

Brexit, Rights and the Northern- Ireland Protocol to the Withdrawal Agreement

Christopher McCrudden FBA MRIA
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Executive Summary

The key, overarching questions to be considered in this paper are how far the Withdrawal Agreement has addressed, as best it can, concerns about the protection of human rights and equality rights in Northern Ireland once the UK has withdrawn from the EU, how far below the current systems of protection the Withdrawal Agreement would leave such rights protection, and how far the Political Declaration has indicated that a Future Relations Agreement might fill vacuums not addressed by the Withdrawal Agreement.

Legal analysis of the provisions of the Withdrawal Agreement suggests that significant progress has been made in meeting the political commitments in the December Report detailing the political agreement between the EU-27 and the UK. When taken together with the accompanying Political Declaration, it is clear that there have been significant improvements since the first Commission draft of the Withdrawal Agreement published in February 2018. Brussels and Dublin both appear to have listened carefully to the criticisms of the February draft and have sought to address these, or have taken pains to explain why the initial criticisms were based on an incomplete understanding of the text.

Since the publication of this draft Withdrawal Agreement, greater understanding of how the different parts of the jigsaw puzzle fit together has also emerged, and as a result, there can be somewhat more confidence that the provisions of the Withdrawal Agreement will produce a more rights-friendly regulatory environment in Northern Ireland than was initially feared. Better understanding, plus changes in the text, plus the Political Agreement on Future Relations, mean that a less sceptical analysis is called for than previously.

We shall see that the provisions of the Withdrawal Agreement and the Protocol are complex, but an initial, broad-brush assessment is possible, stripped of the nuance and technicality that follows. The Withdrawal Agreement and the Political Declaration provide that many of the rights now protected by EU law must continue to be provided in the future, indeed effectively on a permanent basis, by UK or Northern Ireland legislation. The rights protected include human and citizenship rights. In a significant step beyond the Commission's February draft Withdrawal Agreement, provisions have also now been included that address social and workers' rights, in addition to human and citizenship rights, although the two classes of rights are treated differently in terms of their legal status and governance arrangements.

Drawing on the more detailed analysis that follows this Executive Summary, several specific conclusions may be drawn:

- regarding the future role of the European Convention on Human Rights (ECHR): There has been much speculation as to whether the UK would withdraw from the ECHR in the future. Given that the B-GFA obliges the UK to have incorporated the ECHR into Northern Ireland law, with remedies for breach of the Convention, it has long been argued that there is an existing international legal obligation that would prevent the UK from withdrawing. If the UK is obliged to remain a party

to the ECHR at least in respect of Northern Ireland, this would necessarily seem to entail UK-wide membership. But does the Protocol additionally prevent the UK from withdrawing from the ECHR in the future, at least as regards the application of the Convention in Northern Ireland? The answer appears to be no, probably not. However, the Political Declaration indicates that the Future Relationship Agreement will require that the UK remains in the ECHR.

- regarding constraints on the Northern Ireland Executive and Assembly: The Northern Ireland Act 1998 currently limits both the Northern Ireland Assembly and the Northern Ireland Executive from breaching EU law, and provides a remedy if such a breach occurs. Does the Protocol require that existing constraints on primary and secondary legislation and Executive action under the Northern Ireland Act must be replicated, insofar as those constraints prevent such legislation breaching relevant EU law? The answer is yes, at least partially. We shall see that both with regard to the rights obligations of the B-GFA, anti-discrimination law, and social and workers' rights, the Protocol requires that domestic implementation prevent breaches of these obligations, including by the Executive and Assembly.

- regarding the time-limited nature of the rights protected: Changes in the law of the EU in the area of rights will not remain static. In so far as EU rights protections are relevant in Northern Ireland after the UK's withdrawal, are these protections also updated to reflect changes in EU law applicable in the Member States? Do references in the Protocol to Union law include the relevant Union law that has been developed after the transition period, in addition to the Union law applicable on the last day of the transition period? The answer appears to be yes, partially, with regard in particular to EU anti-discrimination law, but not with regard to EU labour and social protections.

- regarding the place of the EU Charter of Fundamental Rights: One of the methods by which the rights listed in the B-GFA are currently protected is via the EU Charter of Fundamental Rights and the general principles of Union law, including fundamental rights. Does the Protocol require that these continue to be operational in Northern Ireland law? The answer appears to be yes, and the EU Charter of Fundamental Rights will continue to apply at least in the interpretation and application of that EU law that continues in force in Northern Ireland.

- regarding the "birth right" provisions of the B-GFA: How, if at all, does the Protocol protect the parties' agreement in the B-GFA to "recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm 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"? The answer is that it does not. The responsibility for addressing this gap is that of the Irish and the UK Governments, rather than the EU. To the extent that the Withdrawal Agreement does not address these issues, there is also likely to be considerable benefit in securing these rights on a fully inclusive basis through the future relationship.

- regarding the protection from nationality discrimination: Although the Protocol will include the relevant provisions of Union law governing anti-discrimination in the area of sex, race, gender, age, disability, religion, and sexual orientation, it will not include discrimination on the basis of nationality. There is, however, a possibility for development of some protections by interpretation of the Protocol. The prohibition on discrimination on grounds of nationality is still protected by virtue of being a general principle of EU law.

- regarding the effective enforcement of the protected rights: The effectiveness of the substantive protections in the Protocol will ultimately depend on effective domestic enforcement in Northern Ireland. There is a clear obligation arising under the Withdrawal Agreement to implement these provisions in domestic law. The UK has committed to introducing a “dedicated mechanism” as part of its implementation of the human and equality rights protections in the Protocol. It is unclear, however, whether this is likely to be an effective mechanism; this is currently still being considered by the UK Government, but at least a basic minimum is set by the Withdrawal Agreement: there is a requirement that an individual should be able to secure a domestic legal remedy for breach of the human rights and equality protections established in the Protocol.

- regarding implementing legislation at Westminster: Because the relevant terms of the Withdrawal Agreement and the Political Declaration are complicated and intensely controversial, even if the Commons votes in favour of the November package in principle, great care will be needed to ensure that the Agreement is correctly and fully written into the UK and Northern Ireland legislation, and that they are guaranteed an appropriate status under UK constitutional law.

- regarding the impact on Parliamentary sovereignty: The Withdrawal Agreement and Protocol seek to ensure that legislation implementing the Withdrawal Agreement, and incorporating human rights and equality protections as set out in the Protocol, is not subject to the whim of future Parliaments. On nearly every important matter, the UK cannot act unilaterally. The Withdrawal Agreement also enables an international legal remedy to be secured for breaches of the Protocol. A new international arbitration panel to resolve disputes is established. The panel must obtain rulings from the Court of Justice of the European Union (CJEU) when questions of EU law have to be decided. Ultimately, however, the UK Parliament could repeal the legislation incorporating the Withdrawal Agreement unilaterally, although that would be a clear breach of international law.

Key Documents Relating to Ireland-Northern Ireland Protocol

Belfast-Good Friday Agreement 1998 (“B-GFA”), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017 (“Joint Report”), available at:

https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33 – Commission to EU 27, 28 February 2018, available at:

https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

Rt Hon Geoffrey Cox QC MP, Attorney General, Legal Effects of the Protocol on Ireland/Northern Ireland, 13 November 2018

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, available at:

<https://www.consilium.europa.eu/en/meetings/european-council/2018/11/25/>

Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (“Political declaration”), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759054/26_November_-_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf

European Commission, Fact Sheet: Protocol on Ireland and Northern Ireland, Brussels, 14 November 2018 (“Fact Sheet”), available at:

[http://europa.eu/rapid/press-release MEMO-18-6423 en.htm](http://europa.eu/rapid/press-release_MEMO-18-6423_en.htm)

HM Government, Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union 14 November 2018 (“Explainer”)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756376/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_1.pdf

HM Government, EU Exit: Legal Position on the Withdrawal Agreement, Cm 9747, December 2018 (“Legal Position”), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761153/EU_Exit_-_Legal_position_on_the_Withdrawal_Agreement.pdf

Introduction

The negotiations that took place between the United Kingdom and the EU-27 following the triggering of Article 50 by the UK Government in March 2017 were intended to secure an orderly withdrawal of the UK from the EU. The negotiations addressed three main issues: the budget issue (what were the financial obligations of the UK on withdrawal?); the citizens' rights issue (what protections would be given to non-UK EU citizens in the UK after withdrawal and vice versa?); and the issues arising from the particular circumstances of Ireland-Northern Ireland.

In the negotiations concerning Ireland-Northern Ireland, three issues were addressed: the issue of the Border, in particular how to avoid the establishment of a "hard border" including any new physical infrastructure. The second issue was more broadly about protecting North-South cooperation and enabling this to continue after Brexit, especially in those areas that cannot be sustained by bilateral arrangements alone, and where the Belfast-Good Friday Agreement (B-GFA) built upon common EU frameworks.

The third Ireland-Northern Ireland issue was the question of "rights" in Northern Ireland, which is the broad subject area of this paper. In fact, the rights issue involves two separate sets of problems: first, the rights of citizens (Irish, British, EU), including rights currently available under the bilateral Common Travel Area arrangements, such as freedom of movement within "these islands"; and, second, the application in the future of human rights standards that are not tied to citizenship. It is important to note that in the December 2017 Joint Report both the UK and the EU-27 committed themselves to protecting the B-GFA "in all its parts," as well as to ensuring that there would be "no diminution" of rights in Northern Ireland as a result of the UK's withdrawal from the EU.

This paper will focus primarily on the non-citizenship rights, and will not consider in detail issues relating to citizenship rights. Nor will it address in detail questions regarding the Common Travel Area, which deserves separate consideration. How it is to be dealt with will in any event not become clear until the Irish and UK Governments publish their proposals. The paper considers in particular how human rights issues in Northern Ireland have been addressed in the Withdrawal Agreement and its accompanying Ireland-Northern Ireland Protocol (which I shall refer to as "the Protocol"), taken together with the Political Declaration on Future Relationship, as agreed by the EU-27 and the United Kingdom on the 24th November.

The consideration of these issues here is prepared as a contribution to public debate, initially in the run-up to the planned motion supporting the Withdrawal Agreement and the Political Declaration in the House of Commons, currently scheduled for January. This paper would continue to have considerable relevance, however, even if the Commons rejects that Agreement.

It should be read alongside, and should be seen as complementary to, the October 2017 Royal Irish Academy-British Academy Brexit Briefing series paper on rights and Brexit in Northern Ireland, which analyses in more depth the human rights and equality rights background to the B-GFA, the role of EU

fundamental and equality rights in that context, and the potential impact of Brexit on these rights.¹ This paper takes off where that paper ended.

The paper is divided into five chapters. In Chapters 1 and 2, there is a detailed legal analysis of the Withdrawal Agreement, concentrating on the treatment of rights and equality in the Protocol. Chapter 3 explains the arrangements for dispute settlement and enforcement. Chapter 4 turns to the, inevitably more sketchy, Political Declaration on future relations of November 2018, which is intended to set the parameters for a subsequent Future Relations Agreement. Chapter 5 identifies some of the most important issues that will arise in the future.

