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The Good Friday Agreement, Brexit, and Rights

A Royal Irish Academy –
British Academy Brexit Policy Discussion Paper

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About this Series

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Rights and the Good Friday Agreement

The Good Friday Agreement ('the GFA') is both a peace agreement, and the basis for reformed government in Northern Ireland. It has three dimensions: an internal Northern Ireland dimension, providing for a Northern Ireland government based on power-sharing between nationalists and unionists; a North-South dimension, establishing mechanisms for greater co-operation between Ireland and Northern Ireland; and an East-West dimension, with mechanisms facilitating relations between Ireland and the various parts of the United Kingdom. Addressing the three sets of relationships was the basis for the peace process, and rights were one of the central instruments for achieving this.

The GFA was much more than a rights-driven document, but rights are central to each dimension. The sources of these rights are diverse, with devolved, national, international and supranational elements layered on top of each other. One set of rights recognises the dual-national makeup of the Northern Ireland population: a majority considering themselves British, a minority considering themselves Irish, and some considering themselves to be both. Another set of rights seeks to ensure respect for a broader set of human rights for all, including equality and non-discrimination rights, transcending the issue of differing national allegiances. Both are essential building blocks for the future Northern Ireland that the GFA envisaged.

The Agreement provides that the people of Northern Ireland may choose to have Irish citizenship or British citizenship, or both. Those born in Northern Ireland (and their spouses and children) are thus entitled (in the case of spouses after a period of residence) to both UK and Irish passports, although in practice

many have only Irish, or only UK, passports. The internal Northern Ireland dimension provides for strengthened anti-discrimination and equality legislation to be introduced. It also provides that the governance arrangements in Northern Ireland will include human rights protections based on the European Convention on Human Rights ('the ECHR'). A Human Rights Commission is established, with the role (among others) of developing proposals for a Northern Ireland Bill of Rights to supplement the ECHR. The North-South dimension provides that human rights protected in Ireland (including socio-economic rights, such as labour and employment rights) will be equivalent to those in Northern Ireland, that Ireland would incorporate the ECHR into Irish law, that there would be a joint committee of the Northern Ireland and Irish human rights commissions, and that an all-Ireland Charter of Rights would be produced.

The linkage between the protection of rights and the GFA is important in another respect. Rights established before the GFA was concluded often underpin aspects of that Agreement, which in turn often significantly contributes to their smooth operation in practice. The North-South and East-West dimensions were preceded by the common travel area arrangements (CTA), which provide for free movement rights on the island of Ireland, and between the island of Ireland and Great Britain. These rights are more extensive than those that derive from the principle of freedom of movement in EU law, the CTA itself is currently not legally enforceable under either UK or Irish law.

Over time, and largely arising out of the CTA arrangements, reciprocal rights for UK and Irish nationals (some of which are legally enforceable) now include the right to enter and reside in the UK and Ireland, the right to work, the right to study, access to social welfare entitlements and benefits and access

to health services, and the right to vote in local and parliamentary elections. Some equality rights also significantly predated the GFA. In both cases, these rights provided some of the key policies that the GFA built on. Recognising this, the GFA, in turn, directly provides for these rights to be further strengthened (in the case of equality), or indirectly builds on and assumes the existence of these rights (in the case of the CTA), without therefore having to specifically address them.

When it was concluded, the GFA clearly presupposed that both Ireland and the United Kingdom would both be members of the European Union -- no one even contemplated the idea that one of them might leave the EU, a view endorsed by the UK Supreme Court in *Miller*. This significantly affected the way in which rights in the GFA were dealt with. This, in turn, affected the framework of the Northern Ireland Act 1998 and, indirectly, the wider UK devolution settlement. Whilst the EU was never conceived as the sole guarantor of rights in Northern Ireland, rights deriving from the EU are, nevertheless, an important dimension of the post-GFA architecture.

