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BrexitLawNI policy report: Brexit, human rights and equality

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BrexitLawNI

Policy Report:

Brexit, Human Rights & Equality

brexitlawni.org



BrexitLawNI

Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences.

About BrexitLawNI:

BrexitLawNI is a collaborative ESRC-funded research project between the Law Schools of Queen's University Belfast and Ulster University, and the region's leading human rights organisation, the Committee on the Administration of Justice (CAJ). Our project examines the constitutional, conflict transformation, human rights and equality consequences of Brexit.

Northern Ireland (NI) (along with Scotland) voted to remain in the European Union (EU); it is the region of the United Kingdom (UK) most likely to be negatively affected by the decision to leave the EU. Many complex questions have been arising, with significant legal and constitutional consequences that demand considered reflection. This initiative has aimed to meet this need by disentangling the legal elements of Brexit with regard to Northern Ireland, and presenting and communicating the related implications for policy and practice in user-friendly formats.

The main outputs for this project are the policy reports covering the 6 themes of the project: the peace process; north-south relations; border controls and free movement in and between Northern Ireland, the Republic of Ireland and Britain; xenophobia and racism in Northern Ireland; the impact on socio-economic rights; and wider human rights and equality issues.

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Executive Summary

Significant Impact on Human Rights and Equality

The UK's exit from the EU has significant potential impacts on human rights and equality in NI. Despite assurances from the UK government, it will undeniably result in the withdrawal of human rights protections. For example, the loss of the EU Charter of Fundamental Rights will result in the removal of a broad range of protections that are currently not contained elsewhere in UK domestic legislation. This is especially concerning in light of the failure to deliver human rights and equality in NI for much of the period since the Belfast/Good Friday Agreement (B/GFA).

The challenges posed by Brexit concern not just the withdrawal of substantive rights themselves but also the availability of enforcement mechanisms. The EU framework provides for a wider range of enforcement mechanisms, such as the *Francovich* remedy, that will no longer be available. The removal of the jurisdiction of the Court of Justice of the European Union (CJEU) provides further complication to this enforcement picture.

Divergence and the Concept of Equivalence

The UK's exit from the EU risks creating further divergence between standards of rights protection on the island of Ireland. This situation would go against the spirit of the B/GFA as well as provide further challenge to the peace process. Furthermore, the current state of the negotiations and arguably the logic of Brexit itself, threaten the universality of rights. Finally, there are also severe implications for the birthright clause of the B/GFA, which provides that people born in NI have the right to be British or Irish or both. The B/GFA states that the choice of identity should not result in differential or detrimental treatment, but as the negotiations currently stand, Irish passport holders will have access to more rights than those without an Irish passport.

Recommendations:

- The position of the **European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) 1998 in relation to NI should be affirmed.**
- Proposed ‘solutions’ for NI and the island of Ireland should be **subject to rigorous human rights and equality impact assessments.**
- **The EU (Withdrawal) Act needs to be amended (or alternative provision made)** to fully protect human rights and equality – including, the rights guarantees in the Charter, general principles of law, and EU secondary legislation.
- There is an urgent need to consider **the Bill of Rights as a mechanism to ensure respect for human rights including those found in EU law.**
- More attention should be given to the **debate on an all-island Charter of Rights** as one way to resolve questions around equivalence.
- Urgent detail is required on the undertaking that **the people of NI who claim Irish citizenship will be entitled to EU citizenship rights.**
- Further consideration needs to be given to the desirability of allowing the **people of NI a voice in the EU’s democratic processes** given the extent to which they will be subject to the common regulatory area.

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BrexitLawNI Policy Report:

Brexit, Human Rights & Equality

A. Context

Brexit will have a serious impact on human rights and equality and there is unease about the implications for the future of existing guarantees and renewed interest in those aspects of the B/GFA that remain unimplemented.

The B/GFA is a major peace agreement, intended to bring an end to the decades-long conflict known as the Troubles. The Agreement recognises that human rights and equality issues were fundamental to the conflict and therefore also to resolving the conflict.¹ In this regard, the B/GFA includes much more elaborate provisions on human rights and equality than were provided for in previous efforts to end the conflict (for example, the Sunningdale Agreement). The section of the B/GFA on Rights, Safeguards and Equality of Opportunity is especially important.²

- The B/GFA includes commitments to:
- The ECHR, and any supplementary Bill of Rights, as binding on the Assembly and public bodies;³
- A human rights commission and possible department of equality;⁴
- A unified equality commission;⁵
- Particular support for rights of free political thought; freedom and expression of religion; right to pursue peacefully democratic national and political aspirations; right to seek constitutional change by peaceful and legitimate means; right to freely choose one's place of residence; equal opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity; freedom from sectarian harassment; right of women to full and equal political participation;⁶
- A statutory equality duty;⁷
- A Bill of Rights supplementary to the ECHR;⁸
- Joint work by the two human rights commissions on the island, including looking at a charter of rights;⁹

1 Belfast/Good Friday Agreement, Declaration of Support. See, in particular, para 2.

2 For further discussion of the equality related issues in the B/GFA see the report on Socio-economic Rights and Equality.

3 B/GFA (n 1) para 2.

4 *ibid*, para 5.

5 *ibid*, paras 6 & 7.

6 *ibid*, para 1.

7 *ibid*, para 3.

8 *ibid*, para 4.

9 *ibid*, para 10.

- The equivalence principle: the Irish government undertook to provide an equivalent level of protection of human rights as pertained in NI;¹⁰
- Victims' rights;¹¹
- Commitments on economic, social and cultural 'issues', including regional and economic development and social cohesion, protecting the environment, employment equality reform, linguistic diversity (especially on promotion of the Irish language), and on the use of symbols and emblems.¹²

A number of these commitments have not been fully realised and there are problems with 'rollback' on some of them. For example, the St Andrews Agreement (2006) includes a commitment to a forum on a Bill of Rights. The Forum's deliberations informed the subsequent advice of the NI Human Rights Commission (NIHRC) on a Bill of Rights, but this advice was essentially rejected by the Secretary of State for NI. St Andrews also includes a commitment by the government to introduce an Irish Language Act but this has also not been done. The failure to advance some of these issues is clearly signalled in paragraph 69 of the Stormont House Agreement (2014), which effectively postpones consideration of a Bill of Rights and instead includes political party undertakings to respect several principles and policy objectives relevant to rights and equality.

B. Themes

Key themes emerge from the literature and the empirical work undertaken for this project, all under the general theme that guarantees of human rights and equality are central to the peace process, the B/GFA and North-South cooperation.

Centrality of Rights

The 1998 Agreement is distinct from early efforts to resolve the conflict because of the detail and **centrality of rights and equality guarantees**. This reflects a concern that the conflict had its origins in systematic rights violations, and that the conflict itself led to numerous human rights violations. These included social and economic rights violations in relation, for instance, to housing and employment. They also included violations of civil and political rights, such as the use of torture, extrajudicial killings, restrictions on free expression and free assembly.

¹⁰ *ibid*, para 9.

¹¹ *ibid*, paras 11-13.

¹² *ibid*, Rights, Safeguards and Equality of Opportunity: Economic, Social and Cultural Issues.

Failure to Deliver

While rights are central, there is a major theme about the **failure to deliver** on some of the undertakings in the B/GFA (and the subsequent St Andrews Agreement) and more generally a failure to adopt rights enhancing measures. While the B/GFA has a relatively short list of rights it mentions for special attention, it also refers to a much wider range of issues - many of which are rights relevant. For example, the B/GFA includes undertakings to make the ECHR binding on the NI Assembly and Executive. It also envisages a Bill of Rights which would include rights supplementary to the ECHR; again this would be binding on the Assembly and the Executive. In 2008, the NIHRC produced advice on a Bill of Rights and presented it to the Secretary of State for NI. The Secretary of State's response was tardy and dismissive. Thus, despite significant work in this area, there has not yet been a Bill of Rights for NI. The Agreement includes the creation of a single Equality Commission; something which has been created. However, there has been no progress on plans for a Single Equality Bill. For the most part, advances in relation to equality since the Agreement, have been achieved thanks to the impact of EU law - most notably in the areas of sexual orientation and age.