The purpose of this paper is to analyse the provisions of the Withdrawal Agreement relating to human rights and equality rights in Northern Ireland. The protection of these rights remains central to the uneasy peace that has emerged since the Belfast-Good Friday Agreement (B-GFA), concluded in 1998. EU membership currently confers certain rights which have provided a supporting framework to the provisions of that peace agreement. Withdrawal from the EU risks undermining aspects of that agreement, therefore, given that these rights will no longer be protected in Northern Ireland by EU law. This paper explores how the Withdrawal Agreement proposes to protect those rights in the future; or conversely, how it fails to do so.

¹ Christopher McCrudden, *The Good Friday Agreement, Brexit and Rights: A Royal Irish Academy – British Academy Brexit Briefing*, October 2017, available at: <https://www.thebritishacademy.ac.uk/sites/default/files/TheGoodFridayAgreementBrexitandRights.pdf>

1. Withdrawal Agreement: A Legal Analysis

A. Some assumptions

The legal analysis that follows is based on several assumptions. I shall assume that the legal position regarding withdrawal and the political agreement regarding future relations will be as agreed between the EU-27 and the UK at the end of November. In that case, there are two main agreements between the EU-27 and the UK which will come into operation by the 29th March 2019: an Agreement on a transition period; and a Withdrawal Agreement, addressing exit issues, in particular addressing the budget, citizen's rights (EU citizens in the UK; UK citizens in the EU-27), and Ireland. Were the November agreements not to secure Parliamentary support, then all bets are off, and a different set of considerations would arise. Judging from the expressions of opposition by significant numbers of Members of Parliament to the Agreement, it seems more likely than not at the time of writing (the end of December 2018) that the Commons may not approve the Agreement in a vote currently scheduled for January 2019. Nevertheless, it is worth considering the Agreement in detail because any future agreement will need to deal with very similar problems, and it is likely to come up with very similar solutions.

I shall assume, second, that during the transitional period the *status quo* applies, and that there will be no alteration in the application of current EU citizens', human, and equality rights, or in the method by which they are applied and interpreted.² The Political Declaration agreed on the 24th November envisages a Future Relations Agreement governing future economic and other relations between the UK and the EU.³ I will also assume that any Future Relations Agreement is likely to be close to the Political Declaration agreed to by the EU-27 and the UK, partly because, thus far in the negotiations, the EU-27's published positions have largely been accepted at each stage of the process to date, but also based on the observation that, in accession and trade negotiations generally, the EU usually gets what it wants.

I shall assume, third, that the provisions of the Ireland-Northern Ireland Protocol to the Withdrawal Agreement will, in fact, come into effect.⁴ This is by no means an unchallengeable assumption, however. Indeed, the UK Government and the EU have consistently argued that it is not desirable that it should come into effect. Article 1(4) of the Protocol makes clear that the Protocol is meant to be a temporary fix. "The objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily ...". The temporary nature of the Protocol is due to both legal and political reasons. Politically and economically, aspects

² If there is an agreement on a transition period, exit day becomes re-dated under section 20(2)-(4) of the UK's European Union (Withdrawal) Act 2018.

³ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom ("Political declaration"), available at: <https://www.consilium.europa.eu/en/meetings/european-council/2018/11/25/>

⁴ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, available at: <https://www.consilium.europa.eu/en/meetings/european-council/2018/11/25/>

of the Protocol are unpalatable to both the UK and the EU. Legally, the Withdrawal Agreement is concluded under Article 50, which is not intended to provide the legal basis for a future relations agreement, and the UK Government has argued that were the Protocol to become effectively permanent, this would be challengeable before the Court of Justice of the European Union.⁵

That said, the provisions of the Protocol will continue in force “unless and until they are superseded, in whole or in part, by a subsequent agreement.” And any future agreement replacing the provisions of the Protocol will need to achieve agreement on the same issues as the Protocol has done: “to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the [Belfast-Good Friday Agreement of 1998] in all its dimensions.” The UK Government’s *Legal Position on the Withdrawal Agreement* states that “[t]hese conditions would be met if the parties had established alternative arrangements for ensuring the absence of a hard border”,⁶ but that is incorrect. Ensuring the absence of a hard border is a necessary but not a sufficient condition for replacing the Protocol. Apart from the protection of rights under the B-GFA,⁷ there is also the complex North-South cooperation arrangements to consider.⁸

So, although Article 2 requires the Union and the United Kingdom to “use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part,” this seems a very tall order given the difficulties that there have been of securing agreement on the Protocol itself.⁹ There are, however, two further ways in which the Protocol, or parts of it, might not come into effect. The first is to extend the, equally temporary, transition period. Article 3 provides that the United Kingdom, “having had regard to progress made towards conclusion” of a replacement agreement may “at any time before 1 July 2020” request the extension of the transition period. If the United Kingdom makes such a request, “the transition period may be extended” in accordance with Article 132 of the Withdrawal Agreement. Any extension of the transition period must, therefore, be agreed with the EU.

An alternative possibility is set out in Article 20. At any time after the end of the transition period the Union or the United Kingdom may “consider[] that this Protocol is, in whole or in part, no longer necessary” to achieve the objectives of addressing the unique circumstances on the island of Ireland, maintaining the necessary conditions for continued North-South cooperation, avoiding a hard border and protecting the B-GFA of 1998 in all its dimensions, and should cease to apply in whole or in part. This review procedure may only

⁵ For a UK analysis of the potential legal difficulties under EU law of a semi-permanent Protocol, see the UK Attorney General’s analysis, Rt Hon Geoffrey Cox QC MP, Attorney General, *Legal Effects of the Protocol on Ireland/Northern Ireland*, 13 November 2018, paragraphs 17-23.

⁶ EU Exit: *Legal position on the Withdrawal Agreement, Annex – Protocol on Ireland-Northern Ireland (“Legal Position”)*, paragraph 7.

⁷ Belfast-Good Friday Agreement 1998, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

⁸ The UK Department for Exiting the European Union has published a note on the mapping exercise regarding North-South Cooperation, available at: <https://www.gov.uk/government/publications/technical-explanatory-note-north-south-cooperation-mapping-exercise>.

⁹ George Peretz QC considers that concerns that these provisions may run indefinitely are exaggerated, EU withdrawal agreement: will we be stuck in the backstop?, *Prospect*, November 20, 2018, available at: <https://www.prospectmagazine.co.uk/politics/eu-withdrawal-agreement-will-we-be-stuck-in-the-backstop>.

kick in after the end of the transition period, and so the Protocol will already have come into effect.

If either party considers that the Protocol should cease to apply, it may notify the other party, setting out its reasons. Within six months of such a notification, the Joint Committee (whose functions are considered in more detail below) shall meet at ministerial level to consider the notification. In deciding the question, the Parties must act in full respect of the principles of mutual respect and good faith set out in Article 5 of the Agreement to “assist each other in carrying out tasks which flow from this Agreement.” The Union and the United Kingdom may then decide jointly within the Joint Committee that the Protocol, in whole or in part, is no longer necessary to achieve its objectives. Only then will the Protocol cease to apply, in whole or in part.

It will readily be seen that in all of these various mechanisms for preventing the Protocol from coming into effect, one element is critical, which is that neither the UK nor the EU may unilaterally prevent the Protocol from operating, and without agreement between the Parties not to bring it into effect or to replace it or to abolish it, it will come into force, and will remain in force. There is no provision for any unilateral withdrawal either from the Withdrawal Agreement or from the Protocol. As the UK Attorney General rightly concluded: “... in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part”¹⁰

B. Rights in Issue

We turn now to the principal purpose of the paper, which is to undertake a legal analysis of the provisions of the Withdrawal Agreement, and in particular the Protocol, in so far as they deal with “rights” issues. As we shall see, at least seven distinguishable sets of human and citizens’ rights currently protected in Northern Ireland may be adversely affected to some degree by a United Kingdom withdrawal from the European Union (“Brexit”).

Economic freedoms

EU law, of course, deals with much more than human and citizens’ rights, in particular the economic rights that are central to the “four freedoms”: the free movement of goods, services, capital, and persons. The Withdrawal Agreement provides, and the Political Declaration envisages, that some elements of the law of Northern Ireland will have to be kept harmonised with the economic law in the EU (and, therefore, Ireland). As far as the Future Relations Agreement is concerned, it is not clear what those elements will be. But whatever they are, they will confer economic rights on residents of Northern Ireland. What these elements should be is outside the scope of this paper. I shall, therefore, leave out of account rights that derive from being a commercial entity, such as a company, wishing to exercise rights such as are typically covered by the Four Freedoms. In practice, of course, these rights are critical to many people.

¹⁰ Rt Hon Geoffrey Cox QC MP, Attorney General, Legal Effects of the Protocol on Ireland/Northern Ireland, 13 November 2018, paragraph 16.

Citizenship rights, human rights, and social rights

These broadly economic rights aside, there are, again very broadly, two broad sets of rights in issue: those that accrue to an individual *as a result of citizenship status* (UK, EU, and Irish), and rights that accrue to an individual *irrespective of citizenship status*, what we might broadly call human and social rights. Both these sets of rights are currently guaranteed by a jigsaw puzzle of legal provisions: by the B-GFA, by EU law, by the ECHR, and by other provisions of domestic UK and Northern Ireland law; and some of these sources of protection overlap. In some cases, the relevant law post-dates, but in other cases pre-dates, the B-GFA. Thus, for example, the EU Charter of Fundamental Rights, although it post-dates the B-GFA, is one mechanism by which elements of that Agreement are implemented.

Mapping the territory of rights in Northern Ireland is complicated, showing the degree to which Northern Ireland rights protection is multi-level, and how the sources of protection are deeply entangled with each other. This is true also in the rest of the United Kingdom, of course, but the Withdrawal Agreement engages with the position of rights in Great Britain (that is, in England, Scotland and Wales, as opposed to Northern Ireland) to a minimal degree, except with regard to EU-UK citizenship rights.

Within each of these broad categories, there are separate rights that need to be distinguished. Initially, I shall simply list the relevant sets of rights, and having done this, I shall then consider how some of these rights are addressed in the Withdrawal Agreement.