In particular, rights deriving from the EU provided one element of the common understanding of rights shared between the UK and Ireland (the other important dimension being the ECHR). In addition, there is a wide range of rights afforded to people in Northern Ireland directly under EU law. These include the European Single Market's four freedoms (free movement of goods, capital, services, and people), and rights such as EU equality law, that together with domestic anti-discrimination law, partially meet obligations under the GFA. The common travel area arrangement between the UK government and the Irish government operates in tandem with the free movement provisions of EU law, to such a degree that it is often difficult to disaggregate what is the precise source of the particular free movement right in issue.

The fact of both the UK and Ireland being in the EU also underpins and significantly delivers on the GFA requirement that rights in Northern Ireland will mirror those in Ireland, and vice versa. Ireland and Northern Ireland are both bound by the EU Charter of Fundamental Rights, for example, when government implements EU law. Ireland and Northern Ireland are both subject to the fundamental rights jurisprudence of the Court of Justice of the European Union ('the CJEU'), part of EU law's general principles. General principles are applied by the CJEU and domestic courts, for example, as an aid to interpretation of EU law; examples of general principles include fundamental rights, including equality. Ireland and Northern Ireland have similar employment rights where these are derived from EU law, such as the provisions regarding working time. Ireland and Northern Ireland accord a similar status to EU-derived rights.

More broadly still, these rights are common EU-wide rights, and therefore affording a degree of distance above and beyond the local and national spheres in both the formulation of these rights and their enforcement. In practical terms, the principle of the supremacy of EU law, together with requirements regarding the direct effect of EU law at the national level, mean that domestic courts in both Ireland and the UK must disapply primary legislation, or a rule of the common law, or strike down secondary legislation, if the domestic law is in breach of EU law. Given the nature of the community divisions which the GFA seeks to address, this is a significant feature.

As importantly, the EU dimension provides a right to supervision and ultimate enforcement of the rights at the supra-national level. In particular, access to the Court of Justice of the European Union, by way of references to the Court by national courts, enable individuals to vindicate EU-derived rights and to secure a wide range of remedies. EU law thus

establishes effective mechanisms for making rights-violators accountable in ways that complement and supplement judicial remedies under the ECHR and the domestic law of Northern Ireland. So, for example, EU law now provides for damages against the UK government for failure to implement EU directives (termed *Francovich* damages) that act as a powerful incentive to comply. Such damages are not otherwise available under existing UK law.

In short, several of the rights and entitlements that are provided for directly or indirectly in the GFA are themselves either directly or indirectly underpinned by EU law, and its system of effective remedies. But the political effect of common membership in the EU goes beyond even that, underpinning the requirement that the UK provide for the ECHR to be implemented in Northern Ireland, by virtue of the political requirement that Member States of the EU should be parties to the ECHR.

Problems for rights in Northern Ireland posed by Brexit

The United Kingdom's exit from the EU will thus affect the extent and delivery of a wide array of rights in Northern Ireland unless effective steps are taken to ameliorate its effects. The following range of rights will all potentially be affected: EU-underpinned rights, particularly those specifically mentioned in the GFA (such as equality rights); fundamental rights deriving directly from EU membership, including those in the EU Charter of Fundamental Rights; labour and employment rights deriving from EU law; and the right to an effective judicial remedy.

Given its history, adversely affecting these rights could have significant consequences that are specific

to Northern Ireland and more severe than will be the case in any other part of the UK. Northern Ireland is the only part of the UK which, after Brexit, will share a land border with the EU, and thus free movement rights are of particular importance. Any undermining of the operation of the CTA challenges a principal objective of the GFA, that the importance of the land border should be minimised. Equality law is of considerable constitutional importance in Northern Ireland, given the extent of discrimination that dogged its history. Indeed, human rights protections generally have a particular salience in the politics of Northern Ireland, given the history of terrorism and state responses to it. Such measures offered reassurance that Northern Ireland was embarking on a programme of real change.

