northern Ireland Executive in Relation to Covid-19 (7 April 2020). And a follow-up MoU between the same parties on Covid-19 Response – Cooperation on an All-Island basis in regard to provision of Critical Care between the Department of Health, Ireland (and its Agencies) and the Department of Health, Northern Ireland (and its agencies), no date given, See Dobbs and Keenan (n 28 above) 217.

30 Nolan et al (n 28 above).

31 Ibid 244–245 in relation to Northern Ireland and Ireland and Sargeant (n 25 above) 12 in relation to the responses of the devolved governments in the UK. Nonetheless, an MoU on reciprocal healthcare arrangements was entered into in December 2020, replacing arrangements that previously operated when the UK was a member of the EU: see MoU on CTA Healthcare Arrangements (in recognition of Residency-based Health Systems) 18 December 2020. See also the ministerial exchange of letters on healthcare arrangements in light of the EU–UK Trade and Cooperation Agreement, 25 November 2021.

32 For an outline of the numerous regulations involved, see Daniel Holder, 'From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020' (2021) 72(S2) Northern Ireland Legal Quarterly 537, 553.

33 European Commission Communication, Covid-19: Temporary Restriction on Non-Essential Travel to the EU COM/2020/115 final.

be shut, though there were political calls to do so.[34] However, it took some time for agreement on the sharing of passenger locator forms of those travelling on from Dublin airport to Northern Ireland to assist in monitoring travellers.[35] The porous border also caused some public outcry in Ireland when it became clear that lockdown legislation did not apply to those travelling across the border from Northern Ireland. Murray suggests that this seems to have been a deliberate policy by the Irish Government.[36]

CONCLUSION

The CTA is rich in political rhetoric but thinner in laws. It has seen changes over the years but has remained durable and generous for Irish and British citizens. The potential body blow of Brexit has instead resulted in greater clarity through the MoU, although EU citizens in both states have seen their rights diminished and not replaced under the CTA. Originally designed mainly to facilitate the migration of Irish workers to Great Britain, it only recognises the single, unattached migrant citizen in either state. The CTA MoU emphasizes how flexibility allows the governments to be responsive to new developments. Covid constituted one such development and showed that operationally the CTA provides one of the bases for close coordination between public agencies (the Belfast/Good Friday Agreement being the other key pillar in this context). Covid showed how borders can appear not only between the two islands but also within Great Britain and how technical cooperation on public health at times of crisis may still be driven by political considerations. Thus, the CTA is durable, operationally robust but, as Covid shows, it remains vulnerable to political context and is dependent on political goodwill between not just the UK and Irish Governments but also the devolved governments of the UK.

34 Gillian Anderson, 'DUP suggestion to close border over COVID cases branded "unbelievable"' *Derry Journal* (Derry/Londonderry 19 January 2021).

35 Brian Lawless, 'Coronavirus: new Irish travel rules will affect NI passengers' (*BBC News* 26 January 2021).

36 The main legislation in Ireland was the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020. Colin Murray, 'The Covid-19 crisis across the Irish border' (*UK in a Changing Europe* 14 May 2020).