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Non-Discrimination: Article 2 in Context

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Article 2: Non-Discrimination in Context

Prof Aoife O'Donoghue, Queen's University Belfast School of Law

'No diminution' appeared very early in the Brexit negotiations as a key component of protecting the human rights advances made in Northern Ireland. While often substituted in debate with the phrases non-retrogression or non-regression, no diminution has a specific different meaning and has the potential to be a significant aspect of future interpretations of Article 2 of the Ireland/Northern Protocol. No diminution is also a significant factor in considering the wider political settlement in Northern Ireland and the overlapping jurisdictions, rights and processes for monitoring of rights, and the rationales for introducing and maintaining those specific rights as part of the long-term governance settlement.

First, the meaning of no diminution. No diminution grants no space for backward movement on rights. The snapshot of the law is fixed. Meanwhile General Comment 19 of the UN Committee on Economic Social and Cultural Rights, interprets non-retrogression as allowing for, in particular circumstances, some temporary retreat on rights. This difference is likely to have significant consequences. For instance, in debates on a new UK Bill of Rights, those rights covered by Article 2 of the Protocol, emergent from the Rights, Safeguards and Equality of Opportunity provisions of 1998 Belfast/Good Friday Agreement, have an added bulwark against any possibility of dilution. This does not make case law, commentary, or scholarship on non-retrogression irrelevant, but sets the baseline for manoeuvre for the UK Governments higher than analysis based in non-retrogression locates it. Non-diminution sets a higher baseline. Wider non-retrogression requirements also apply to both Ireland and the UK under broader international human rights requirements and are also significant.

Non-diminution within rights discourse is a rarity. South Africa's interim constitution had a non-diminution clause regarding language rights, but it did not reappear in the final constitutional text. It also appears in labour rights in the Philippines and has been the subject of case law there. Non-diminution creates a snapshot of time to be a measure of future change, which can only be positive, it cannot retreat, in any way. Which rights are regarded as incapable of diminution is critical as is the moment that the rights are captured at, because it is this moment that establishes the baseline. Within the Protocol, there are two strands, those subject to dynamic change listed in Annex 1 of the Protocol and the broader rights that come under the Rights, Safeguards and Equality of Opportunity strand, but both are subject to non-diminution, and both cannot be retreated from.

Non-diminution attempts to close any possible gaps that may emerge as EU and UK rights diverge and the clause covers a vast array of potential rights that result from Brexit and have to potential fall below the baseline set in Article 2. The range of rights, the operation of devolution and the 1998 Agreement makes both monitoring and operationalising this difficult and the array of Human Rights Bodies and the specific Committees created by the Protocol and wider Withdrawal Agreement will play a significant role in ensuring no diminution is maintained.

The potential broadness of the non-diminution requirements makes their direct effect less obvious, though the UK Government accepts this responsibility across Article 2. Where EU law is listed in the Protocol and comes under s6 of the 1998 Agreement, demonstrating their connection and non-diminution requirement is uncomplicated, but the wider rights involve close monitoring as they are not a closed category.

Non-diminution will also be significant to both the devolved administration and to Westminster where processes for legal reform will need to be cognisant of not downgrading rights in any way. This includes their justiciability as the ability to enforce a right is an important aspect of that right. In the specific context of Northern Ireland and the object and purpose behind the 1998 Agreement which includes some political rights currently subject to debate in the context of UK constitutional reform, no diminution could potentially play an important role. The 1998 Agreement and the wider Northern Ireland constitution already complicates wider UK constitutional reform, but Article 2 and the no diminution clause adds an extra layer of complexity. It is likely no diminution and Northern Ireland will be at the forefront of novel legal rights analysis in the coming decades.