Leaving the EU would also impact on the *remedies* available for the enforcement of rights in Northern Ireland, in particular the extent to which human rights obligations limit Parliamentary sovereignty, an important part of the political settlement. In this respect, the remedies available under EU law for a breach of equality law, for example, are potentially more far-reaching than the remedies available under the Human Rights Act 1998, the Northern Ireland Act 1998, and domestic anti-discrimination law. This is because EU-based remedies include the power for courts to disapply UK law that is contrary to EU law, and to award *Francovich* damages to an individual who suffers loss as a result of the government's breach of EU law. These represent forms of remedy that could be employed by a Northern Ireland court currently – including in the context of EU human rights and equality provisions. Because of the supremacy of EU law, national law is thus prevented from reducing rights protections below EU standards, at the same time ensuring common North-South equality protections as required by the GFA. Unless specific measures are taken to provide otherwise,

exiting the European Union will mean remedies such as this, enforceable domestically and supra-nationally, will be irrevocably lost. Individuals would, for example, have a right to compensation, if at all, only under UK law, and that right could be reduced or limited or removed by UK legislation.

Whether these consequences are good or bad is ultimately a matter of subjective political judgement. Some may consider that problems were created in trying to insert what is sometimes seen as a more rigid, EU culture of rights into the UK, and that removing this would be for the best. Differences between the UK and the EU over the best approach to take have long been a source of tension, and it would be misguided to suppose that the EU's approach was always necessarily to be preferred, simply because it derived from the EU. Traditional UK approaches to the protection of rights, through common law and Parliamentary legislation should not always be assumed to result in less good protection of rights.

Nor, of course, should we assume that a rights-based approach, whether derived for the EU or not, is always the best way of tackling political problems. Sometimes, they may damage relationships, when for example claiming rights results in a principled stand-off rather than political negotiation. And it is a political judgment whether the use of rights to underpin a social-market economic system, by way of socio-economic rights such as labour rights, is preferable to de-regulated, neo-liberalism.

That said, others will consider that relying exclusively on politics rather than legal rights, and on traditional British approaches to such rights, both contributed to the unfortunate state of affairs in Northern Ireland that the GFA's rights-oriented approach, and the Agreement's assumption of the continuing role of EU-underpinned rights, were designed to change.

The failure of the UK Supreme Court to develop robust common law constitutional protections for rights arising from the GFA in the *Miller* case, which involved a challenge to the triggering of Article 50, further undermined the assertion that such an approach would easily replace EU-derived rights in Northern Ireland.

Supporters of EU-derived rights would also suggest, no doubt, that the relative success of a social-market economy during the 1990s was one of the conditions which allowed the GFA to come into being, and with it a period of uneasy, but nevertheless significant, peace. The important political point is not that there is disagreement about the importance of rights in Northern Ireland – that is obvious – but that this disagreement is a difference that divides the two communities, and reigniting the debate over rights has thus a significant destabilising effect.

Turning from the politics and economics of rights to the difficulties arising from Brexit for the modalities of rights protections, there is a significant additional uncertainty, arising from the structure of the devolution arrangements currently in place, that will affect the status of rights protections in Northern Ireland after Brexit in two respects.

First, the powers available to the Northern Ireland Assembly and Executive are currently limited by the EU law compliance provisions of the Northern Ireland Act 1998. The Assembly is not capable of legislating, and Northern Ireland departments are not competent to act, in breach of EU law. The exercise of devolved powers that overlap with EU law must therefore not only comply with the substantive provisions of EU law, but also the fundamental rights law that in turn conditions these substantive provisions. This imposes a significant constraint; Ministers may not discriminate against men who have sex with other men in establishing the criteria for

blood donations, to take a recent example. Getting rid of this constraint would thus significantly *increase* the powers of the Assembly and Executive; it would place issues that remain contentious between the communities, and that are currently beyond their powers, now potentially within their powers.