Rights dependant on citizenship

- (i) The rights of Irish citizens resident in Northern Ireland, *qua* Irish citizens. This would include such rights as being able to hold dual Irish-British citizenship, with the ability to exercise rights under EU law as an EU citizen,¹¹ by virtue of having Irish citizenship.
- (ii) The rights of EU-27 citizens resident in Northern Ireland who are non-Irish and non-UK citizens, to the extent that they differ from other sets of rights listed above.
- (iii) The right of Irish and UK citizens in Northern Ireland to be able to continue to enjoy free movement, including the ability to travel and work in both the UK, and Ireland beyond those granted under EU law. This would include rights that operate under the current Common Travel Area arrangements.¹²

¹¹ For an account of the difficulties to be faced, see Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, Discussion Paper on the Common Travel Area, Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission, 2018. Also see the Royal Irish Academy and British Academy Brexit Briefing by Imelda Maher on The Common Travel Area: More Than Just Travel:

https://www.thebritishacademy.ac.uk/sites/default/files/TheCommonTravelAreaMoreThanJustTravel_0.pdf October 2017

¹² For an account of the difficulties to be faced, see Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, Discussion Paper on the Common Travel Area, Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission, 2018. Also see the Royal Irish Academy and British Academy Brexit Briefing by Imelda Maher on The Common Travel Area: More Than Just Travel:

https://www.thebritishacademy.ac.uk/sites/default/files/TheCommonTravelAreaMoreThanJustTravel_0.pdf October 2017

Rights not dependant on citizenship

- (iv) The rights of all in Northern Ireland to be able to continue to enjoy those equality rights that derive from, or are supported by, EU law. This would include such rights as non-discrimination on the basis of ethnicity in the provision of goods and services, and non-discrimination on the basis of sexual orientation in employment.
- (v) The rights of all in Northern Ireland to be able to continue to enjoy “social” rights deriving from or supported by EU law, broadly defined to include employment rights (the Posted Workers Directive, and the Working Time Directive, for example) and social rights (such as access to social protection measures).
- (vi) The rights of all in Northern Ireland to be able to continue to enjoy human rights generally, including rights deriving from the European Convention on Human Rights.
- (vii) Fundamental rights guarantees applying currently to the United Kingdom in respect of Northern Ireland when acting to implement EU law, including those rights and obligations provided under the EU Charter of Fundamental Rights.

This paper is primarily concerned with rights *not* dependant on citizenship. It is important to distinguish the different sets of rights in issue, not only because they are substantively different, but also because they are, and will be, addressed in different Agreements arising from Brexit, at different times, and with different governance arrangements. It will be important to keep this in mind when we consider what progress has been achieved, and what remains to be achieved. I should emphasise again that, in several cases, these sets of rights are overlapping, in that any particular right, may be found in several different factual contexts. It is very difficult to glean an overall rationale accounting for these differences of treatment, and a not unfair criticism of the approach taken in the Withdrawal Agreement and the Protocol would be that the overall structure (in particular the different treatment of the different kinds of rights) does not appear to be based on any rational principle at all.

C. Protocol Rights in context

Rights in the context of the other provisions of the Ireland-Northern Ireland Protocol

The Withdrawal Agreement deals with Irish-Northern Ireland issues through the mechanism of a dedicated Protocol. This includes protections for rights, which we consider in detail subsequently, but other provisions address a wide range of issues which are intended to protect various other aspects of the B-GFA, and in particular to render unnecessary any border or customs controls on the island of Ireland. The provisions of the Protocol dealing with rights issues is, therefore, embedded in the wider context of the Protocol and its concerns, and need to be read in light of that. We shall see, in particular, that the inclusion of customs arrangements that apply to the whole of the UK,

have necessitated (from the EU's perspective, at least) the inclusion of various provisions that maintain a "level playing field", which include provisions dealing with some of the rights listed above.

We have seen that the aim of the Withdrawal Agreement is to provide for the orderly withdrawal of the United Kingdom from the European Union. From the perspective of European Union law, the Withdrawal Agreement is concluded under Article 50 TFEU, and is therefore constrained by the terms of Article 50. Article 50 requires a withdrawal agreement to take into account future relations with the exiting state, but this strongly implies that a withdrawal agreement under Article 50 cannot itself become a future relations agreement. A Withdrawal Agreement under Article 50 does not, and could not, deal with the wide range of future relationship issues that are considered suitable for a subsequent Agreement, but there is no reason why a provision in a withdrawal agreement cannot be designed and intended to be repeated in a later future relations agreement, and this appears to be the case here.

This has various implications. The provisions of the Protocol in the Withdrawal Agreement are subject to several conditions and exceptions. Perhaps the most important is set out in Articles 1 and 2 addressing subsequent agreements which may replace the Protocol. Article 1(4) provides:

"The objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1). The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement."

(Parenthetically, we should note that the two statements in Article 1(4) are not necessarily compatible, and the balance between them may give rise to future disputes.)

Article 2(1) provides that "The Union and the United Kingdom shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part." Article 2(2) expands on this commitment, spelling out the implications of concluding a subsequent Agreement.

"Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it supersedes. Once a subsequent agreement between the Union and the United Kingdom becomes applicable after the entry into force of the Withdrawal Agreement, this Protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this Protocol, not apply or shall cease to apply, as the case may be, in whole or in part"

There would, at least in theory, be nothing to prevent subsequent wholesale revision of the rights provisions in the Protocol, but this is subject to the

agreement of the Union and the UK, and subject to the scrutiny of the dispute settlement mechanism (which is considered below).

The substantive provisions of the Protocol are also subject to Article 18 of the Protocol. This provides:

“If the application of this Protocol leads to serious economic, societal or environmental difficulties liable to persist, the Union or the United Kingdom may unilaterally take appropriate measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.”

Theoretically, at least, this would enable the UK to declare that, for example, the provisions regarding rights, to be discussed below, have led to serious “economic, societal or environmental difficulties” that are liable to persist and that as a result, the UK is suspending these provisions unilaterally. No doubt the Parties to the Agreement would consider this scenario unlikely.

There are, in any event, two significant limitations on the use of this safeguard provision. The first is that if, for example, the United Kingdom did invoke the provision, but the safeguard measure was regarded by the EU as having created an imbalance between the rights and obligations under the Protocol, the EU has the right to take such “proportionate rebalancing measures”, as are strictly necessary to remedy the imbalance. The second is that whether the safeguard action and any rebalancing measures are justified is also subject to review by a dedicated dispute settlement process, included in Annex 10 of the Protocol.

Rights in the context of the other provisions of the Withdrawal Agreement

Not only do the rights provisions in the Protocol need to be read in light of other provisions in the Protocol, but they also should be read in light of other provisions of the Withdrawal Agreement, particularly those in the main body of the text of the Agreement. As we shall see, this means that simply focusing on the text of the specific rights provisions of the Protocol, or even the text of the rights provisions in the context of the Protocol taken as a whole, may be misleading. The rights provisions in the Protocol are embedded in the Agreement as a whole, not just the Protocol as a whole and need to be interpreted in this broader context. In particular, we shall see that protections for rights in Northern Ireland are sometimes provided indirectly rather than directly. That does not mean that the protection will be any less significant in practice.

2. Rights in the Ireland-Northern Ireland Protocol: Substantive Provisions

A. Rights in the Recitals to the Protocol

There are three relevant “Recitals” in the Protocol relevant to rights. Recitals are provisions that appear in the Protocol at the very beginning of the Protocol, before Article 1. Recitals are, in general, usually exhortatory and context-setting. Formally, they are not legally binding, but that statement of their legal status is slightly misleading in practice. On several occasions, the Court of Justice of the European Union (CJEU) has interpreted legally-binding provisions of EU law in light of a Recital. Recitals cannot be ignored as they may, on occasion provide a gloss on a binding legal provision that the CJEU may incorporate into its own reasoning. In general, as we shall see, the Recitals in the Protocol point to the need to minimise the shortfall between the rights that would have applied in Northern Ireland before UK withdrawal and those that will apply after. As a general principle, it seems likely that the CJEU would be disposed to follow the logic of this principle, where possible.

In the case of the Protocol, there are three Recitals regarding rights. The first reiterates and reflects the December EU-27 and UK joint report in “Affirming that the Good Friday or Belfast Agreement ... including its subsequent implementation agreements and arrangements, should be protected in all its parts.”¹³ The second relevant Recital notes “that Union law has provided a supporting framework to the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement.” The third, and rather more substantive provision “Recognis[es] 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.” We shall see subsequently that the “Irish citizens” Recital is particularly relevant.

B. Introduction to Article 4 of the Protocol

For an understanding of the way in which rights are treated as regards Northern Ireland, the starting point is Article 4 of the Protocol, entitled “Rights of individuals.” This provides:

“The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998

¹³ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017 (“Joint Report”), available at: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

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.”

There are several preliminary observations that can be made regarding Article 4. The first is that it is addressed to the United Kingdom (not to the EU or another Member State), which accepts the obligations in Article 4 as part of the package of rights, obligations, and duties that arise under the Withdrawal Agreement as a whole. It is neither more nor less important legally than any other provision of the Withdrawal Agreement. Second, Article 4 places the United Kingdom under a *legally-binding* obligation in international law. It is not a mere statement of good intentions, or a political declaration. Third, the provisions of the rest of the Withdrawal Agreement, in particular its general provisions (on the meaning of terms) and the governance arrangements, will apply unless otherwise stated, because the Protocol is to be regarded as an integral part of the Withdrawal Agreement. Fourth, the EU is not a party to the B-GFA, so, before UK withdrawal, the CJEU has no jurisdiction to interpret it. But whatever the details, the Withdrawal Agreement incorporates the B-GFA by reference, as it were, into EU law and so may be subject to interpretation by the CJEU in certain circumstances if and when the Protocol comes into force.

Before we begin to apply the substantive provisions of the Withdrawal Agreement, and Article 4 of the Protocol in particular, to the specific rights identified earlier, there are four important elements to note in the way that the Article is structured: first, the protection accorded by Article 4 applies to those “rights, safeguards and equality of opportunity *as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity*” – in other words, no obligations on the UK arise under Article 4 if the rights and safeguards claimed are not set out in that particular part of the B-GFA. Second, Article 4 introduces two different methods of indicating what the relationship is between the rights protected and EU law in the future, with equality rights being treated somewhat differently than other B-GFA rights, as we shall see. Third, Article 4 prohibits only the “diminution” of such rights, where that diminution “results from” the UK’s “withdrawal from the Union”. Fourth, the UK undertakes to “implement this paragraph through dedicated mechanisms”, an issue we shall return to later when considering the governance arrangements. As we shall see, however, there are other provisions in the Withdrawal Agreement that accompany this dedicated governance arrangement, which may become at least as important in practice.

Having noted these limitations and restrictions, we can now move to consider the substantive rights issues identified at the beginning of this paper. In considering the impact of Article 4 on the rights issues identified earlier, we will address the implications of the distinction between what I shall call the “general clause” (“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”) and what I shall call the more specific “anti-discrimination clause” (“including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol”). I shall consider the scope of the general clause before turning to consider the scope of the anti-discrimination clause.

C. Rights in Issue

In order to appreciate the scope of the general clause in Article 4, it is worth reminding ourselves initially of the rights set out in the Rights, etc section of the 1998 B-GFA referred to in Article 4. These rights are primarily identified in paragraph 1 of that part. This provides:

“The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one’s place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.”

In addition to this, we can add the right of victims “to remember as well as to contribute to a changed society”, recognized in paragraph 12 of the section on Rights, etc.