'A Frightful Mess': What Rights People Have

In this context of a failure to deliver on many of the human rights and equality promises contained in the B/GFA, a further theme that has emerged relates to **what rights are protected**. The EU has provided a set of norms which protect a much fuller range of rights than are protected in the ECHR and the HRA. EU law protects rights through several different mechanisms:

- **General principles of law.** These are principles that the Court of Justice discerns typically from the common constitutional traditions of the member states. These general principles include several directly relevant to the protection of rights (for example, proportionality, equality, and non-retroactivity).
- **Certain EU treaty provisions.** Articles 18-25 of the Treaty on the Functioning of the European Union concern non-discrimination and citizenship. They include prohibition on nationality based discrimination (Article 18), the right of EU citizens to move and reside within the member states, to participate in European Parliament and local (municipal) elections, diplomatic protection, to petition the European Parliament and other institutions and to write in any of the Treaty languages (Articles 20-24). Other articles are also relevant, such as Article 45 on free movement of workers and Article 157 on equal pay for equal work or work of equal value.
- **The EU Charter of Fundamental Rights.** The EU Charter was adopted as a political statement in 2000 (after the B/GFA) and was given full legal force by the Treaty of Lisbon in 2009. The Charter applies to acts of the EU and to acts of the member states when they are implementing EU law. In this sense, its scope is more limited than that of the HRA for instance. In other respects, it is also much broader. It includes an expansive list of 50 rights in six chapters: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.

- **EU secondary legislation in the form of regulations.** EU regulations are directly effective in national law without the need for national legislation to transpose them. An Example of regulations which protect rights include the recent General Data Protection Regulation (GDPR).
- **EU secondary legislation in the form of directives.** EU directives bind member states as to the objective to be achieved but they have to be implemented by member states. If a member state fails to implement a directive properly then in certain circumstances parts of it may become directly effective against the state. There are numerous examples of directives which protect rights and equality. These include:
 - **Non-discrimination:** Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000; Council Directive 2006/54 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, Recast 2006; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (27/11/00) 2000
 - **Workers' rights:** Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 1998; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses; Directive on Informing and Consulting employees (2002/14/EC) 2002
 - **Environmental standards:** Council Directive 92/43/EEC of 21 May 1992 (Habitats Directive); Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste
 - **Victims' rights:** Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012; victim of domestic violence: Regulation 606/2013 on mutual recognition of protection measures in civil matters 2013
 - **Asylum-seekers and refugees:** Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
 - **EU free movement rights:** 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
 - **Consumer protection:** Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993

- **Protection of Children:** Directive 2009/48/EC on the safety of toys and subsequent amending Directives; Directive 2011/93/EU on combatting sexual abuse and sexual exploitation of children and child pornography.¹³
- **Judgments of the CJEU.** The CJEU has frequently been called upon to interpret the treaties and EU legislation and has given more expansive interpretation to legislation than might otherwise have occurred. For example, the CJEU has ruled that:
 - discrimination based on pregnancy is always sex discrimination¹⁴
 - discrimination on grounds of having had gender reassignment surgery amounts to sex discrimination¹⁵
 - national security must not block sex discrimination claims¹⁶
 - states cannot impose limits on compensation for sex discrimination¹⁷
 - disability discrimination also protects persons caring for someone with a disability¹⁸

Enforceability

A further major theme revolves around **enforcement** – at the moment, EU rights protection offers some significant benefits in terms of enforceability when compared to other rights in the UK legal system. There are at least seven respects in which enforceability is superior. First, parts of EU law can be directly effective. Directly effective EU law applies immediately without the need for any national implementing measure and so can be relied on in any domestic court. Second – and important in a system otherwise based on parliamentary sovereignty - EU law is supreme in the event of a clash with national law. This means that a national court, from the lowest to the highest, must disapply national laws which are inconsistent with EU law obligations. This is a much stronger position than is the case under the HRA. Under the HRA, courts may issue a declaration of incompatibility against an Act of Parliament, but may not disapply a statute. EU law supremacy therefore puts it in a superior position compared to the HRA; this is even starker when comparing it to the position of human rights treaties which the UK has ratified but not incorporated. This supremacy is sometimes attractive to litigants, including the Secretary of State for Exiting the EU at one point in his previous position as an MP.¹⁹ Third, there is a strong obligation on courts to interpret law to be compatible with EU obligations; this is similar to the obligation in Section 3 of the HRA, requiring courts to interpret legislation so far as it is possible to do so to be compatible with Convention rights. Fourth, EU law offers the possibility of going to the CJEU

13 Cited by the Human Rights Consortium, 'Rights at risk: Brexit, human rights and Northern Ireland' (2018) 70 <<https://brexitlawni.org/assets/uploads/HRC-Rights-at-Risk-Report.pdf>>.

14 Case 177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3951.

15 Case 13/91 *P v S and Cornwall County Council* [1996] ECR I-2143.

16 Case 224/84 *Johnston v RUC* [1986] ECR 1651.

17 *Marshall II* case 271/91 *Marshall v Southampton and South West Hampshire Area Health Authority (No. 2)* [1993] ECR I-4367.

18 *Coleman v Aldridge Law* Case C-303/06.

19 *Tele 2 Sverige v Post-och, Secretary of State v Watson* C-203/15 and C-698/15 (21 Dec 2016), (CJEU). See also *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, (18 October 2017); *Walker v Innospech Ltd* [2017] UKSC 47, (12 July 2017).

as an international court charged with ensuring the uniform application of EU law across the Union. Any court throughout the Union has the possibility to make a ‘preliminary reference’ to the CJEU, asking for their ruling on an interpretation of EU law or the validity of EU law. As noted above, this has allowed the CJEU to decide some cases in a way that is favourable to rights protection. Fifth, the EU possesses other mechanisms of redress. For instance, the Commission can take enforcement action against states for breach of EU law. In extreme situations, the EU can also suspend some of the rights of EU states that are breaching human rights standards. The Joint Committee of the two Human Rights Commissions notes the possibility to avail of protection from the European Parliament, Ombudsman, Data Protection Supervisor, and Fundamental Rights Agency.²⁰ Sixth, there is the possibility to obtain damages for harm caused by a state’s breach of EU law – this is known as the *Francovich* remedy after the case where the CJEU established it.²¹ Seventh, the standing requirements under EU law are less strict than under the UK’s HRA.

Equivalence

Next is the issue of **equivalence** of rights on the island of Ireland. This has its roots in the B/GFA. The section on Rights, Safeguards and Equality of Opportunity sets out a series of obligations for each state. There is a section on Comparable Steps by the Irish government in which the Irish government undertakes to create a human rights commission, ratify the Framework Convention on National Minorities, enhance equality legislation and take other measures which ‘would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland’. The significance and wording of this undertaking is open to interpretation. Worded as an obligation on Ireland to ensure standards equivalent to those pertaining in NI, made sense at a time when much of the focus was on internal reform within NI and when Ireland was notably backward on several important human rights questions (for example, the ECHR was not yet part of domestic Irish law). At the time, Ireland needed to improve its human rights mechanisms to reach the same level of protection as in NI (post-reform). However, since 1998 there may be some areas – notably on equal marriage – where NI lags behind human rights developments in Ireland.

A more expansive interpretation of the B/GFA is that the purpose was to ensure that overall, human rights received equivalent protection across the island of Ireland. This is the view favoured by the Joint Committee of the two Human Rights Commissions.²² This notion of all-island standards is also reflected in the Agreement where it envisages a joint committee of the two human rights commissions ‘as a forum for consideration of human rights issues in the island of Ireland’; this joint committee could consider establishing a charter ‘reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland’. This more expansive interpretation also means that irrespective of the sovereign status of NI, there will be an equivalent level of protection for rights of residents here.²³

20 Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, *Policy statement on the United Kingdom withdrawal from the European Union 2018* 4.