Second, at the moment, powers have been devolved to the Northern Ireland Assembly and Executive that enable those bodies to legislate and implement rights that, in part, derive from EU law. Equality law is the most prominent example. After Brexit, existing areas of EU competence will be repatriated to the UK, but there is considerable uncertainty as to which of these competences will be allocated to Westminster/Whitehall, and which to the devolved governments across the UK. There is thus the potential for Brexit to lead to a significant *decrease* in the powers of the Assembly and Executive, such as the EU competencies which engage equality and human rights.

Brexit has the potential, therefore, to reshape devolved government, by both increasing the powers of devolved institutions in some respects, and decreasing their powers in others, in both cases adding to the political difficulties of forming and maintaining devolved government in Northern Ireland.

A further difficulty for rights protections in Northern Ireland from Brexit is that the existing EU-regulated single market system, one relatively sympathetic to aspects of labour rights, for example, will need to be replaced with something different and, potentially, much less sympathetic to these requirements, which is a significant difficulty for supporters of the existing social-market economy. The UK's stated aims, post-Brexit, include reaching extensive trade and investment agreements with states other than the EU, such as the United States. The question that

will arise in this context is what deregulation other states with which the UK wishes to conclude an agreement require, in order to conclude the deal. In such agreements, the principal issue is often not the question of tariff barriers, but non-tariff barriers, which may be seen by the other state to include regulatory standards in the UK that the other state considers a barrier to entry into the UK market. Examples would include regulatory standards such as restricting hormones in beef, but it could equally include some types of rights protections, particularly in the area of labour rights and equality.

The potential impact on human rights in Northern Ireland of leaving the customs union and introducing new immigration controls, as is currently envisaged by the UK Government, are also significant. Leaving the customs union will require customs controls of some kind, which will require some policing. So too, current discussions on future UK immigration policy suggests an imminent immigration clampdown. Taken together, it would be reasonable to suppose that there will be a need for enhanced police powers, and increasing police activity on and around the border between Ireland and Northern Ireland. To the extent that this involves policing by bodies other than the Police Service of Northern Ireland, such as the UK Border Force, such bodies may be outside the police accountability mechanisms established in Northern Ireland since 2001. A return to much more contentious policing would potentially have significant negative effect in Northern Ireland on public confidence in the rule of law.

Finally, a significant layer of rights protection in Northern Ireland now derives from the Human Rights Act 1998 and the ECHR. Proposals to replace the Human Rights Act 1998 with a UK Bill of Rights, and the possible withdrawal of the UK from the ECHR, although temporarily stayed, have not gone away. During the recent UK General Election, the

Conservative Party committed a future Conservative Government not to leave the ECHR or replace the Human Rights Act during the term of this Parliament, but that commitment is time-limited. Brexit will remove the significant political requirement that the UK continue as member of the ECHR, and effectively implement the ECHR in practice, as part of its responsibilities as an EU member state. Since the ECHR would, in the absence of anything more robust, be the primary external constraint on new post-Brexit UK-Ireland arrangements in areas such as immigration, customs, intelligence-gathering, and data-protection, weakening the status of the ECHR is of considerable significance.

Rights in the negotiations: the EU-27's position

Once the withdrawal process was formally underway, with the transmittal of the Prime Minister's letter triggering Article 50 in March 2017, the European Council set out its negotiating guidelines, which indicated that the Irish Government had persuaded the EU to seek to guarantee the Good Friday Agreement in the negotiations. The Guidelines referred, in particular, to the "unique circumstances on the island of Ireland," which required "flexible and imaginative solutions," including in order to avoid "a hard border, while respecting the integrity of the Union legal order." In this context, "the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law". These "agreements and arrangements" include both the CTA arrangements and the GFA, "in all its parts".