The general clause of Article 4 does not only apply to the *rights* set out in the B-GFA’s section on Rights, etc, but also to the “safeguards” included in that section of the Agreement. This is of considerable importance, since it includes, therefore, paragraph 2 of that section, which provides:

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”

In light of this preliminary analysis, we can now consider the extent to which the general clause provides protection for the rights identified earlier. It is important to continue to keep in mind that the obligation on the United Kingdom is only to “ensure that no diminution of rights, safeguards ... as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity *results from its withdrawal from the Union.*” To the extent that certain rights in the list of B-GFA rights are currently protected by domestic law alone, the UK Government is not constrained by Article 4 from amending or abolishing that protection. This indicates, as Sylvia de Mars, Colin Murray, Aoife O’Donoghue, and Ben Warwick have suggested, that “in line with the general approach of the Protocol, certainly in relation to rights – that the agreement is concerned with EU competences and what is currently EU law,

and not with underwriting broader commitments or standards for post-Brexit Northern Ireland.”¹⁴

D. Scope of Article 4: ECHR

One of the critical sources of protection for several of the rights in Northern Ireland identified earlier is the European Convention on Human Rights. The importance of the Convention is likely to increase in importance after UK withdrawal from the EU because the Convention will be used to try to fill gaps in human rights protection, in particular to protect some already-acquired rights of EU citizens.¹⁵ The first issue to consider is whether, properly interpreted, the general clause effectively prevents the UK from withdrawing from the ECHR in the future, at least as regards the application of the Convention in Northern Ireland.

The Convention is incorporated into the law of NI in two different ways. First, as in the rest of the UK, the Human Rights Act 1998 effectively, although not technically, incorporates the ECHR. In addition, the Northern Ireland Act 1998 provides that Convention rights (defined by reference to the HRA 1998¹⁶) are a constraint on the Northern Ireland Executive and Assembly. The B-GFA does not prevent the repeal of the Human Rights Act 1998 because that Act was not in terms mentioned in the B-GFA, but the B-GFA does require, for example, that there be substitute legislation that gives direct access to the domestic courts for alleged breaches of the Convention were the HRA to be repealed in so far as it applies in Northern Ireland. The ECHR constraints on devolved executive and legislative power would also need to continue.

The question we need to consider is not the larger question of withdrawal from the Convention by the UK thus reducing the protections in the Northern Ireland Act, or the narrower question of the repeal of the HRA or its replacement by a “British Bill of Rights”, but rather whether either of these actions by a future UK Government, should they take place, could be linked in some way to the withdrawal of the UK from the EU, with the effect that Article 4 would then apply to constrain such actions as regards Northern Ireland. Tempting though it would be to interpret the general clause of Article 4 to require that the existing constraints on primary and secondary legislation under the Northern Ireland Act, and the HRA, must continue, this seems a controversial argument.

We have seen earlier that Article 4 of the Protocol prohibits only the “diminution” of such rights and safeguards, where that diminution “*results from*” the UK’s “withdrawal from the Union”. It is somewhat unclear whether this means that any alleged breach of the general clause is challengeable under Article 4 of the Protocol only where any such alleged breach *directly* results from Brexit, occurring at the same time as and immediately connected to the withdrawal process. It is also unclear what would be the method of establishing the necessary causal connection were this narrow interpretation to be adopted. A narrow reading of “results from” would mean that the repeal of ECHR constraints on primary and secondary Assembly legislation, or on

¹⁴ Sylvia de Mars, Colin Murray, Aoife O’Donoghue, and Ben Warwick, Briefing on: The Protocol on Ireland/Northern Ireland (November 2018), available at: <https://ssrn.com/abstract=3287729>.

¹⁵ Jure Vidmar, Brexit, Democracy, and Human Rights: The Law Between Secession and Treaty Withdrawal, (35(2) Wisconsin International Law Journal 425 (2018).

¹⁶ Northern Ireland Act 1998, section 98.

executive action, might not be regarded as “resulting” from withdrawal from the Union if it occurred some way down the road, as part of some broader reform of human rights or devolutionary arrangements throughout the UK. The preferred interpretation, I suggest, is not this narrow approach, but a “but for” test. So, the relevant question would be: *but for* the UK exiting the EU, would this right have been protected at the time at which the alleged diminution took place?

Given that there is a political obligation on all EU member states to remain a member of the ECHR, it is arguable that the application of the “but for” test could mean that the UK could not subsequently withdraw from the Convention because, “but for” the UK leaving the EU, the UK would be subject to this political constraint. This argument may be regarded as challengeable, however, for two reasons. First, the constraints on the competence of the EU-27 to conclude an Agreement under Article 50 argue against an approach that would effectively bind the United Kingdom into a Council of Europe treaty. Second, it is unclear whether the political constraint that the EU places on the UK currently to adhere to the ECHR is sufficiently strong to mean that its withdrawal would mean there was a diminution of rights protected by EU law. We shall see subsequently that the EU has, in any event, recognised the problem and plans to address the issue of the ECHR in the Future Relations Agreement. Ultimately, the CJEU may be called on to decide.

Scope of Article 4: EU Charter of Fundamental Rights

Several of the rights listed in the Rights, etc section of the B-GFA are currently not protected under the ECHR or the Human Rights Act but are addressed to some extent under the EU Charter of Fundamental Rights. This is the case in particular regarding “the right to freely choose one’s place of residence” (Article 45 of the Charter), and “the right of women to full and equal political participation” (Article 23 of the Charter). In the absence of the Charter applying, these B-GFA rights would not be as fully guaranteed as they are whilst the UK is a member of the EU.

To see to what extent the Charter may or may not apply after withdrawal we need to distinguish the different status of Union law as opposed to Union-derived law after Brexit, in the law of Northern Ireland. Under EU law, the EU Charter currently applies to Member States where they are implementing Union law, and the CJEU has held that the Charter applies throughout the sphere of EU law.¹⁷

There are several provisions of Union law that currently apply in Northern Ireland which the Withdrawal Agreement requires the UK to continue in force in Northern Ireland law after Brexit. These are primarily in the areas of customs and Single Market requirements. These provisions are not to be thought of as the UK simply transcribing the substance of Union law into the UK and leaving its status as EU law to one side, but rather as Union law applying in the same way and with the same status as was previously the case under the European Communities Act 1972. The UK is required to provide for this Union law to be incorporated into the law of NI and produce the same effects in NI as it does in the Member States of the EU. Article 4(1) of the Withdrawal Agreement clearly provides: “The provisions of this Agreement

¹⁷ Case C-617/10, *Akerberg Fransson* [2013] 2 CMLR 46.

and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the *same legal effects* as those which they produce within the Union and its Member States.” The UK will need to re-introduce the equivalent of section 2 of the European Communities Act 1972 in order to give effect to this provision.

The Withdrawal Agreement makes clear that the Charter (and the general principles of EU law as well) will continue to apply where the UK is implementing Union law, which it will be doing when it is implementing legislation incorporating the Withdrawal Agreement into domestic law. There are multiple reasons why this is the case. First, the “same legal effects” cannot be achieved by a piece of Union law in the UK post-withdrawal without the Charter being given effect in its interpretation and delimitation. Second, Article 2 of the Withdrawal Agreement provides that “Union law” means “the Treaty on European Union (‘TEU’), the Treaty on the Functioning of the European Union (‘TFEU’) and the Treaty establishing the European Atomic Energy Community (‘Euratom Treaty’), as amended or supplemented, as well as the Treaties of Accession and the *Charter of Fundamental Rights of the European Union*, together referred to as ‘the Treaties’” together with “the general principles of the Union's law”. Third, Article 4(3) provides: “The provisions of this Agreement referring to Union law or ... provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.” The term “methods” includes the application of the Charter. Fourth, Article 4(4) provides: “The provisions of this Agreement referring to Union law or to ... provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.” Again, the case law of the CJEU makes clear that the Charter applies.

There is in addition, however, a second set of legal rights and obligations that will apply in Northern Ireland after withdrawal that is not “Union law” in this sense. There will be legislated rights and obligations, which currently apply in Northern Ireland as EU law, but will cease to apply as EU law after Brexit and will instead become UK law after Brexit by virtue of the Withdrawal Act 2018. In such cases, the UK Withdrawal Act 2018 specifies that the Charter will not apply. In those situations, there is a theoretical diminution of rights protected under the B-GFA, in so far as those few rights currently protected by the GFA and not by the ECHR where EU law is currently being implemented will no longer be protected. And the February draft of the Withdrawal Agreement¹⁸ was regarded by several commentators, myself included, as a potentially significant reduction in rights in Northern Ireland.¹⁹

There is now, however, considerably less significant a gap in protection because of an important development in the way in which the customs arrangements have been accompanied in the final Withdrawal Agreement by

¹⁸ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33 – Commission to EU 27, 28 February 2018, available at: https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

¹⁹ See, for example: Colin Harvey, et al, BrexitLawNI Policy Report: Brexit, Human Rights & Equality (September 2018), available at: <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2018/09/2111631/brexit-human-rights-and-equality.pdf>; Colin Murray, Aoife O'Donoghue, and Ben Warwick, Discussion Paper on Brexit (Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018), available at: <https://ssrn.com/abstract=3260497>; The Brexit and Rights Engagement Network, Rights and Devolution After Brexit: Report of a roundtable held on 26 September 2018 at Queen's University, Belfast, available at: <https://ssrn.com/abstract=3274729>.

extensive Annexes to the Protocol, which were not in the Commission's February draft. There is now a substantially increased role for Union law in Northern Ireland. Quite a lot of the substance of current Union law that would have become UK law after Brexit by virtue of Withdrawal Act will become Union law again by virtue of the Withdrawal Agreement. This change in status means that the Charter will apply in a considerably increased set of circumstances, because Union law applies in an increased set of circumstances.

The general clause in Article 4 of the Protocol does not incorporate the Charter into Northern Ireland law, but *other* provisions of the Withdrawal Agreement mean that the Charter does apply extensively in Northern Ireland when the Withdrawal Agreement comes into force. I cannot guarantee that there will not be circumstances in which the Charter will not apply in NI, where it would have applied before Brexit, and that the fact that the Charter does not apply means that those rights provided for by the B-GFA not otherwise protected by the ECHR will be diminished. But I certainly cannot identify them at the moment, and they are likely to be relatively few and far between.

Scope of Article 4: Irish citizens as EU citizens

We have so far considered two areas of substantial concern that were identified prior to the Withdrawal Agreement, viz. the continued role of the ECHR, and the continued role of the Charter of Fundamental Rights. We turn now to a third issue, viz the rights of Irish citizens in Northern Ireland. Since Irish citizens resident in any part of the UK, including Northern Ireland, are *ipso facto* EU citizens, they will benefit from all rights set out in Part Two of the Agreement governing citizens' rights. The question I explore here is more specific: the rights of Irish citizens in Northern Ireland, *qua* Irish citizens, and the availability to them of EU rights as a result of their *Irish* citizenship specifically. We have seen that one of the Recitals to the Protocol refers to this issue, but that this is not legally enforceable. The question I want to address is whether these rights are included within the protection of Article 4 of the Protocol?

The B-GFA does provide, quite explicitly, for rights in this context. The parties to the B-GFA:

“recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm 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.”

This provision is not, however, to be found in the section of the B-GFA on Rights, etc, but in the section dealing with Constitutional Issues, in para 1(vi), and therefore is *not* included within the scope of Article 4 of the Protocol. In order to have the gist of the identity rights in B-GFA, Constitutional Issues, para 1(vi) recognised, it would be necessary to interpret “the right to pursue democratically national and political aspirations” in the Rights, etc part of the B-GFA to include the right to hold Irish or British citizenship, or both. It is a plausible interpretation, but not one that would withstand close scrutiny, and

the better legal view is that it would be unlikely that a court or arbitral body would interpret it in that way.