21 For an explanation of the *Francovich* principle, see <<https://www.blackstonechambers.com/news/great-repeal-bill-what-will-happen-accrued-rights-claim-francovich-damages/>>.

22 Joint Committee (n 20) 6.

23 So even in the event of a united Ireland, the rights currently enjoyed in NI would receive equivalent protection; see BrexitLawNI, Interview with Senior Official (26 October 2017).

Rights-Holders and the Universality of Rights

Finally, there are themes about **rights-holders and the universality of rights**. The B/GFA includes particular language about the birthright of the people of NI to be British or Irish or both. Other language in the B/GFA similarly highlights the traditional community divide. This reflects the particular circumstances of the conflict in NI, and a commitment that the people of NI can freely choose their identity, and that their rights do not depend on this. The B/GFA, though, also continues other human rights provisions which are more obviously universal – in other words, presumably applying to everyone in the jurisdiction.²⁴

When considering these different themes, it is important to reflect on the multiplicity of legal norms involved: the 1998 international treaty between the UK and Ireland, the 1998 multiparty agreement, a raft of UK legislation, and EU law in all its forms. This will however become even more complex post-Brexit. As we consider the impact of Brexit, we have also to address the forthcoming Withdrawal Agreement being negotiated between London and Brussels, possibly further agreement(s) between London and Brussels, the European Union (Withdrawal) Act, the Withdrawal Agreement and Implementation Bill²⁵ and in due course statutory instruments made under UK legislation.

C. Impact of Brexit

The Brexit process and the possible outcomes of this process may impact on these areas of concern.

Centrality of Rights

While rights are central to the B/GFA and maintaining peace in NI, they have often been side-lined in the Brexit negotiation process in favour of arguments over economic issues. Indeed, certain rights issues have been treated as a bargaining chip in the negotiation process.²⁶ Furthermore, the Conservative government’s attitude towards human rights have produced high levels of fear regarding what the post-Brexit human rights landscape will look like, and the knock-on implications for peace in NI.

24 Christopher McCrudden, ‘The Good Friday Agreement, Brexit, and Rights’ (British Academy / Royal Irish Academy, 2017) 3 <<https://www.britac.ac.uk/sites/default/files/TheGoodFridayAgreementBrexitandRights.pdf>>.

25 Department for Exiting the European Union, ‘Legislating for the Withdrawal Agreement between the United Kingdom and the European Union’ (Cm 9764, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf>.

26 Caoilfhionn Gallagher, Angela Patrick and Katie O’Byrne, ‘Report on Human Rights Implications of UK Withdrawal from the EU’ (Doughty Street Chambers, 2018) 8 <http://www.guengl.eu/uploads/news-documents/GUE_NGL_Brexit_and_HR_Final_020318_TO_PRINT.pdf>.

One of the most worrying issues is the ultimate attitude of the Conservative minority government towards the HRA and the ECHR. The 2017 Conservative Party manifesto has this important paragraph on human rights:

We will not bring the European Union's Charter of Fundamental Rights into UK law. We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.²⁷

This is concerning on a number of fronts. First there is the commitment to removing the Charter from UK law (see below). Second, while there is a commitment not to repeal or replace the HRA while Brexit is underway, it is concerning that the preferred options are repeal and replace in the future. Furthermore, this is only a guarantee for the duration of the Brexit process. Depending on when this process ends, that suggests HRA repeal or replacement could become an issue during this Parliament. Third, there is the suggestion that after the next election the Conservative Party might want to withdraw from the ECHR. This short paragraph however gives no indication that human rights protection is important to the governing party; furthermore, it is oblivious to the undertakings in relation to the ECHR contained in the B/GFA. The HRA and the ECHR have been important to the peace process, and there are (international) legal obligations in the B/GFA about the ECHR's position in NI.²⁸ More recently, in its Chequers proposals, the UK government has indicated that it is 'committed to membership of the European Convention on Human Rights (ECHR).'²⁹

Given the Conservative government's statements on the HRA, ECHR and the Charter, it is understandable that many interviewees we spoke to are very concerned about the future of human rights protections in NI and the lack of focus on human rights protections in the Brexit negotiations. For example, one interviewee stated that Brexit 'will be an absolute disaster for anyone who has any belief in human rights, civil liberties, in the peace process, in anti-discrimination.'³⁰ Another expressed concern that Brexit should not be seen as an opportunity for turning the clock back to the 1950s.³¹ In light of this, there is a wide range of work taking place in NI towards ensuring the continued protection of human rights and providing solutions to the problems created by Brexit.

27 Conservative Party, *Forward, Together. Our plan for a stronger Britain and a prosperous future. The Conservative and Unionist Party Manifesto 2017* (2017) 37.

28 CRG Murray, Aoife O'Donoghue and Ben Warwick, 'Policy Paper: The Place of Northern Ireland within UK Human Rights Reform' (2015) <https://eprint.ncl.ac.uk/file_store/production/220016/8BE66F76-5A5D-4366-83F5-B8BAB3B6D8DF.pdf>.

29 HM Government, *The Future Relationship between the United Kingdom and the European Union* (Cm 9593, 2018) 52 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf>.

30 BrexitLawNI, Interview with Anonymous Interviewee 1 (4 December 2017).

31 BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

Despite the added workload to many NI institutions (such as the Human Rights Commission) there has not been adequate additional support provided to them.³²

There have also been some efforts within the Brexit process, largely efforts led by the EU, to maintain the centrality of rights or at least some of them for certain categories of people. As these relate to the specific risks that rights will be diminished, we will come to this in a later section.

Failure to Deliver

The impact of Brexit is especially significant given the failure of the institutions to deliver on the commitments in the B/GFA and more generally the difficulty in pursuing progressive public policy measures in NI. That said, many aspects of the B/GFA have been implemented and undoubtedly NI is a very different place from 20 years ago. Nevertheless, there have also been provisions of the B/GFA left unimplemented and instances where the local institutions have not progressed a rights and equality agenda.

As noted above there has been no progress on a Bill of Rights for Northern Ireland, a Single Equality Bill or an Irish Language Act. This is in the context that all other major jurisdictions in the islands have single equality acts, and several have acts protecting Irish, Scottish or Welsh languages. The reasons for these lapses have been various – the institutions have not always been operational, the parties have been unable to agree, formal cross-community rules have stymied change, or the government has not shown an inclination to act. These factors inhibiting action though have generally been of no avail in the face of EU obligations.

The EU legal framework has provided some reassurance in this context. Most notably, the major changes to NI's equality framework since the start of the century have largely been down to the requirement to implement EU legislation. This includes provisions protecting those on maternity leave,³³ improvements to the law on sex discrimination,³⁴ the prohibition of age discrimination,³⁵ the prohibition of sexual orientation discrimination,³⁶ and protection from discrimination on grounds of having had gender reassignment.³⁷

It should be acknowledged that this is not entirely a one-way street. One interviewee noted that in some instances domestic UK protection may go beyond the minimum requirements of EU law and that there existed a 'robust framework in Northern Ireland because of our history' that

32 BrexitLawNI, Interview with Les Allamby (Belfast, 12 October 2017).

33 Maternity and Parental Leave and the Paternity and Adoption Leave (amendment) Regulations (Northern Ireland) 2008.

34 Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 Statutory Rule 2001; Sex Discrimination (Amendment of Legislation) Regulations 2008; The Sex Discrimination (Amendment of Legislation) Regulations 2008, SI 2008/963.

35 Employment Equality (Age) Regulations (Northern Ireland) 2006, SR 2006/261; Employment Equality (Age) (Amendment No. 2) Regulations (Northern Ireland) 2006, SR 2006/453.

36 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, SR 2006/439.