The European Commission negotiating directives elaborated on these guidelines, drawing attention to two issues of particular significance in the Irish context: First, "[f]ull account," said the paper,

"should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens." In addition, "[e]xisting bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised." An Irish Government priorities paper on the Article 50 issues that are unique to Ireland, drew attention to a third rights issue, in addition to the CTA and EU citizens' rights in Northern Ireland, namely the right of the people of Northern Ireland to choose either UK or Irish citizenship: "The [Irish] Government", it stated, "will also ensure the protection of the rights of those in Northern Ireland who choose to exercise their right to hold Irish, and thus EU, citizenship, and will advocate for continued EU engagement in Northern Ireland."

Not only have the rights identified as related to the issue of Ireland/Northern Ireland become increasingly specific, but their importance in the negotiations as a whole has been significantly enhanced. The EU-27 has made it clear that it considers that there are two separable phases in the negotiations with the UK concerning Brexit. The first set of negotiations concern the exit arrangements, and the EU-27 has identified three key issues on which "sufficient progress" needs to be made, before the second phase (of conducting negotiations on the future relationship between the EU and the UK, including trading relationships) can take place. These three key issues are: (i) the financial settlement concerning existing and future UK commitments; (ii) the position of EU citizens in the UK, and vice versa; and (iii) addressing the problems that arise for the ROI and NI from Brexit, including the threat to the Good Friday Agreement. The second and third of these engage areas of rights protections of particular relevance for Ireland/Northern Ireland.

The EU-27's paper on "Guiding Principles for the dialogue on Ireland/Northern Ireland," published in September marked a considerable deepening of the EU-27's commitments to protect rights in Northern Ireland. As regards citizenship, the paper stated that: "Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. To this end, the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for the people of Northern Ireland who choose to assert their right to Irish citizenship."

The CTA was recognised as "fundamental to facilitating the interaction of people in Ireland and the United Kingdom" and "underpin[ing] the peace process and the provisions of the Good Friday Agreement, in particular the citizenship and identity provisions...". The paper identified what it considered the United Kingdom's "readiness to ensure that the Common Travel Area can continue to operate without compromising Ireland's ability to honour its obligations as a European Union Member State, including in relation to free movement for European Economic Area nationals to and from Ireland."

In addition, however, the EU-27 went significantly beyond the protection of EU and Irish citizenship rights and free movement, including specific mention for the first time of the broader set of rights protections associated with the GFA. Regarding these, the paper stated: "The Good Friday Agreement includes provisions on Rights, Safeguards and Equality of Opportunity, for which European Union law and practice has provided a supporting framework in Northern Ireland and across the island." It continued: "The Good Friday Agreement requires equivalent standards of protection of rights in Ireland and Northern Ireland."

As a result, the aim of the negotiations from the perspective of the EU-27 is now that the United Kingdom "should ensure that *no diminution of rights* [in Northern Ireland] is caused by the United Kingdom's departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law" (emphasis added). The EU-27's negotiating position on Ireland does not distinguish between what is necessary for the long term on Ireland, and what may be necessary in any implementation/transition period. In other words, what is described above relates to the final agreement. (So far, there is no indication that the EU-27 will require equivalent non-regression in the rest of the United Kingdom, and in that context, one could imagine significant differences on what the EU would require on rights between any transition period and the final agreement.) This is a powerful statement of intent on the part of the EU 27, committing the EU 27 to engaging with the UK to ensure that it will provide for the non-regression of a significant part of the existing *acquis* of rights protection in Northern Ireland. There is, however, a very significant gap between the EU-27 and the UK on this, particularly concerning the protection of general equality and human rights protections other than those concerned with citizenship.

Rights in the negotiations: the UK's position

The approach adopted by the UK Government to rights issues in Northern Ireland is, thus far, less clear and less extensive. There is broad agreement on some of the general principles: to avoid a return to a hard border; to maintain the CTA; to make sure that nothing is done to jeopardise the peace process in Northern Ireland; and to continue to uphold the GFA. Beyond informally agreeing these broad principles,

however, there is relatively little agreement, thus far, on any details on how these commitments can be made operational in a way that is consistent with EU law, and able to be delivered politically at Westminster.