So, is there a problem? At this point, we need to introduce several different scenarios. First, the rights of an Irish citizen currently resident in Northern Ireland to move to an EU Member State, for example to take up permanent residence; second, the rights of an Irish citizen resident in Northern Ireland who wishes to exercise his rights as an EU citizen whilst temporarily visiting an EU Member State (including in the (Republic of) Ireland), such as securing health care; third, the rights of an Irish citizen resident in Northern Ireland who wishes to exercise her rights as an EU citizen whilst remaining resident in Northern Ireland, such as voting in European Parliamentary elections.

As regards the first scenario, where an Irish citizen currently resident in Northern Ireland wants to move to an EU Member State, for example to take up permanent residence, this is fully protected under existing EU provisions protecting free movement, and this will not be changed by the UK exiting from the EU. As regards the other two scenarios, a somewhat more complicated analysis is needed, but the short answer is that there could be a diminution of rights in those contexts.

The question is: who is responsible for addressing this diminution? These are not issues that were considered to be appropriately within the scope of an Article 50 withdrawal agreement, because in general the scope of national citizenship rights is in the hands of the Member State itself, rather than the European Institutions. In the second and third scenarios, therefore, the responsibility lies with the Irish Government and the UK Government to address the reduction in rights unilaterally and bilaterally, by extending what we might call the privileges and immunities of Irish citizens resident in Northern Ireland under domestic Irish law.

Just as the Irish state may decide to extend the franchise to allow Irish citizens in Northern Ireland or elsewhere to vote for the Irish Presidency, so too it may allow Irish citizens in Northern Ireland or elsewhere to vote in European Parliamentary elections (scenario 3). So too, if the Irish state wished to allow Irish citizens in Northern Ireland to be able to access health care in another EU Member State, it could provide the relevant Irish health card which would provide such access.

I am not aware of any definitive statement from the Irish Government on how, if at all, it intended to address these issues, which would undoubtedly raise delicate legal and political issues. If the right to vote were to be extended to non-resident Irish citizens only in Northern Ireland, would this run into difficulties under the 1937 Constitution, as discriminating between Irish citizens in terms of their current residency outside the state? How would an at-large European Parliamentary constituency be defined? Who would pay for Irish citizens outside the Irish Republic to gain access to health benefits in EU Member States? Without a clear indication of what might be brought forward, it is difficult to predict what, if any, issues might arise under EU law.

The Irish Government should not be seen as the only relevant actor, however. The UK itself would benefit from the continued provision of such

rights and privileges deriving from Union citizenship, and we can envisage that there will continue to be discussion whether continuing to provide for such rights and benefits, via the future relationship, on an inclusive basis that would not be based on whether an individual identifies as Irish or British, would be advantageous to both parties.

Anti-discrimination clause of Article 4

The rights of all in Northern Ireland to be able to continue to enjoy those equality rights that derive from, or are supported by, EU law, is addressed directly in Article 4 of the Protocol. To repeat, Article 4 states:

“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.”

There is an important technical difference between the EU legislation that is listed in this Annex, and the EU legislation that is listed in the other Annexes to this Protocol. In contrast to the other EU law listed in the other annexes to the Protocol, the Directives in Annex 1 do not “apply” to and in the UK in respect of Northern Ireland by virtue of the Protocol. Rather, these Directives make more precise the evolving benchmark underlying the self-standing “no diminution” obligation. As a result, there is less room for argument as to the relevant anti-discrimination rights that are in play than in the context of the general clause. The recognised anti-discrimination protections are not to be drawn only from the terms of the B-GFA, Rights etc provisions. Instead, the relevant EU provisions on equality and non-discrimination rights that are affected are set out specifically in Annex 1 to the Protocol. The UK Government’s Legal Position correctly states: “Article 4 does not directly require compliance with these provisions of Union law: it just (sic) prohibits any diminution in rights falling within the relevant provisions of the 1998 Agreement including but not limited to the listed provisions of Union law, and only if the diminution is a result of the UK’s withdrawal from the EU.”²⁰

When the draft Withdrawal Agreement was published, the main uncertainty was which type of Union anti-discrimination law was to be specifically included in the Annex. The designated EU law now listed in the Annex includes only the substantive anti-discrimination Directives.²¹ There appears to be a broad distinction between the *anti-discrimination* Directives,

²⁰ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33 – Commission to EU 27, 28 February 2018, available at:

https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

²¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

and Directives that address broader issues of equality of opportunity and social policy. The Annex does not include the Directives that are often considered as part of the EU broader equality *acquis*, such as the Part-time Work Directive, the Maternity and Parental Leave Directive, and the Pregnancy Directive.

Nor are the relevant provisions of Union law governing non-discrimination in the area of nationality explicitly included. However, this broad-brush statement may leave a mistaken impression that there is a secondary law legal act addressing this matter that has been omitted from Annex 1, which is not the case. More importantly, the prohibition on discrimination on grounds of nationality will still be protected by virtue of being a general principle of EU law. In Case 147/79 *Hochstrass*, the Court stated that “the general principle of equality, of which the prohibition of discrimination on grounds of nationality is merely a specific expression, is one of the fundamental principles of Community law. That principle requires that comparable situations should not be treated differently unless such differentiation is objectively justified.” The non-diminution commitment in the general clause will therefore apply to the right not to be subject to nationality discrimination in those contexts in which the general principles of EU law bite.

Although somewhat narrow, the list included in the Annex is broader than would be the case if the UK had signed up to the EEA Agreement. Currently, Annex XVIII of the EEA Agreement contains provisions that mirror EU legal obligations on equal treatment between men and women. The method chosen to accomplish this is to list the EU equality directives (in some cases suitably amended) that, effectively, apply in all non-EU member states of the EEA. These EEA obligations broadly reflect the EU’s *gender equality* legal framework. The EEA Agreement does not, however, include provisions incorporating or reflecting the remainder of the EU’s anti-discrimination law framework, which the Annex to the Protocol does.

At this point, we need to return to the general clause in Article 4 of the Protocol, and in particular remind ourselves that the general clause also protects “equality of opportunity”. It states: “The United Kingdom shall ensure that no diminution of ... 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 ...” The B-GFA provides that “... the parties affirm in particular: ... the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity ...” It will be noted that the B-GFA provision refers explicitly to “equality of opportunity” on certain grounds, which should be read as encompassing “non-discrimination” but going beyond it.

The reference in the second part of Article 4, therefore, to “*the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol*” addresses only part of the idea of “equality of opportunity” referred to in the B-GFA. To the extent that “equality of opportunity” was protected by the provisions of EU law, the general clause of Article 4 requires no diminution, rather than the more specific anti-discrimination clause including the Annex. Therefore, although not listed in the Annex, those provisions of EU law, such as the Part-time Work Directive, the Maternity and Parental Leave Directive, and the Pregnancy Directive were

important measures providing for women's equality of opportunity in the workplace, they are protected by the general clause. (We shall see subsequently that they are also covered by the level-playing field provisions as well.)

The real import of the second part of Article 4 of the Protocol referring to "*the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol*" lies in its reference to the provisions set out in the Annex to the Protocol as "Union law". Article 4 of the Withdrawal Agreement which applies to the Agreement as a whole unless otherwise provided for in specific parts of the Agreement, such as the Protocol, specifies the methods and principles relating to the effect, implementation and the application of the Agreement. As we have seen, Article 4(1) provides that the provisions of the Agreement and the provisions of Union law made applicable by the Agreement "shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States." This requirement brings with it an important set of accompanying obligations on the United Kingdom.

The first concerns the question of the future role of CJEU jurisprudence. Imagine that the CJEU interprets one of the Directives listed in the Annex to Article 4 of the Protocol after the transition period. Does this jurisprudence apply in Northern Ireland? Article 4(3) of the Withdrawal Agreement provides that the provisions of the Agreement referring to "Union law or to concepts or provisions thereof" shall be "interpreted and applied in accordance with the methods and general principles of Union law." This includes conforming to the relevant case law of the CJEU, but there is a critical difference as to what case law applies. In general, Article 4(4) provides that the relevant case law of the CJEU is that "handed down before the end of the transition period." Article 4(5) only provides that "the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period" (emphasis added), which is a weaker requirement.

However, as regards the interpretation and application of Union law, concepts and provisions in the Protocol, including Article 4 and its Annex, Article 15(3) of the Protocol places no temporal limitations on the relevant case law. It provides that "*Notwithstanding Articles 4(4) and 4(5) of the Withdrawal Agreement,*" the provisions of the Protocol referring to Union law or concepts or provisions "shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union." The effect is to require those interpreting the Protocol, including Article 4 and its Annex, to conform with the most up-to-date case law of the Court, including post-transition case law.

There is a second, similar, issue regarding the temporal limitation of the meaning of "Union law". Article 6(1) provides that, in general, and unless otherwise specified, "all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period." However, Article 15(4) of the Protocol provides, again, that "*Notwithstanding Article 6(1) of the Withdrawal Agreement,* and unless otherwise provided, where this Protocol makes reference to a Union act, the reference to that act shall be read as referring to it as amended or replaced."

Thus, for example, were a particular anti-discrimination Directive listed in Annex 1 of the Protocol to be replaced by the EU after the transition period, it is this replacement that is relevant for the purposes of the Annex. This gives rise to an interesting effect, where the United Kingdom becomes a rule-taker, having given up its seat at the table participating in the making of the replacement Directive. To compensate, somewhat, under Article 17 of the Protocol, the EU is required to inform the United Kingdom about planned EU acts within the scope of the Protocol, including those amending or replacing the EU acts listed in the Annexes to the Protocol. How significant this provision will be in practice will depend, in part, on how long the Protocol continues in effect. The UK Government's Explainer, in paragraph 218, states that "[i]n practice, the extent to which amendments or replacements may be relevant for a temporary Protocol will be limited",²² but that will not be the case if no replacement to the Protocol can be agreed.

A third issue arises regarding the application of Union law. What happens if the EU adopts further legislation that may be relevant to the operation of the Protocol, but does not amend or repeal an existing listed Directive, for example a new piece of anti-discrimination legislation covering the ground of religion extending coverage to goods and services. The UK will not be involved in deciding on any new measure at the EU level but, partly to offset this, under Article 17 of the Protocol, the EU is required to inform the United Kingdom about planned EU acts within the scope of the Protocol. Article 15(5) also provides a post-enactment information requirement. Where the EU adopts a new act that "falls within the scope of this Protocol, but neither amends nor replaces a Union act listed in the Annexes to this Protocol," the EU is required to "inform" the United Kingdom of the new measure in the Joint Committee, whose role we discuss subsequently. Either side may then request the Joint Committee to hold an "exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol" within six weeks after the request. As soon "as reasonably practical", the Joint Committee may agree to add the newly adopted measure to the relevant Annex of the Protocol. The UK Government indicates in its Explainer, in paragraph 218, that the UK "would ensure an appropriate role for the Northern Ireland Assembly, in line with our commitments, in this situation before agreeing to the addition of any new areas of Union law under the Protocol."