37 Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999, SR 1999/311.

includes institutions such as the ECNI and NIHRC which were not threatened by Brexit.³⁸ The EU itself is not a perfect institution,³⁹ and in some cases UK law had a positive influence on the scope of EU equality law.⁴⁰ It was suggested by one interviewee that Brexit may even create the potential for the EU to reduce human rights protection.⁴¹

'A Frightful Mess': What Rights People Have

On the **rights which people have**, or rather will have post-Brexit, the picture is complicated by the different sources involved at the UK and European levels, the fact that many of them are at the debate stage or in draft, and the fact that they are not entirely coherent across the different levels. It will be helpful to take the developments separately at the UK and the EU level.

At UK Level: The European Union (Withdrawal) Act

The EU (Withdrawal) Act is the key legislative development at the moment and is 'really significant for equality and human rights issues.'⁴² The Withdrawal Act impacts directly on what rights people have. In one sense the default position is that most EU law will become 'retained EU law', many EU law rights will be domesticated as UK-based rights. The effect of sections 2, 3, 4 is that EU regulations, regulations implementing EU directives, directly enforceable EU treaty provisions and general principles of law will be continued as retained EU law. There are some important exceptions and caveats both as regards the rights people will have and how they will be enforced.

The Charter of Fundamental Rights

This is one of the most important exceptions to the general provisions making EU law 'retained EU law'. As indicated in the Conservative Party manifesto the Charter will not be retained. Section 5(4) of the Act removes the impact of the Charter from UK law. This has been described as a 'process of disentanglement, quite unique in the democratic world.'⁴³

The White Paper presaging the Bill makes the argument that the rights in the Charter are protected anyway by the ECHR and other international treaties.⁴⁴ The White Paper also says (correctly) that the Charter only applies to the EU institutions or the member states when implementing EU law.⁴⁵ It goes on to assert that 'it cannot be right that the Charter could be used to bring challenges

38 Stalford Interview (n 31).

39 Allamby Interview (n 32).

40 BrexitLawNI, Interview with Evelyn Collins (Belfast, 9 November 2017).

41 BrexitLawNI, Interview with Martina Anderson (Derry, 20 September 2017).

42 Allamby Interview (n 32).

43 Vernon Bogdanor, 'Brexit and our unprotected constitution' (The Constitution Society, 2018) 20 <<https://consoc.org.uk/wp-content/uploads/2018/02/Brexit-and-our-unprotected-constitution-web.pdf>>.

44 Department for Exiting EU (n 25) para 2.22.

45 *ibid* para 2.23.

against the government, or for UK legislation after our withdrawal to be struck down on the basis of the Charter.'⁴⁶ The government further argues in the White Paper, and in the Explanatory Notes to the Bill, that the Charter 'did not create any new rights, but rather codified rights and principles which already existed in EU law.'⁴⁷ The Withdrawal Bill, now Act, instead will retain the rights or principles which exist independently – as provided for in section 5(5).

These arguments are difficult to sustain. The government has produced a right-by-right analysis to explain its contention that rights are covered in other parts of the law; the Joint Committee on Human Rights has carefully analysed this.⁴⁸ The argument that the Charter's rights are already covered in the ECHR and other treaties does not withstand scrutiny. Even allowing for the fact it only applies in a limited sphere, one interviewee notes it is 'the nearest thing in the absence of a Bill of Rights, to where the Belfast Agreement envisaged us going.'⁴⁹

Importantly, most human rights treaties the UK has ratified are not part of domestic UK law. So, for example, it is not possible to go to a UK court and invoke rights in the Convention on the Elimination of Racial Discrimination or most other human rights treaties. The ECHR is, thanks to the HRA, an exception. The argument based on the existence of Charter rights in other international treaties apart from the ECHR is disingenuous.

The Charter goes beyond the ECHR significantly in the rights which it protects. It includes many rights which are simply not found in the ECHR. These include an explicit right to dignity (article 1), data protection (article 8), freedom of the arts (article 13), freedom to choose an occupation and engage in work (article 15), freedom to conduct a business (article 16), asylum (article 18), respect for diversity (article 22), rights of the child (article 24), rights of the elderly (article 25), and many others. Even where the ECHR protects the same right, the Charter frequently develops the right. For example, the right to marry is in gender neutral terms (article 9), the right to bodily integrity addresses issues of eugenics (article 3), and the free expression right is explicit about the need for media pluralism (article 11).

It is also somewhat misleading to present the Charter as simply replicating what already exists in EU law. The Charter would hardly serve any purpose currently in EU law if it simply replicated existing EU law. But even if the government's contention is correct, then there can be no harm in retaining the Charter. Furthermore, there is a serious risk to the principle of legal certainty (that the law must be accessible). The Charter is more accessible than disentangling rights and principles from the vast corpus of what will be retained EU law.

The argument that it would be wrong to allow the Charter, post-exit, to be used to strike down UK law is undercut by the very provisions of the Act. The Act makes a distinction between UK laws passed before and after exit day. UK laws passed after exit day are not subject to the supremacy of EU law, but those passed before exit day are (section 5(1)-(2)). There is no reason that this solution

46 *ibid*.

47 European Union (Withdrawal) Bill (HL Bill 79) Explanatory Notes (2018) para 103.

48 Joint Committee on Human Rights, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis First Report of Session 2017-19 (HL 70/HC 774, 2017-2019)*. <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/774.pdf>>.

49 Allamby Interview (n 32).

cannot also apply to the Charter – it would retain the principle of parliamentary sovereignty and treat the Charter similarly to other EU law.

There is therefore a strong argument to retain the Charter. If not for the whole of the UK, the Charter should be retained for NI given: the failure to deliver a Bill of Rights in NI, the position of Irish citizens north and south of the border, and the fact NI voted to remain.⁵⁰

Given the weaknesses in the government's arguments on this, it is perhaps unsurprising that the House of Lords voted to retain the Charter (or most of it). The government was defeated 316-245 on this. The Commons however rejected this change and so the Charter is not being retained.

General Principles of Law

Section 4 of the Act would seem to retain 'general principles of law'. Section 5(4) retains 'fundamental rights or principles' which exist independently of the Charter; however, we will return to this when considering enforceability.

EU Secondary Legislation (Regulations and Directives)

There are numerous examples of regulations and directives which protect human rights and equality. Section 3 of the Withdrawal Act will convert EU regulations into retained EU law. Section 2 covers regulations made to implement EU law (for example, to implement EU directives). Section 4 will also in certain cases cover directives, where a court has decided before exit day that part of the directive is directly effective.

The key challenge here is not so much whether the rights in these regulations and directives will be retained, but rather the possibility for ministers to use powers in sections 8 and 9 (originally clauses 7, 8, 9) to make changes to the statute book. As originally introduced, these clauses gave sweeping law-making powers to ministers to correct deficiencies in retained EU law (clause 7), to ensure respect for international obligations (clause 8) and to implement the Withdrawal Agreement (clause 9). These clauses contained some safeguards as introduced – none of them could be used to amend, repeal or revoke the HRA, and clause 7 had a clause protecting the Northern Ireland Act; they were also subject to time limits.⁵¹ These limits though seemed paltry when set against the vague parameters for their use and the powers were severely criticised by parliamentary committees.⁵²

⁵⁰ Allamby Interview (n 32).

⁵¹ Clause 7(8), clause 8(4), clause 9(4).

⁵² Constitution Committee, *9th Report of Session 2016–17 The 'Great Repeal Bill' and delegated powers* (HL 123, 2016-2017) <<https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>>; Constitution Committee, *9th Report of Session 2017–19 European Union (Withdrawal) Bill* (HL 69, 2017-2019) <<https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf>>; Delegated Powers and Regulatory Reform Committee, *3rd Report of Session 2017–19 European Union (Withdrawal) Bill* (HL 22, 2017-2019). <<https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>>; Delegated Powers and Regulatory Reform Committee, *12th Report of Session 2017–19 European Union (Withdrawal) Bill* (HL 73, 2017-2019) <<https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/73/73.pdf>>.