As a result, there is relatively little detail in the UK's position paper about rights issues in Northern Ireland, with the exception of citizenship and CTA rights. "At this stage," says the UK's position paper on Ireland/Northern Ireland, the UK proposes only that both the UK and the EU "formally recognise that the *citizenship* rights set out in the Good Friday Agreement will continue to be upheld" (emphasis added). These appear to include the right of the people of Northern Ireland to identify themselves and be accepted as British or Irish or both; to equal treatment irrespective of their choice; and to hold both British and Irish citizenship. As regards the operation of the CTA, the UK has proposed that "the UK and the EU seek to agree text for the Withdrawal Agreement that recognises the ongoing status of the CTA and associated reciprocal arrangements following the UK's exit from the EU."

Even with regard to these EU citizens' rights and the CTA, the modalities are seldom explored, in particular regarding the rights of EEA citizens other than Irish nationals, and the problem of how to make these commitments consistent with Ireland's obligations under EU law. The UK's position is that "the UK's future operation of its whole border and immigration controls for EEA nationals (other than Irish nationals) can only be addressed as part of the future relationship between the UK and the EU." This has been regarded by some as attempting to locate the Irish Border issue in the UK's new economic relations with the EU, thus attempting to break the EU-27's determination that issues surrounding Ireland/Northern Ireland should be substantially addressed before moving on to post-Brexit trade and customs arrangements.

The UK's position fails to engage with the EU's rights agenda in another respect. Beyond (partially) addressing the CTA and citizenship rights issues, there is no discussion of any proposed arrangements for the continued protection of the other rights associated with the GFA immediately following Brexit, or whether such rights would be protected in any future agreements between the EU and the UK, or between the UK and non-EU states.

Which rights are to be protected, and where, is one set of issues, but there is an additional cross-cutting consideration: how to make any rights commitments that are agreed in any Withdrawal Agreement "stick"? The EU-27's negotiating guidelines are clear that the exit agreement "must include effective enforcement and dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union ...". This has led to a continuing standoff between the UK and the EU over the enforcement of citizens' rights. For the EU-27, it would be necessary for any Withdrawal Agreement to be capable not only of creating obligations in international law but also, in some cases, creating individually enforceable and directly effective provisions in the domestic courts of EU-27 *and the UK*. The effect would be that individuals could rely directly on the relevant provisions of the Withdrawal Treaty in front of UK domestic courts to override incompatible domestic legislation.

Commitments in the Withdrawal Agreement would be enforced through rights being granted in UK law, presumably in Parliamentary legislation, and would be enforceable through the domestic UK judicial system. Critically, however, any Withdrawal Agreement-created rights would not itself have *direct* effect in UK courts. Such courts which would only "have regard" to the Withdrawal Agreement "where the implementing legislation was ambiguous", and not

otherwise. (This reflects a return to the traditional understanding of the relationship between international treaties and UK law, an understanding that was not adopted in the Human Rights Act.) The only barrier to permitting both express and implied repeal is the presumption that Parliament is presumed to have intended to legislate in conformity with the UK's international obligations – a presumption that is rebutted by clear Parliamentary language to the contrary. Commitments in any Withdrawal Agreement would, as a result, be subject to any subsequent, unambiguous Parliamentary legislation changing or revoking the domestic implementation of the rights protected.

Rights and the UK's Withdrawal Bill

Although the UK's published position papers are lacking in detail in some cases, and lack engagement with the EU-27's position in others, the UK government negotiating positions need to be supplemented by the provisions of the European Union (Withdrawal) Bill for a more complete understanding of what is intended regarding the protection of rights in Northern Ireland after Brexit. The Bill was given its formal First Reading in July 2017, and its Second Reading in September 2017. It is currently in Committee, and a potentially lengthy and almost certainly extensive process of amendment, particularly in the House of Lords, can be anticipated. The Bill as published, therefore, should not be regarded set in stone, but rather as indicating the UK Government's *current* intentions only.