Failing agreement to include the new provision, the Committee must "examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect." If the Joint Committee has not taken a decision within a reasonable time, the EU is entitled, after giving notice to the United Kingdom, to take "appropriate remedial measures". Such measures shall take effect at the earliest six months after the Union has informed the United Kingdom of the adoption of the measures, but no earlier than the date on which the newly adopted act is implemented in the Union. In this context, Article 5 of the Withdrawal Agreement will be highly relevant. It provides, repeating Article 4(3) TEU, that the EU and the United Kingdom "shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate

²² HM Government, Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union 14 November 2018 ("Explainer"), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756376/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_1.pdf

measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement. This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.” This binds national authorities and courts in Northern Ireland, creating an obligation across the board to minimise the diminution of rights resulting from Brexit, since it is now clearly an objective of the EU (not only of the UK and Ireland) to support the B-GFA.

Drawing from this, the CJEU should, and would I think, be favourable to the idea that the distinctions that I draw should not be given too much weight and that a simpler broader-brush approach should be adopted as far as the terms of the Withdrawal Agreement permits, unless there is some underlying rationale for drawing the distinctions. The CJEU should not, and I think will not, be very sympathetic to any efforts the UK may make to minimise its obligations. The CJEU will, surely, want to protect rights in Northern Ireland, since in general that will be conducive to peace.

The status of the listed Directives as Union law, brings with it a fourth important implication. There are notable omissions from the list of provisions in the Annex, in particular the equality provisions of the EU Charter of Fundamental Rights, and the general principles of Union law, including fundamental rights, are not listed in the Annex. Do they not apply, therefore? The answer is that they do apply because of the earlier point made above that the “same legal effects” cannot be achieved by a piece of Union law in the UK post-withdrawal without the Charter and the general principles of Union law being given effect in its interpretation and delimitation.

E. Labour and social rights in the Protocol

One of the most important modifications to the Protocol was the agreement that the United Kingdom as a whole (i.e. including Northern Ireland) would, until a new Future Relationship Agreement was concluded, form a new single customs territory with the EU. This complex, and controversial arrangements – controversial both within the EU and in the UK – was intended to address the problem of preventing a customs border on the island of Ireland, whilst at the same time preventing a customs border between Northern Ireland and the rest of the UK. Within the EU, one of the controversial aspects of the new arrangement was the potential for the UK to benefit from access to the EU markets, whilst at the same time lowering its regulatory standards, thus allowing them to reduce the price. In addition, Northern Ireland effectively remains in the Single Market. As a result, Article 6 of the Protocol provides that “With a view to ensuring the maintenance of the level playing field conditions required for the proper functioning of this paragraph, the provisions set out in Annex 4 to this Protocol shall apply.”²³ Part 3 of Annex 4 refers to labour and social standards in this context.

Article 4 of Annex 4 provides that a set of labour and social standards will apply throughout the UK, but unlike in Article 4, it does not set out the relevant EU labour and social standards. Instead, as is the practice in many

²³ Article 6 also provides: “Where appropriate, the Joint Committee may modify Annex 4 in order to lay down higher standards for these level playing field conditions.”

free trade agreements concluded with the EU, the approach taken is to require non-regression by the UK (and the EU) from labour and social standards that exist in the UK (and the EU) at the end of the transition period. The EU and the United Kingdom “shall ensure that the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in the area of labour and social protection and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring.” The “common standards applicable within the Union and the United Kingdom” are effectively those established in EU law, and thus the effect of the provision is to require the UK to maintain the existing standards set by EU law.²⁴ No diminution of these standards is permissible.

Article 6 of the Annex provides in addition for the monitoring and enforcement of these labour and social standards, which we shall examine subsequently. Beyond maintaining existing common standards, the UK and the EU agree, in Article 5 of the Annex to “protect and promote social dialogue on labour matters among workers and employers, and their respective organisations, and governments.” Particular emphasis is placed on ILO standards and the Council of Europe Social Charter.

²⁴ A special dispute settlement procedures is established, to be considered in the next section, and not the dispute settlement procedure established by Article 170 to 181 of the Withdrawal Agreement (Article 4(2) of Annex 4).

3. Rights in the Ireland-Northern Ireland Protocol: Governance Arrangements

Before turning to examine the governance arrangements in detail, we should consider, first, the problems to be confronted in any dispute settlement and enforcement procedures that apply to the UK with its current constitutional understandings. There are two central problems in the British constitution which need to be addressed. The first is that the UK's current understanding of parliamentary sovereignty (that the UK Parliament can make or unmake any law it chooses, and that no future Parliament can legally be bound by any previous Parliament) means that there needs to be considerable safeguards against a future UK Government simply renegeing on commitments dealing with Ireland-Northern Ireland in the future, and particularly in the area of human and fundamental rights.²⁵ These safeguards need to be such that there should be considerable political, economic, and (at the international level) legal disincentives in place to dissuade future UK Parliaments from backsliding or renegeing on its commitments.

The second is that the UK is a dualist state, which means that any international legal obligations that the UK accepts will not be incorporated into domestic UK law, unless and until Parliament has passed legislation which translates these international obligations into domestic legal obligations. This has meant, for example that the B-GFA could be ignored in the recent *Miller* decision,²⁶ despite the fact that it was specifically brought to the attention of the Supreme Court in that case. Much will depend, therefore, on how precisely the UK implements the Withdrawal Agreement. No text of the necessary legislation has yet been published and careful scrutiny will be required when it is.

Turning now to the governance provisions of the Withdrawal Agreement, it is important to distinguish between the arrangements envisaged for *international* interpretation and enforcement of the Protocol, from the arrangements envisaged for the *domestic* implementation and enforcement of these provisions.

A. International governance arrangements under the Protocol

The international governance arrangements are complex, with significantly different mechanisms being available, depending on which particular sets of rights are in issue in any particular circumstance. In the bulk of cases, the relevant governance arrangement for the Protocol is that provided in Title 2 of Part 6 of the Withdrawal Agreement. This is the default mechanism. We shall see subsequently that there is a special "international"

²⁵ Christopher McCrudden and Daniel Halberstam, *Miller and the Northern Ireland: A Critical Constitutional Response*, (2017) 8 UK Supreme Court Yearbook 299

²⁶ [2017] UKSC 5.

governance arrangement regarding the customs and single market requirements that apply to Northern Ireland.

Default mechanism

Article 164 establishes a Joint Committee comprising representatives of the EU and of the United Kingdom, and co-chaired by the EU and the United Kingdom. It is required to meet at the request of the EU or the United Kingdom, and in any event must meet at least once a year. The Joint Committee is responsible for the overall implementation and application of the Agreement. The EU and the United Kingdom may each refer to the Joint Committee any issue relating to the implementation, application and interpretation of this Agreement.

We saw earlier that, of particular importance to the operation of the Protocol, Article 20 of the Protocol provides that, if at any time after the end of the transition period the EU or the United Kingdom considers that the Protocol is, in whole or in part, no longer necessary to achieve its objectives and should cease to apply, in whole or in part, it may notify the other party, setting out its reasons. Within six months of such a notification, the Joint Committee shall meet at ministerial level to consider the notification, having regard to all of its objectives. The Joint Committee may seek an opinion from institutions created by the 1998 Agreement. The UK Government's Legal Position lists what it considers to be the relevant institutions: "the Northern Ireland Assembly, the Northern Ireland Executive, the North/South Ministerial Council, the British-Irish Intergovernmental Conference, and the British-Irish Council",²⁷ but it should be noted that this list is incomplete. The 1998 Agreement also established the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission.

If the EU and the United Kingdom "decide jointly within the Joint Committee that the Protocol, in whole or in part, is no longer necessary to achieve its objectives, the Protocol shall cease to apply, in whole or in part." In such a case the Joint Committee is required to address recommendations to the EU and to the United Kingdom on the necessary measures, taking into account the obligations of the parties to the B-GFA.

Although important, this is not the only or even the prime function of the Joint Committee. Article 166 of the Withdrawal Agreement provides that the Joint Committee has the power to adopt decisions in respect of all matters for which this Agreement so provides and to make appropriate recommendations to the Union and the United Kingdom. Importantly, the decisions adopted by the Joint Committee are binding on the EU and the United Kingdom, and both parties are bound to implement those decisions, which have the same legal effect as the Agreement itself. It is crystal clear that the Joint Committee may only act jointly; there is no unilateral action permitted. Article 166 provides: "The Joint Committee shall adopt its decisions and make its recommendations by mutual consent."

²⁷

EU Exit: Legal position on the Withdrawal Agreement, Annex – Protocol on Ireland-Northern Ireland, paragraph 8.

In addition, Article 165 establishes several specialised committees, including a committee on issues related to the implementation of the Protocol, comprising representatives of the EU and representatives of the United Kingdom. The EU and the United Kingdom are required to ensure that their respective representatives on the Specialised Committee have the appropriate expertise with respect to the issues under discussion. The creation or existence of a specialised committee does not prevent the EU or the United Kingdom from bringing any matter directly to the Joint Committee.

Article 16 of the Protocol specifies the tasks of the Specialised Committee, which are to: facilitate the implementation and application of this Protocol; examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement; discuss any point raised by the Union or the United Kingdom that is of relevance to this Protocol and gives rise to a difficulty; and make recommendations to the Joint Committee as regards the functioning of this Protocol. Of particular relevance to the implementation of Article 4 of the Protocol, the Specialised Committee may consider any matter of relevance to Article 4 brought to its attention by 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 addition to the Joint Committee and the Specialised Committee, Article 17 of the Protocol establishes a joint consultative working group on the implementation of the Protocol, which is to “serve as a forum for the exchange of information and mutual consultation,” composed of representatives of the EU and the United Kingdom. It is required to carry out its functions under the supervision of the Specialised Committee, to which it reports. The working group has no power to take binding decisions other than adopting its own rules of procedure. The working group serves as a forum for the exchange of information “about planned, ongoing and final relevant implementation measures” in relation to the EU acts listed in the Annexes to the Protocol, which includes the anti-discrimination Directives. The working group is to meet at least once a month, unless otherwise decided by the EU and the United Kingdom by mutual consent.

The rules of procedure for the operation of these bodies will need to be agreed speedily. Article 185 of the Withdrawal Agreement establishes that these bodies are established with the entry into force of the Agreement. As a result, for example, the joint consultative working group (JCWG) will be reviewing relevant EU legislative proposals from 30 March 2019. The membership still needs to be determined and it will be important to ensure appropriate expertise, as well as clear mechanisms for consultation of interested parties in Northern Ireland. In particular, given that the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland may report to the Specialised Committee under Article 169(c) of the Protocol, there will also need to be established some procedure for how the Commissions are to feed in to the work of the JCWG.²⁸

These three bodies, and their functions, are merely the tip of the governance iceberg. We turn now to the mechanisms for dispute resolution.

²⁸ I am grateful to David Phinnemore for the points in this paragraph.

The first point to bear in mind is the emphasis placed in the Agreement on trying to head off any dispute arising, and resolving any dispute that does arise as quickly and co-operatively as possible. Thus Article 167 provides that the EU and the UK “shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation.”