Consideration in the Commons and the Lords has resulted in some important improvement in these provisions. Schedule 7, paragraph 28 now requires a degree of equality proofing for regulations under clauses 7(1), 8 or 9. From a Northern Irish perspective though, this protection is problematic as it only refers to the British equalities legislation as the relevant standards - ignoring the different equality legislation in NI. In the Lords, the changes have been more significant. A government supported amendment removed clause 8. Clause 8, the power to correct deficiencies in retained EU law, has been significantly curtailed with an exhaustive list (subject to amendment) provided of when it can be used.

The European Union and the Draft Withdrawal Agreement⁵³

The European Union has emphasised the importance of rights in the negotiations, more so than the UK government. This is seen from an early stage in the European negotiation documents, which refer to the rights of EU citizens living in the UK as a priority issue.⁵⁴ The early guiding principles also refer to the B/GFA in all its parts, though does not specifically mention rights in this context.⁵⁵ The subsequent Council Negotiating Directives lists protecting the rights of EU27 citizens in the UK and UK citizens in the EU27 as the first priority.⁵⁶ The Negotiating Directives also flesh out some detail on the B/GFA, adding specific mention of 'Irish citizens residing in Northern Ireland'.⁵⁷

The Commission's Task Force 50 (TF50) has given further detail to all of these issues and in particular has published more elaborate guidance on NI. Its Guiding Principles for the Ireland/Northern Ireland Dialogue contain these two crucial paragraphs:

(4) 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. The Good Friday Agreement requires equivalent standards of protection of rights in Ireland and Northern Ireland.

⁵³ This paper focuses on rights and Northern Ireland, and therefore does not offer lengthy discussion of the customs and free movement issues raised in relation to Northern Ireland.

⁵⁴ European Council (Art. 50) Guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017) <<http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/>>.

⁵⁵ *ibid*, '11. The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding 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.'

⁵⁶ Council Directive (EC) supplementary 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 [2017] XT 21004/18 (Council Negotiating Directive) para 11.

⁵⁷ *ibid*, para 14.

The United Kingdom should ensure that no diminution of rights 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.

(5) As regards citizenship, the Good Friday Agreement recognises the birthright of all of the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose. Further, it confirms that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland. 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.⁵⁸

The December 2017 Joint Report of the UK and EU negotiators reflects this specification on the themes of rights. Much of the public discussion of the Joint Report has focused on the three scenarios envisaged for resolving the challenges posed by the border. The Joint Report envisages three possibilities: (a) a comprehensive agreement on the future UK/EU relationship; (b) specific UK proposals on how to deal with the border (usually understood to be technological in nature); and (c) the so-called backstop provision whereby the UK maintains full alignment with those internal market and customs union rules which 'now or in the future, support North-South cooperation, the all-island economy, and the protection of the 1998 Agreement.'⁵⁹ The Joint Report provides:

52. Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.

53. The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland.

⁵⁸ European Commission, *Guiding principles for the Dialogue on Ireland/Northern Ireland* (TF50, 21 September 2017) <https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf>.

⁵⁹ Negotiators of the European Union and UK Government, *Joint Report on the progress during phase 1 of the negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union* (2017) para 49. <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> The undertakings in paragraph 49 are difficult to reconcile with the UK's intentions in paragraph 50 to avoid new regulatory barriers between NI and the rest of the UK, and the UK's 'red lines'.

The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.⁶⁰

In March 2018, the Commission published a draft Withdrawal Agreement which gives a legal form to the undertakings in the earlier Joint Report. The draft Agreement has a draft Protocol on Ireland/Northern Ireland. The Commission has colour-coded the degrees of agreement within the draft Agreement: the Preamble, articles 1, 6, 9, 13, 14, 16 are coded yellow, meaning there is agreement on the policy objective; articles 2, 8, 10, 15 are coded green, indicating the negotiators agree subject to technical revisions.

On the key rights issues there are two important provisions. The first is on the rights of Northern Irish people who assert Irish - and therefore EU - citizenship. This is found in the Preamble to the Protocol:

RECOGNISING that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship";⁶¹

We return to this provision below when discussing the theme of differential rights.

The second important provision is located in article 1 of the Protocol on 'rights of individuals':

1. The United Kingdom shall ensure that no diminution of rights, safeguards and 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.

⁶⁰ *ibid*, paras 52-53.

⁶¹ European Commission, *Draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (coloured version)* (2018), preamble <https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf>.

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.⁶²

It is symbolically important that this is in the first article; the reference to the implementing institutions in Article 1(2) is also welcome. Article 1(1) remains vague in at least two important respects – what are the ‘dedicated mechanisms’ to implement this paragraph? And what are the provisions in Annex 1 – there is no text. Does this just include specific anti-discrimination provisions or does it also include the Charter provisions and perhaps even general principles of law? Is it limited to anti-discrimination law or does it cover other rights relevant to the NI circumstances? The Joint Report and the draft Protocol seem more limited than some of the earlier documents – for instance, there is no mention of equivalence in the December Joint Report or the draft Protocol. The Protocol ‘no diminution’ clause seems to be limited to the rights in the ‘Rights, Safeguards and Equality of Opportunity’ section of the B/GFA – this would not include the ‘birthright’ clause of the B/GFA.⁶³

What rights will exist for people in NI after the UK’s exit from the EU? The government has succeeded in its determination to remove the Charter. The position of the EU is stronger on rights protection in NI but is importantly vague on which rights will be protected post-exit. The emerging picture is one which demonstrates the potential for a ‘very confusing mix of common law, EU law, Court of Justice jurisprudence, Court of Human Rights jurisprudence, ... which is going to be a frightful mess.’⁶⁴ This potential for complications is confirmed by analysis suggesting there will be at least nine different categories of rights holders post-Brexit.⁶⁵

Enforceability

The above section has covered in detail the state of the proposals and negotiations on what rights will be retained after the UK’s exit. But also of importance is the enforceability of those rights. Recall that EU law offers some important benefits for enforceability: direct effect and supremacy, EU compatible interpretations, *Francovich* damages, and access to the CJEU and Commission. These will all be seriously attenuated post-exit. One interviewee emphasised the importance of the EU framework as a backdrop and especially the role of the CJEU, which could be accessed even from an industrial tribunal thanks to the preliminary reference procedure.⁶⁶

⁶² *ibid*, ch 1, art 1.

⁶³ Anonymous, ‘The Rights Question: Determining the “how” of Giving Effect to Rights after Brexit’ (Conference organized by Sinn Féin, 8 June 2018).

⁶⁴ Anonymous Interviewee 1 (n 30).

⁶⁵ Colin Murray, Aoife O’Donoghue and Ben Warwick, *Discussion Paper on Brexit* (Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, 2018) <<https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>>.

⁶⁶ Collins Interview (n 40).

On EU supremacy, the Withdrawal Act provides that it will still apply to pre-exit UK law but not ‘any enactment or rule of law’ made on or after exit day.⁶⁷ Remember however that the Charter will not be continued according to the government’s plans. The Act does continue ‘fundamental rights or principles which exist irrespective of the Charter’⁶⁸ but this has to be read in conjunction with Schedule 1. Schedule 1 imposes limitations on the uses to be made of ‘general principles of law’. It is not clear what is the relationship between the ‘general principles of law’ (which is a recognised EU doctrine) and the notion of ‘fundamental rights or principles’ (which is a less well defined notion).⁶⁹ Schedule 1 limits the uses of the former: it excludes any cause of action based on failure to comply with general principles of law; furthermore, it provides that no court can disapply or quash any enactment, rule of law or declare any conduct unlawful by reason of failure to comply with general principles of law.⁷⁰ This seriously denudes the retained general principles of law of any enforcement value. Schedule 1 goes on to declare the *Francovich* principle is unavailable after exit day. In summary, the scheme of the Withdrawal Act therefore is to either remove rights (the Charter) or to curtail the enforcement mechanisms for them (general principles of law, *Francovich*).