In most respects, the Bill does not distinguish between how rights in Northern Ireland and in the rest of the United Kingdom will be treated. The Withdrawal Bill provides that all EU-derived rights in domestic law (or some variation of them) will

continue in force even after the UK leaves the EU. The most significant exceptions to this general rule, so far as the practical application of rights is concerned, relate to the principle of the supremacy of EU law, the EU Charter of Fundamental Rights, and the general principles of EU law.

After Brexit, the supremacy of EU law will no longer obtain. Thus, although the current administration may commit to retain EU legal standards, future administrations will be under no obligation to do so and there would be nothing to prevent equality and human rights protections currently derived from, or supported by, EU law being eroded over time. The EU Charter of Fundamental Rights will not apply in UK law after exit, as there is an explicit provision in the Bill preventing this. EU law's general principles, including the EU's fundamental rights jurisprudence, will also generally not apply after Brexit. The Bill confusingly refers to the continuing role of "fundamental rights", but it would seem that this is a reference to "fundamental rights" in common law, not in EU law.

The Bill enables the UK to comply with its international obligations by giving a power to Ministers to make regulations that remedy any breaches of international obligations arising from withdrawal from the EU. Secondary legislation made under the power in this clause can do anything an Act of Parliament might. This is subject to limitations, such as not being able to amend the Human Rights Act, but it does allow amendment of the Northern Ireland Act 1998, as does the power to implement the contents of any withdrawal agreement. Regulations may make any provision that could be made by an Act of Parliament (including modifying the contents of the Bill itself when it is enacted). But regulations may not amend, repeal or revoke the Human Rights Act 1998.

In one significant respect, however, Northern Ireland is distinguished, together with Wales and Scotland. We have seen that institutions in Northern Ireland have had devolved to them broad powers over areas of rights. As currently envisaged in the Withdrawal Bill, the UK government intends that with regard to those devolved policy fields that are not currently subject to the EU *acquis*, devolved institutions will continue to be able to legislate, subject to the broad constraints set out in the NIA 1998 and other legislation. So, for example, the issue of same-sex marriage equality, which is not currently part of the EU *acquis*, would remain a matter for the Assembly after exit, to the same extent as it is before exit.

However, the UK government's proposal regarding EU-derived rights is that powers over these areas would be returned to the *UK Parliament*, even in those areas where the implementation of EU policy at the domestic level is currently devolved. The Bill provides that the devolved legislatures or administrations may only modify retained EU law to the extent that they had the competence to do so immediately before exit. The effect of this is that what was a common *European* approach will now become a common *United Kingdom* approach on exiting from the EU.

According to the Explanatory Memorandum, the UK Government "hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power. This process will be led by the First Secretary of State and supported by the relevant territorial Secretary of State and will begin immediately following the Bill's introduction." The approach adopted, it is said, "allows for the UK Government to hold discussions with the devolved administrations to establish areas where a common approach is or is not required, to help

determine where UK frameworks might need to be kept after exit." Given that there is currently no Northern Ireland Executive in existence, however, it is particularly unclear what, if any, mechanism is available for these negotiations.

Even if the Northern Ireland Executive is reformed, however, the UK arguably lacks effective intra-UK intergovernmental mechanisms capable of dealing with these issues. The Joint Ministerial Committee, intended to bring together the leaders of the devolved administrations of Scotland, Wales and Northern Ireland with the United Kingdom government to consider the implications of Brexit, has been marginalised, and the traditional view of British constitutionalism apparent in the Supreme Court's judgment in *Miller* (in particular, the refusal to accord any legal status to the constitutional conventions protecting devolution arrangements) does little to discourage a top-down, command-and-control attitude from London, rather than negotiation.