Only if it cannot be resolved within the Joint Committee will the formal dispute settlement process be initiated. The Withdrawal Agreement dispute settlement procedure is to be the exclusive method of dispute settlement permitted between the parties. Article 168 provides that for “any dispute” between the EU and the United Kingdom “arising under this Agreement,” the EU and the United Kingdom “shall only have recourse to the procedures provided for in this Agreement.” This is the default procedure for remedying disputes under the Protocol, including disputes arising under Article 4 concerning rights. It provides, for the first time, an international mechanism for addressing some disputes arising under the B-GFA. As regards equality issues arising under the anti-discrimination Directives, it replaces the infringement procedure under existing EU law, where the European Commission may refer compliance issues by a Member State to the CJEU.

There are, potentially, three main stages in the new dispute settlement process. The first stage is the initiation of formal “consultations” between the parties in the Joint Committee. Article 169 provides that a party wishing to commence consultations “shall provide written notice to the Joint Committee”. Once initiated, the EU and the United Kingdom “shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution.”

The procedure discussed up to the end of this first stage applies to all disputes arising under the Protocol (with the exception of disputes arising under those Articles which provide that EU law itself continues to apply in the customs and Single Market contexts, where a specialised dispute settlement procedure applies – considered below). The second stage of the general dispute settlement procedure applies to a narrower set of disputes. It applies neither to disputes arising from Articles which require the application of EU law, nor to disputes concerning the level-playing field labour and social provisions. Article 4 of Annex 4 to the Protocol explicitly provides that the second stage of the international dispute settlement procedure, involving arbitration of disputes, does not apply to the latter disputes. The second stage does, however, apply to disputes arising regarding Article 4 of the Protocol, as well as to Article 6 of Annex 4 to the Protocol, concerning the obligation to ensure effective domestic enforcement of the common labour and social standards. The UK Government’s Legal Position correctly states: “Disputes in respect of this particular obligation are subject to the arbitration mechanism of the Agreement, so the EU could use that mechanism if it considered the UK had not met its obligation to ensure effective domestic enforcement.”²⁹

The second stage in the process arises where no mutually agreed solution has been agreed under the first stage process. Article 170 provides that if no

solution has been reached within three months after a written notice has been provided to the Joint Committee in accordance with Article 169, the EU or the United Kingdom may “request the establishment of an arbitration panel”. Such a request is to be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration. The request is required to identify the subject matter of the dispute to be brought before the arbitration panel and a summary of the legal arguments in support of the request.

An arbitration panel of five members is to be drawn from a standing list to be established earlier by the Joint Committee. The Committee is required, no later than by the end of the transition period, to establish a list of twenty-five persons who are willing and able to serve as members of an arbitration panel. The EU and the United Kingdom are each required to propose ten persons as ordinary members, and jointly propose five persons to act as chairperson of the arbitration panel. The persons proposed must meet a high standard, and it may well not be easy to establish a list of twenty-five people, comprising “persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence, and who possess specialised knowledge or experience of Union law and public international law,” but who also cannot comprise persons who are members, officials or other servants of the Union institutions, of the government of a Member State, or of the government of the United Kingdom.”

Once a request for the establishment of a panel is made, the ordinary procedure is that such a panel is to be established within fifteen days of the date of the request. The EU and the United Kingdom are required to each nominate two members from among the persons on the list established by the Joint Committee. The chairperson is then to be selected by consensus by the members of the panel from the persons jointly nominated by the EU and the United Kingdom to serve as a chairperson. In the event that the members of the panel are unable to agree on the selection of the chairperson within the time limit of fifteen days from the date of the request, the EU or the United Kingdom may request the Secretary-General of the Permanent Court of Arbitration to select the chairperson by lot within five days of the request to him from among the persons jointly proposed by the Union and the United Kingdom to act as chairperson. There are various provisions addressing various different eventualities. The ultimate fallback position is that in the event of a failure to establish an arbitration panel within three months from the date of the request for consultations, the Secretary-General of the Permanent Court of Arbitration shall, upon request by either the Union or the United Kingdom, within fifteen days of such request, after consultation with the Union and the United Kingdom, appoint persons who fulfil the requirements to constitute the arbitration panel.

Once appointed, the panel members must, as required by Article 181, be independent, serve in their individual capacity, not take instructions from any organisation or government, and shall comply with the Code of Conduct set out in the Agreement.³⁰ The Panel is to conduct itself according to the Rules of Procedure set out in the Agreement,³¹ and should ordinarily deliver its decision within 12 months of the establishment of the panel, unless either

³⁰ Part B of Annex IX. The Joint Committee may amend the Code of Conduct.
³¹ Part A of Annex IX (“Rules of Procedure”).

party requests that the case be treated as a matter of urgency, in which case if the panel agrees, it should deliver its decision within six months of the request.

We turn now to the controversial topic of the involvement of the CJEU in the disputes process. The *draft* Withdrawal Agreement, the Commission's draft, had taken a robust attitude to the involvement of the CJEU, providing in draft Article 162, that *either the EU or the UK* were able to bring any dispute which concerned the interpretation or application of the Agreement before the Joint Committee. The Joint Committee was able to settle the dispute through a recommendation or, at any point, to decide to submit the dispute brought before it to the CJEU for a ruling. The Court's rulings would be binding on the EU and the UK. If a dispute had not been settled within three months after it was brought before the Joint Committee and it had not been submitted to the CJEU by the Joint Committee, the dispute was able to be submitted to the CJEU for a ruling at the request of *either the EU or the UK*, in which case the rulings of the Court are again binding on the EU and the UK. The draft Agreement had also provided in draft Article 163 that where *either the EU or the UK* considered that the other had not taken the necessary measures to comply with the judgment of the Court of Justice of the European Union resulting from these proceedings, *either the EU or the UK* could bring the case before the CJEU, and again its rulings were binding. If the CJEU found that the EU or the UK had not complied with its obligations, the other party could decide to suspend parts of the Withdrawal Agreement or parts of any other agreement between the UK and the EU. The suspension was subject to judicial review by the CJEU.

In the November Agreement, a somewhat different approach is adopted regarding the role of the CJEU. Article 174 provides that where a dispute submitted to arbitration raises a question of interpretation of a concept of Union law, or a question of interpretation of a provision of Union law referred to in the Agreement, the arbitration panel is not permitted to decide on any such question. After hearing representations from the parties, it must request the CJEU to give a ruling on the question. The CJEU is given jurisdiction to give such a ruling, which is binding on the panel.

If either the EU or the United Kingdom considers that a request to the CJEU is to be made, it may make submissions to the arbitration panel to that effect. In such case, the arbitration panel is required to submit the request to the CJEU unless the question raised does not concern the interpretation of a concept of Union law, or interpretation of a provision of Union law referred to in the Agreement, in which case the arbitration panel is required to provide reasons for its assessment. Within ten days following the assessment, either party may request the arbitration panel to review its assessment, and a hearing is to be organised within fifteen days of the request for the parties to be heard on the matter. Again, the arbitration panel is required to provide reasons for its assessment.

When the provisions of the draft Agreement are compared with those of the Agreement as agreed, it is clear that a reference to the CJEU can only be generated by the panel itself. The effect is that neither the UK nor the EU can by itself refer a matter to the CJEU. This may lead to a situation where the panel finds it necessary to have a decision as to the meaning of EU law determined before it can reach a decision, but there is no agreement to send

the issue to the CJEU, which means that the panel cannot reach a decision, since the panel is expressly forbidden from deciding an issue of EU law. We should not exaggerate the practical difficulties this poses, however. The possibility of such a standoff is considerably reduced by the provisions regarding how decisions may be taken by the panel. The panel, in this as in all other matters, is required to act by consensus, but ultimately by a majority, as provided by Article 180, reducing the possibility that those nominated solely by either the UK or the EU could block referral to the CJEU.

Turning now to the issue of enforcement of panel rulings, we can identify a similar pattern of referring issues to the panel for arbitration rather than to the CJEU as under the draft Agreement. Article 175 provides that the arbitration panel ruling is binding on the EU and the United Kingdom. The Union and the United Kingdom are required to take “any measures necessary to comply in good faith with the arbitration panel ruling and shall endeavour to agree on the period of time to comply with the ruling within a reasonable period of time as set by agreement between the parties or, failing this, by the panel.” In accordance with Article 177(2), if at the end of the reasonable period, the complainant considers that the respondent has failed to comply with the arbitration panel ruling, the complainant may request the original arbitration panel in writing to rule on the matter. The arbitration panel is required to notify its ruling to the Union and the United Kingdom within 90 days of the date of submission of the request.

Article 178 provides that if the arbitration panel rules that the respondent has failed to comply with the ruling, it may, at the request of the complainant, impose a lump sum or penalty payment to be paid to the complainant. In determining the lump sum or penalty payment, the arbitration panel is required to take into account the seriousness of the non-compliance and underlying breach of obligation, and the duration of the non-compliance and underlying breach of obligation.

If, one month after this arbitration panel ruling, the respondent has failed to pay any lump sum or penalty payment imposed on it, or if, six months after the arbitration panel ruling, the respondent persists in not complying with the arbitration panel ruling, the complainant is entitled, upon notification to the respondent, to suspend obligations arising from any provision of the Withdrawal Agreement, other than those contained in the Part concerning citizens’ rights, or parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement.

Any suspension must be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question and, where the suspension is based on the fact that the respondent persists in not complying with the arbitration panel ruling, whether a penalty payment has been imposed on the respondent and has been paid or is still being paid by the latter. If the respondent considers that the extent of the suspension set out in the notification is not proportionate, it may request the original arbitration panel in writing to rule on the matter. The suspension of obligations is to be temporary and is to be applied only until any measure found to be inconsistent with the provisions of this Agreement has been withdrawn or amended, so as to achieve conformity with the provisions of this Agreement, or until the Union and the United Kingdom have agreed to otherwise settle the dispute.

Special mechanism for customs and single market disputes

We have seen that Northern Ireland will, effectively, remain within the EU Customs Union and the EU Single Market arrangements, in so far as the EU law governing these arrangements will remain in force in Northern Ireland.³² In respect of the supervision and enforcement of these obligations, the Protocol provides a special mechanism, effectively replicating the existing system under EU law. As the House of Lords European Union Committee put it in its recent report, “full jurisdiction” is conferred on the CJEU “to oversee the operation of the EU law applying to Northern Ireland; including the power to hear applications for preliminary rulings submitted by the Courts of Northern Ireland; the UK would enjoy the right to participate in these proceedings as if it were a Member State.”³³

These arrangements are important in the context of the previous discussion concerning the future role of the Charter of Fundamental Rights. It was argued above that it is in the interpretation and application of the customs and Single Market requirements that the Charter is likely to arise. Courts with jurisdiction in Northern Ireland will be required in these contexts to apply the Charter as before withdrawal, and they will also be able (and, in the case of final appeals, required) to refer questions to the CJEU on the interpretation and application of the Charter.

B. Domestic governance arrangements under the Protocol

We shall turn in a moment to assess several issues that arise regarding the domestic governance arrangements that relate to the rights provisions of the Protocol specifically. There is a broader question that arises, however: what are the general obligations on the United Kingdom regarding giving effect to the Withdrawal Agreement and the Protocol?