The draft Withdrawal Agreement has also to be considered. The draft Protocol on Ireland/Northern Ireland has a number of different chapters. Article 1 on rights of individuals is Chapter 1. Article 2 is Chapter 2 and covers free movement of persons. Chapter 3 is more extensive and addresses the ‘common regulatory area’. Chapter 4 is about institutions. Article 11 says that as regards Chapter 3, the EU institutions, in particular the CJEU, should have all the powers conferred by the EU treaties. This offers considerable institutional protection, but it does not cover Chapter 1 on rights of individuals.

The draft Protocol envisages two layers of enforcement for the rights in Article 1. First, Article 1(1) itself says the UK will implement it through ‘dedicated mechanisms’. Article 1(2) goes on to address the role of the NI Human Rights Commission, the Equality Commission for NI and the Joint Committee of the two national human rights institutions, but the reference to ‘dedicated measures’ in Article 1(1) does not seem limited to these.

The draft Agreement provides the second layer of enforcement in Articles 157-165. These articles create a Joint Committee of the UK and the EU, including a specialised committee on Ireland/Northern Ireland. This Joint Committee can consider complaints brought by the EU or the UK about the application or interpretation of the Agreement and can issue recommendations to resolve these. There are provisions for either the Joint Committee or the UK or the EU to refer the dispute to the CJEU. It appears from the draft Protocol and draft Agreement that there is therefore no direct access to the CJEU for the purposes of enforcing Article 1. With regard to the Preamble, this is likely not binding at all.⁷¹

⁶⁷ EU (Withdrawal) Act, s 5(1) and (2).

⁶⁸ *ibid*, s 5(5).

⁶⁹ McCrudden suggests this is a reference to fundamental rights in common law, not EU law. See, McCrudden (n 24) 11.

⁷⁰ sch 1, para 3.

⁷¹ Case 134/08 *Hauptzollamt Bremen v J.E. Tyson Parketthandel GmbH hanse j* [2009] ECR-I.

The access to these enforceability mechanisms at European level has implications beyond the protection of human rights. Respect for human rights and access to these accountability mechanisms, as one interviewee notes, is also integral to much of the security apparatus supported by the EU – such as, for example, data sharing and the European Arrest Warrant.⁷² Undermining these systems has implications not only for security but for relations between North and South, between Dublin and London, as well as London and Brussels.

Equivalence

The **equivalence** concern goes back to the original provisions of the 1998 B/GFA. The concern about equivalence is linked also to the dynamic nature of rights protection. If Ireland remains a part of the EU while NI leaves, then there is a risk that NI will not be adopting the equivalent of EU measures in, for example employment rights, health and safety, and environmental standards. This would, over time, lead to a growing gap between the rights protections offered north and south of the border. Attention was drawn to the equivalence principle as being important for leveraging support for equality protections that may not be available in Britain.⁷³

The Commission's Guiding Principles expressly refer to the equivalence principle as being required under the B/GFA.⁷⁴ This explicit reference in the Guiding Principles disappears though in subsequent texts. There is however some scope for ensuring equivalence going forward. This lies in the draft Protocol article 12(3) which says that where the Protocol refers to a Union act and that act is amended subsequently or replaced, then the Protocol is deemed to refer to that amended or new act. So if any of the EU laws referred to in Article 1 and Annex 1 are subsequently amended or even new versions adopted, then the Protocol covers those. It also covers those EU acts specified in relation to the Common Regulatory Area in Chapter 3 of the draft Protocol.

The Birthright Clause

A final issue relates to the ongoing ability of British and Irish citizens, when residing in NI, to have access to EU citizens' rights. These are mostly framed around freedom of movement, along with the concurrent implications for the EU26.

Under EU law, Irish citizens automatically retain EU citizenship.⁷⁵ Irish citizenship is currently an entitlement to almost all those born in NI (save for persons born after 2004 whose parents are temporary migrants). Irish citizenship can also be conferred through parentage. In short, almost the whole population of NI will be or will be entitled to be EU citizens even after Brexit.

⁷² Allamby Interview (n 32).

⁷³ Collins Interview (n 40).

⁷⁴ European Commission, (n 58).

⁷⁵ Treaty on the Functioning of the European Union [2012] OJ C326/47, art 20(2) 'Every person holding the nationality of a Member State shall be a citizen of the Union.'

There have been regular reiterations throughout the Brexit process of the core provision in the British-Irish Agreement regarding the birthright of the 'people of Northern Ireland' to hold Irish and/or British citizenship, which explicitly endorse that the choice be without differential or detrimental treatment. For example, the UK Northern Ireland and Ireland Position paper makes reference to the B/GFA birthright for the people of NI: '... to identify themselves and be accepted as British or Irish or both, as they may so choose; to equal treatment irrespective of their choice.'⁷⁶

The EU Citizens' Rights in Question

In summary, the core EU citizens' rights are:

1. Rights to Freedom of movement in EU to visit, work, study, retire, etc.;
2. Political rights to vote in MEPs and stand for election;
3. Consular assistance from other EU countries when you are abroad and your own state does not have consular facilities;
4. Rights to petition EU institutions, Parliament, Ombudsman etc.

There are other rights as well, such as rights not to be discriminated against on the basis of nationality. Accessing the above rights in practice is tied up with other EU rights, opportunities and benefits. For example, the right to study is linked to rights to pay EU student fees rates – not the much more expensive international student rates. The ability to travel to other EU states is linked to the European Health Insurance Card (EHIC) to help access healthcare needed during a visit (particularly essential for persons with pre-existing conditions, who are unlikely to be able to get travel insurance). Taking up work is dependent upon mutual professional qualification recognition. The right to be joined by family members (who are not EU/EEA nationals) are an inherent part of EU treaty rights to work and study. It is important to note that the continuation of access to most of these EU citizens' rights after Brexit would require specific arrangements; whilst it would still be possible to travel freely to other EU states, most of the above rights are usually tied to residency in an EU member state.⁷⁷

⁷⁶ HM Government, 'Northern Ireland and Ireland Position Paper' (16 August 2017) para 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>.

⁷⁷ For example, access to EU student fees rates normally requires residency in an EU member state for three of the previous five years; the right to vote for an MEP is normally tied into the member state of residency (although states can make specific arrangements); access to EHIC normally involves billing the health authorities in the EU member state of residence – e.g. the NHS; see Daniel Holder, BREXIT – *Sleepwalking into second class EU citizenship?* (Rights NI, 2 July 2018) <<http://rightsni.org/2018/07/brexit-sleepwalking-into-second-class-eu-citizenship/>>.

Other EU rights of concern would include the right of Irish citizens in NI to be joined by non-EEA family members.⁷⁸ In this area, the Home Office has already controversially sought to curtail such entitlements in NI by arguing that those Irish citizens who solely identify as Irish under the B/GFA are also to be considered British.⁷⁹ In essence, the Home Office is treating persons as British for statutory purposes on the basis of conferral of British citizenship, regardless of whether the individual does not wish to be identified and accepted as such.

The Commitment in the EU-UK Joint Report

The Phase 1 Agreement of December 2017, alluding to the B/GFA provision on the birthrights to choose to be Irish or British or both, contains the following commitment:

... The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, **including where they reside in Northern Ireland**. Both Parties therefore agree that the **Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits** (emphasis added).⁸⁰

This provision makes explicit reference to residence in NI, elaborates that both the UK and EU agree that the Withdrawal Agreement 'should respect and be without prejudice to the rights that come with EU citizenship', and will examine the 'arrangements required' to give effect to the ongoing exercise and access to such rights in the next phase of negotiations. The subsequent paragraph of the Phase 1 Agreement (alluding to how EU law and practice have been a supporting framework for the rights, safeguards and equality provisions of the B/GFA) further states that 'the United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union'.⁸¹

This wording commits the UK and EU to the continuation of 'active' EU rights well beyond those accessible to Irish nationals in, for example, Canada or other 'third' (i.e. non-EU) countries, which are largely 'dormant' rights accessible only if the EU citizen departs the third country and moves to live in an EU member state. The breadth of the Paragraph 52 commitment beyond this is clear as the text references the need for specific *arrangements* (that otherwise would not be required) and states that rights will be exercisable for persons *resident* in NI. In essence, this commits the UK

78 Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

79 See, for example Sorcha Pollack, 'Derry woman's husband denied visa as she refuses to identify as British' *Irish Times* (18 July 2017) <<https://www.irishtimes.com/news/social-affairs/derry-woman-s-husband-denied-visa-as-she-refuses-to-identify-as-british-1.3159094>>.