In addition, the looming problems arising for the protection of rights in Northern Ireland have received scarcely any attention in the UK-wide debate on Brexit, which is hardly surprising given the extraordinarily low profile of Irish issues generally in Brexit debates before and since the referendum. Describing Ireland/Northern Ireland as a mere side-show in British politics would be seen by many on the island of Ireland to be overly generous. And these issues are themselves overshadowed by the fact that the current UK government is dependent on the Democratic Unionist Party (which overwhelmingly derives its support from one section of the community in Northern Ireland) for its Parliamentary majority. If a comprehensive form of direct rule from London were to be introduced, over the objections of the Irish Government, any negotiations would be even more controversial, since Northern Ireland

interests would be represented by UK ministers – involving, arguably, a conflict of interests.

In the currently unlikely event that serious negotiations on the protection of rights in Northern Ireland post-Brexit were to be undertaken on a UK intergovernmental level, it is very uncertain what could be contemplated. In that context, one of the Northern Ireland issues left unresolved in the *Miller* case – the scope of obligations arising under section 75 of the Northern Ireland Act 1998 – could reappear, in the form of a request to subject proposals emerging from negotiations to an equality impact assessment.

Issues that might emerge include: whether any common UK policy frameworks should treat Northern Ireland as a special case; how the rights of Northern-Irish born holders of Irish passports will be guaranteed in the future; whether a Bill of Rights applying to Northern Ireland could be used to guarantee rights that are seen to be under threat (does this breathe new life into the Northern Ireland Bill of Rights proposed by the Northern Ireland Human Rights Commission?); whether there is some merit in a further all-island articulation of rights (itself contemplated in the GFA, and taken up in the work of the joint committee of the Irish and Northern Irish Human Rights Commissions); how rights should be effectively enforced (should a human rights court with judges drawn from both jurisdictions and beyond be contemplated, for example?); whether, if a common position on rights in Northern Ireland and Ireland were to be maintained, this could mean that there should be some continuing role for the CJEU, if only in ensuring that the rights of Northern Ireland-born citizens of Ireland (and thus EU citizens) are protected.

That these issues will need to be considered *somewhere* is clear, but at the moment it seems more

likely that they will arise in the Brussels negotiations themselves rather than be resolved at the UK intergovernmental level.

These speculations aside, the further question arises whether such discussions (whether conducted in London or Brussels) would in any event be significantly limited by existing UK policy positions. Would the UK government regard the current EU policy framework on areas of human rights and equality, for example, as an area requiring a common UK policy framework, or would it be prepared to allow Northern Ireland to adopt a different policy framework in those areas currently the subject of a common EU policy framework? The White Paper identifies two criteria that indicate that UK government might be loath to allow important aspects of the rights framework in Northern Ireland to be devolved to Northern Ireland institutions, namely the importance of being able to secure trade deals with third countries, and the need to protect the “single market” in the UK.

As we have seen, compliance with future international trade obligations may arise in this context because equality requirements may come to be seen as giving rise to non-tariff barriers to trade in goods and services, or as a barrier to investment. So too, the argument may well be made that a common UK equality framework is necessary in order to lessen the likelihood that, for example, different equality frameworks in the England, Wales, Scotland, and Northern Ireland could give rise to an “adverse effect on the operation of the single market” within the United Kingdom. Intriguing though both of these arguments are, further consideration is hampered by the current absence of any real discussion of the fuller implications of either.

Unless and until the allocation of power to the centre is altered by Parliament, devolved institutions

in Northern Ireland would no longer be able to legislate, for example, in those areas of equality that were previously subject to a common EU equality framework. They would be required to retain the current EU approach to equality, which would now become the UK approach, until it was altered by Westminster. Essentially, the substantive *status quo* would be preserved at the UK level, subject to the UK Parliament deciding to alter it, and there would be no power at the devolved level to change this, thus significantly altering the shape of devolved government. That has various consequences, not least in preventing the devolved institutions from continuing to keep in step with common EU standards, even if they wanted to do so, despite the expectation in the GFA that the presence of EU law would be a continuing influence.

About the Author

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