80 Joint Report (n 59) para 52.

81 *ibid*, para 53.

and EU to a form of special status for NI, at least on this issue. This is in order to comply with the commitments for ongoing access and exercise to rights, opportunities and benefits. In most cases, you would need to treat Irish citizens in NI as if they were resident in an EU member state – at least for that purpose; otherwise it would not be possible to vote for MEPs, pay EU student fees rates, etc. This interpretation is strengthened as it concurs with a number of statements made by the UK and Irish governments in the build up to following the Phase 1 report, which allude generally to access to a full range of continued EU rights and support this interpretation.⁸²

Whilst Paragraph 52 provides a broad ranging commitment for continued EU rights for Irish citizens in NI (which encompasses those who identify solely as Irish or as both Irish and British, in NI), it does not provide any mechanism for equivalence for those who identify as solely as British. The implication of this clause is that those people of NI who assert Irish citizenship will have greater rights than those who assert only British citizenship. This is troubling in the B/GFA context, which clearly envisages a right to be British or Irish or both. The implication of this 'birthright' is that people should not be negatively affected by reason of their choice of citizenship. But, the logic of the Withdrawal Agreement (and perhaps the logic of Brexit) is that this will not be respected. Even where the rights concerned are relatively limited and only apply when a rights-holder travels to an EU state, this still means that Irish citizens of NI will have greater rights. One interviewee indicated that it was not possible to accept that there should be a differentiation of rights based on what passport one had or indeed whether they had a passport.⁸³ Given that such a differential approach in rights undermines the spirit of the B/GFA, and could stir up 'enmities',⁸⁴ there is an argument for extending the EU rights to all the people of NI.⁸⁵ This could be accomplished through a 'qualified persons' mechanism that covered NI-born persons who were *entitled* to Irish (and hence EU citizenship) but wished to solely identify as British.

In light of provision of non-discrimination on the basis of nationality, there are also questions regarding the continuation of active EU citizens' rights of the EU26 residing in NI: whether rights will be continued for post-Brexit Irish citizens. Academics providing Written Evidence to the NI Affairs Committee inquiry, reflecting on EU rights of Irish citizens becoming 'dormant' in NI post-Brexit, raise the question of special status providing continuation, but advocate that this would create a number of counter problems for UK-Irish relations:

[52] A possible alternative to this 'loss' of EU rights for those resident in Northern Ireland is a bespoke arrangement with the EU in which Northern Ireland will be treated *as if* a territory of a Member State.

82 HM Government (n 76) para 14 states that 'all' the EU rights of Irish citizens in NI will be the same as those who reside in the Republic: '...Irish citizenship also confers EU citizenship, with all the rights that go with this. This is as true for the people of Northern Ireland who are Irish citizens – or who hold both British and Irish citizenship – as it is for Irish citizens in Ireland'; The Irish government in response to the Phase 1 Agreement explicitly stated that the birthright to be Irish and hence EU citizens 'will be protected', the Taoiseach, Leo Varadkar specifically elaborating 'So, a child born in Belfast or Derry today will have the right to study in Paris, buy property in Spain, work in Berlin or any other part of the European Union.' Irish Government News Service, 'Statement on Brexit negotiations by Taoiseach Leo Varadkar' (8 December 2017) <https://merriionstreet.ie/en/News-Room/News/Statement_on_Brexit_negotiations_by_the_Taoiseach_Leo_Varadkar_T_D_.html>.

83 Anderson Interview (n 41).

84 Gallagher (n 26) 69. See also Human Rights Consortium (n 13) 61.

85 Joint Committee (n 20) 8.

This would be unprecedented, but if successfully negotiated, it results in further, rather than fewer, problems for UK-Irish relations. For one, the principle of consent under the Good Friday Agreement precludes changes to the territorial status of Northern Ireland without agreement from both Irish and Northern Irish voters, so pushing through such a 'status' change via a treaty may be ill-advised. Secondly, the equivalence of rights mandated by the Good Friday Agreement would run into significant problems if those born in Northern Ireland choosing to hold an Irish passport had the full extent of EU citizenship rights, but those born in Northern Ireland choosing to hold a UK passport did not. Finally, it is also highly doubtful that the EU would agree to extend such treatment to Irish passport holders in Northern Ireland without demanding it be replicated for all other EU nationals resident in Northern Ireland. The loss of 'active' EU citizenship rights for Irish nationals in Northern Ireland, consequently, seems to be the simpler solution – but must be adequately prepared for and communicated to those Irish nationals sooner rather than later.⁸⁶

However, there are counter arguments to each of these problems presented. First, the provisions in the B/GFA requiring the consent via a North-South referendum for a change in the status of NI, can be read only as referring to whether NI remains in the UK or joins a sovereign united Ireland. Even in the alternative, if the provision is read as referring to any change in status of NI requiring such consent, then this should read over as to Brexit (including any removal of access to EU rights) requiring a North-South referendum. Provision to ensure the ongoing access to EU rights in fact would reflect the status quo, not a change.

Second, the issue of equivalence for those who exercise B/GFA rights to solely identify as British, could be creatively dealt with through mechanisms grounded in the aforementioned concept of a 'qualified person'. Ensuring 'equivalence' by removing everybody's EU rights would be a deeply retrogressive step. Given the outcry it would create from Irish citizens in NI, this would also create a problem for UK-Irish relations that should not be underestimated.

Third, the argument that the EU would only be likely to agree to continued Irish citizen access to EU rights in NI (and indeed even more if that included NI-British citizens, qualified to be Irish citizens) on the basis of reciprocity for EU26 nationals in NI, should be seen as an opportunity and not a problem. This would address many of the problems identified in this paper, and in the paper on racism and xenophobia, of significant complex differentials in entitlements (and hence likely racial discrimination) that Brexit is otherwise likely to bring.

Implementation of Phase 1 Paragraph 52 Commitments

Since the publication of the Phase 1 agreement, there has been both a lack of clarity, and subsequently significant signs of a U-turn on the implementation of its provisions.

⁸⁶ Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Written Evidence submitted by Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick for the Northern Ireland Affairs Committee's inquiry into the land border between Northern Ireland and Ireland (ILB0003)' (October 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/the-land-border-between-northern-ireland-and-ireland/written/72232.html>>

The Protocol in the draft Withdrawal Agreement published by the EU in February 2018, and again with annotations in March 2018, reiterates the provisions of paragraph 52 - but only in the preamble. The Protocol does not set out any substantive provisions or 'required arrangements' for their realisation.⁸⁷ The preamble seems a potentially awkward place to include protection of rights as it is not enforceable and it is sparse on details such as which rights are actually meant here. It also does not have the phrase found in the Joint Report 'including where they reside in Northern Ireland'. This commitment though has been reiterated in a UK ministerial response to a parliamentary question⁸⁸ and a response to a Select Committee report.⁸⁹

In April 2018, in response to a Parliamentary Question by John Grogan MP, the UK government declined to both list EU rights in question and confirm that they referred to all those usually associated with residency in an EU member state.⁹⁰ In the Oireachtas, questions were also asked by David Cullinane TD both on the EU rights of Irish citizens in the north after Brexit and the question of assuring concurrent equivalence for British Citizens in accordance with the B/GFA. The response from the Tánaiste and Minister for Foreign Affairs, Simon Coveney TD, reiterated commitments to the B/GFA, including its provisions on citizenship but made clear that the EU rights in question were still under negotiation:

Discussions on the rights of individuals are ongoing as part of the Phase 2 negotiations on issues related to Ireland and Northern Ireland. Further engagement is needed on which EU rights, opportunities or benefits can be exercised by the people of Northern Ireland who are Irish and therefore EU citizens, when they are resident in Northern Ireland, which will be outside the territory of the European Union after the UK departure.⁹¹

The response also stated that there was an onus on the UK government to 'ensure that it provides as necessary' for persons residing in NI who identify as Irish continued access to EU rights. It also referenced an obligation on the UK to ensure that the B/GFA provisions on identifying and being accepted as British or Irish (or both) were upheld, and that 'the means by which both of these obligations can be upheld by the UK requires further discussion between the EU and the UK'.⁹² By contrast, when asked by the NI Affairs Committee on ongoing access to EU rights, the UK Minister Robin Walker MP stated that the exercise of rights by Irish citizens who are EU citizens 'is a question

⁸⁷ Draft Agreement (n 61) Preamble. Article 1(1) of the draft Protocol deals with non-diminution of rights but at present takes a much more restrictive approach than the Phase 1 Agreement, restricting the rights in question to those listed in one section of the B/GFA.

⁸⁸ HC Deb 13 June 2018, W 153188.

⁸⁹ Northern Ireland Affairs Select Committee of the House of Commons, *4th Special Report - The land border between Northern Ireland and Ireland: Government Response to the Committee's Second Report 2017-2019* (HC 1198, 15 June 2019) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/1198/1198.pdf>>.

⁹⁰ HC Deb 24 April 2018, W137432.

⁹¹ Dáil Éireann Debate, 'Brexit Negotiations' (26 April 2018) Questions 54, 55, 56, 57, 58 <https://www.oireachtas.ie/en/debates/question/2018-04-26/58/#pq_58>.

⁹² *ibid.*

for the EU because they have to make the appropriate arrangements.⁹³ On this issue, the NI Affairs Committee itself recommended the government, in response to its report, specify which EU citizens' rights that Irish citizens in NI will retain after Brexit and how they would be funded.⁹⁴ However, the brief government response on this matter did not specify any of the rights in question.⁹⁵

A more detailed response was received on the issue from the President of the EU Commission, Jean Claude Juncker, in response to a parliamentary question from MEP Martina Anderson. This question sought clarity as to which EU rights would be protected, and whether provision would be made for both Irish and British citizens.⁹⁶ The response from President Juncker in June 2018 cited that NI would no longer be in an EU member state, and whilst Irish citizens would remain EU citizens, benefits from UK participation in EU programmes would end with Brexit. Regarding rights to vote for MEPs, the EU stated that this was determined by Irish electoral law (which currently requires residency in the south of Ireland). The response also sought to restrict the 'no diminution' in rights commitment in the Withdrawal Agreement to one section of the B/GFA, and did not indicate any work was taking place on dedicated arrangements for continued EU rights.⁹⁷

This response, and a letter from CAJ challenging the position as not compliant with the terms of Paragraph 52, received significant media coverage.⁹⁸ At the time of writing, the question as to the extent of access to EU rights for Irish citizens, and any B/GFA equivalence for British citizens, remains unresolved.

One of the citizenship rights which deserves special mention is the right to vote for and run for election to the European Parliament. Given that the people of NI have the right to be British or Irish or both, in effect, most people are entitled to EU citizenship. Furthermore, there is a distinct possibility that NI will be subject to EU rules in a way that potentially GB will not be (through the 'backstop' clause). This raises a serious issue as to political representation - including in the European Parliament. This suggests that ways need to be found to enable the people of NI to participate in European Parliament elections.⁹⁹ The recent decision to reallocate MEPs to states in anticipation of the UK's exit from the EU has seen Ireland's MEP allocation increase by two, which perhaps gives it some flexibility in this regard to provide representation for Irish (EU) citizens in NI. Some members of the Unionist community though, express a different view – that NI should not be treated differently from the rest of the UK.¹⁰⁰

93 Northern Ireland Affairs Committee, 'The land border between Northern Ireland and Ireland' (16 March 2018) para 124 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/329/329.pdf>>.

94 *ibid*, para 136.

95 Northern Ireland Affairs Committee (n 89).

96 EP Question EN E-002232, Martina Anderson MEP (GUE-NGL) 'Continued exercise of EU rights by Irish citizens residing in the North after Brexit' [20 April 2018] <<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2018-002232&language=EN>>.

97 EP Response EN E-002232, President Juncker on behalf of EC [22 June 2018] <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2018-002232&language=EN>>.

98 See for example, Lindsay Fergus, 'Irish citizens in NI could lose EU rights post-Brexit – warning' *Irish Times* (16 July 2018) <<https://www.irishtimes.com/news/politics/irish-citizens-in-ni-could-lose-eu-rights-post-brexit-warning-1.3565855>>.

99 Joint Committee (n20) 14; There is nothing in EU law that would restrict Ireland from extending the franchise to Irish citizens in NI: O'Donoghue (n 65) 24; Human Rights Consortium (n 13) 59; Costello and White suggest the creation of a special Ulster constituency: Francis Costello and Ciaran White, 'Protecting the democratic voice for citizens in Northern Ireland within the EU' *Irish News* (5 March 2018) <<https://www.irishnews.com/news/brexit/2018/03/05/news/opinion-protecting-the-democratic-voice-for-citizens-in-northern-ireland-within-the-eu-1269565/>>.

100 Stalford Interview (n 31).

D. Ways Forward

The position of the **ECHR** and the **HRA**, in relation to NI, should be affirmed. While not immediately under threat, the Conservative Party 2017 manifesto signals future action as regards these, demonstrating indifference to their role in the B/GFA and the NI peace process.

All proposed 'solutions' for NI and the island of Ireland should be subjected to **rigorous human rights and equality impact assessments**.

The EU (Withdrawal) Act needs amendments to protect human rights and equality – such as the rights protected in the Charter, general principles of law and EU secondary legislation. The equality proofing clause in Schedule 7 needs to be amended to include appropriate protections for NI's distinctive equality law regime.

There is an urgent need to consider the **Bill of Rights** as a mechanism to ensure NI authorities respect the range of rights found in EU law. It was noted that Brexit has created the possibility to discuss the potential of an NI Bill of Rights or even an all-island measure.¹⁰¹ Given the altered position regarding the supremacy of EU law on rights and equality, there is a risk that these will not be guaranteed in the Northern Irish legal system. A Bill of Rights would also offer a welcome degree of clarity on the rights which people have – the current proposals with the Withdrawal Act, possible regulations made under the Withdrawal Act, and the draft Withdrawal Agreement, create a complex and potentially confusing kaleidoscope of rights protection.

Given there is a risk that the equivalent protection of rights on the island of Ireland will be significantly undermined, more attention should be given to the debate on an all-island **Charter of Rights**.

Urgent detail is required on the undertaking that people of NI who claim Irish citizenship will be entitled to EU citizenship rights. The UK and EU, including Ireland, should work to implement the commitments in the Phase 1 Agreement for continued access to a full range of EU citizens' rights for Irish citizens where residing in NI, and engage in dialogue on the arrangements required to do this. This would include measures that are to be taken forward directly by the UK and Irish governments; including in the case of the latter, reform to Irish electoral law to ensure ongoing access to political rights. The process should explore and incorporate the best mechanism to ensure those in NI who wish to solely identify as British (but are entitled to Irish and hence EU citizenship) could still be included in such arrangements if and when they so desire. The potential for the EU to seek reciprocity in NI for EU26 nationals as a consequence of agreement of any such arrangements would positively assist in mitigating against complex differentials in entitlements that would otherwise occur.

101 BrexitLawNI, Interview with Claire Hanna, SDLP MLA (Belfast, 20 February 2018).



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