The overarching obligation is set out in Article 4(1) of the Withdrawal Agreement, which provides that the “provisions of this Agreement ... shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.” The legal status of the Withdrawal Agreement in domestic UK law must mirror its status under EU law. As we have seen above, the question of the precise legal status of the Agreement in UK domestic law may be determined by the CJEU.

Under Article 4(2), the UK is required to “ensure compliance with paragraph 1 ... through domestic primary legislation.” This is a critical obligation because it not only specifies that domestic effect has to be given to the provisions of the Agreement, but also that it must be done through *primary* legislation. Paragraph 2 goes further still because it makes clear, in case there were any doubt, that domestic primary legislation must include provisions regarding “... the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions ...”.

³² Provisions regarding customs (Article 6(2)), technical regulations and authorisations (Article 8), VAT and Excise (Article 9), Agriculture and Environment (Article 10), the single electricity market (Article 11) and state aid (Article 12).

³³ House of Lords, European Union Committee, 24th Report of Session 2017–19, HL Paper 245, Brexit: the Withdrawal Agreement and Political Declaration, HL 245, 5 December 2018, paragraph 167, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/245/245.pdf>

The effect, of course, is to require the substantial replication of sections 2 and 3 of the European Communities Act 1972.

We shall see in a moment that there is an additional question regarding *who* is able to take advantage of the provisions in domestic courts, but that is not the only issue arising from Article 4(2) of the Withdrawal Agreement. We shall see that Article 4(1) of the Protocol provides that the UK will implement that paragraph through “dedicated mechanisms”. Article 4(2) of the Withdrawal Agreement effectively provides the minimum of what this dedicated mechanism must provide, viz that judicial and administrative authorities must be empowered “to disapply inconsistent or incompatible domestic provisions”. This means, therefore, that, for the first time in UK law, elements of the B-GFA expressly have the status of higher law in UK law, rather than indirectly *via* the Northern Ireland Act 1998.

It will also require that such bodies as the Northern Ireland Assembly and Executive must be prohibited at least from legislating or acting contrary to Article 4(1) of the Protocol.³⁴ Ciaran White has also argued, persuasively, that similar constraints must be enacted regarding the social and workers’ rights that apply as part of the level-playing field requirements. White suggests that: “one can presume that this aspect of the Protocol would also appear in domestic legislation in the form of limits on the legislative competence of Parliament and the NI Assembly, though the ‘entrenchment’ of these rights would only be as to the ‘proper functioning of the single customs territory’.”³⁵

We have seen that an overarching problem remains of how far to ensure that legislation incorporating these elements is not subject to the whim of future UK Parliaments. We have examined how the international governance machinery will police this, but there is a further issue of how the issue is to be dealt with in *domestic law*. The best way forward, I suggest, would be to ensure that the domestic legislation incorporating the Withdrawal Agreement into domestic law should be accorded the status of “constitutional legislation” under the British constitution. Ultimately, this status is accorded by the domestic courts, rather than by Parliament, and there is a degree of uncertainty whether the courts will accord legislation this status, but Parliament and the UK Government can send sufficient signals to the courts to make it more likely than not that such a status will be accorded. The statutes that have been recognised as having the status of “constitutional statutes” are generally thought to include the European Communities Act 1972 and the Human Rights Act 1998.

Being accorded a “constitutional” status similar to those statutes has two important implications. The first is that the ordinary doctrine of interpretation of statutes may not fully apply. In both the ECA 1972, and the HRA 1998, there is a provision that ensures that potentially conflicting provisions of domestic law will be interpreted as far as possible to negate or minimise the conflict.³⁶ The second is that, by judicial interpretation, the doctrine of implied repeal does not apply, meaning that legislation that is enacted later than the

³⁴ Thus providing for an international legal guarantee for Section 26(1), Northern Ireland Act which provides that “If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken.”

³⁵ Ciaran White, Northern Ireland Workers’ Rights and the Draft Withdrawal Agreement: The Quasi-constitutional Entrenchment of EU-derived Labour Law Rights, U.K. Constitutional Law Blog, 19th Nov. 2018, available at: <http://ukconstitutionallaw.org>.

³⁶ But note that the ordinary rules of construction otherwise apply: *Imperial Tobacco* [2012] UKSC 61.

constitutional statute which is in conflict with it does not repeal the conflicting provisions of the earlier statute, unless the later statute explicitly repeals the earlier statute.

Given Parliamentary sovereignty, it should be clear, that Parliament may expressly repeal even constitutional statutes. Under international law, this would be a breach of the UK's obligations under the Withdrawal Agreement, unless it was done with the express consent of the EU. The provisions of the Withdrawal Agreement on supremacy thus have a direct bearing on the international legal effect of repealing the future Withdrawal Agreement Act. Any such breach would be sure to be referred to arbitration, and in that context it is important to note that pursuant to Article 4 of the Withdrawal Agreement, the Agreement as a whole needs to be endowed with supremacy in UK law. Domestically, however, what would be the position if the UK repealed the primary legislation giving effect to the Withdrawal Agreement in UK law? Due to the dualist nature of UK law, if the statute giving effect to the Withdrawal Agreement in UK law is repealed, the Withdrawal Agreement itself has no further domestic effect (in the same sense that a repeal of the ECA means that EU law as such loses its relevance in UK law).

There is another important dimension of Article 4(1) of the Withdrawal Agreement. We have seen that Article 4(1) provides that the provisions of the Agreement and the provisions of Union law made applicable by the Agreement "shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States." This will include the ability to secure monetary remedies for failure to implement these provisions, under the *Francovich* principle.³⁷

Of considerable additional significance for the rights provisions in the Protocol, Article 4(1) continues: "Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law." The principle of direct effect enables individuals immediately to invoke a European provision before a national court. The Court held that EU law has direct effect when its provisions are unconditional and sufficiently clear and precise and that they do not call for additional measures, either national or European.³⁸

How this applies to Article 4 of the Protocol is likely to occasion considerable debate. The CJEU has held consistently that the anti-discrimination Directives listed in the Annex to Article 4 have direct effect on the Member States. There is, therefore, a strong argument that at least the anti-discrimination clause in Article 4 satisfies the requirements for direct effect. There is more uncertainty regarding the general clause, but it can be argued that it would produce considerable anomalies were only the anti-discrimination clause to be given direct effect. In addition, a strong argument can be made that the provisions of the B-GFA relating to rights are, in any event, sufficiently clear, precise and unconditional to be accorded direct effect. Ultimately, however, the issue may have to be decided by the CJEU.

³⁷ Under the principle in *Francovich* and *Bonifaci v Italy*, C-6/90 and C-9/90, [1991] ECR I-5357.
³⁸ C-26/62, *Van Gend en Loos*, [1963] ECR 1; C-41/74, *Van Duyn*, [1974] ECR 1337.

There is a further issue of uncertainty. For a long time, there has been an important distinction between the horizontal and vertical direct effect of Directives. Vertical direct effect refers to the effect of directives between individuals and a Member State -- individuals could invoke a provision of EU law against a Member State. Horizontal direct effect, on the other hand, refers to the effect of the directive between individuals -- individuals could invoke a provision of EU law in relation to other individuals. Until very recently, the Court of Justice has accepted only the partial direct effect of directives (confining them to vertical direct effect³⁹). An individual remedy will therefore be available in domestic law only against these public authorities. In its most recent judgment on the issue, however, the CJEU has held that when read with the EU Charter of Fundamental Rights, social and equality Directives may have both horizontal and vertical direct effect,⁴⁰ although the contours of this remain to be clarified in practice. This means, therefore, that individuals may be able to rely on the direct effect of the anti-discrimination directives in cases involving other individuals.

We have examined these provisions because they form a vital part of the jigsaw puzzle of the enforcement of the rights provisions in the Protocol, in particular Article 4. Paragraph 1 has an additional, specific set of governance provisions relating to the domestic effect of the substantive provisions in Article 4 in the United Kingdom. “The United Kingdom ... shall implement this paragraph through dedicated mechanisms.” What these mechanisms are to consist of in detail has not yet been announced by the UK Government, but the current intention, spelled out in the UK Government’s *Explainer* that accompanied the publication of the Withdrawal Agreement, is that they will involve at least the statutory bodies with responsibility for enforcing human rights in Northern Ireland (the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland) having some sort of monitoring and enforcement function. The UK Government’s *Explainer* states, in paragraph 176:

“It is intended that this mechanism will draw on the existing human rights and equality bodies established under the Belfast (Good Friday) Agreement - namely the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and, on issues with an island of Ireland dimension, the Joint Committee - to provide independent oversight of the ‘no diminution’ commitment. The UK will confer upon NIHRC and ECNI new powers to monitor, supervise, advise and report on and enforce the commitment, as well as provide adequate resources to ensure that they are able to perform their enhanced roles effectively. The UK Government will continue to engage with both Commissions on issues relating to the dedicated mechanism.”

There are three particular issues that arise from this, each of which the European Commission will, no doubt, want to pay close attention to when they consider whether the dedicated mechanism to be proposed by the UK Government is acceptable. First, there appears to be no obligation arising specifically under this clause for the duty just set forth to be implemented in *domestic* law; the clause refers only to “dedicated mechanisms”, without specifying their status. Given the dualist nature of the British constitution,

³⁹ C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, [1986] ECR 723

⁴⁰ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, Judgment of 6 November 2018.

unless it is incorporated in domestic legislation, it will have no legal status in domestic law. A key question, therefore, will be the legal form and the legal status of the “dedicated mechanisms” in UK law. Fortunately, as we have seen, under Article 4(2) of the Withdrawal Agreement, the UK is required to “ensure compliance ... through domestic primary legislation.”

Second, there also appears to be no requirement arising under this clause that an individual should be able to secure a domestic legal remedy under these dedicated mechanisms – whether one is provided appears to be at the discretion of the UK. It is unclear, therefore, whether there will be an individual remedy provided specifically under the dedicated mechanism. That would be unsatisfactory, as it would leave it entirely in the hands of the EU whether to pursue a complaint against the United Kingdom through the international mechanisms, in which there appears to be no opportunity for individuals to participate or be represented. Again, fortunately, the direct effect of the anti-discrimination provisions is secure, meaning that the enforcement of the second clause of the paragraph may be enforced by individuals in UK domestic courts. There is likely to be more discussion of the direct effect of the no-diminution commitment in the general clause of Article 4 of the Protocol. In any event, the *Francovich* principle applies.⁴¹

Third, it appears that the role of the statutory equality and human rights Commissions will be particularly important but, if so, further critical questions arise, including what particular increase in their statutory powers is envisaged, what additional resources will be provided to these bodies to enable them to function effectively with their new obligations, how far they will be independent of Government, and in particular whether their membership will be committed and equipped to work this mechanism effectively.

Paragraph 2 of Article 4 is relevant here. It provides that 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.” The effect of this provision is to ensure that, as part of an internationally binding agreement, the UK is required to retain, *inter alia*, the main official equality body in Northern Ireland, the Equality Commission for Northern Ireland, and the main official human rights body, the Northern Ireland Human Rights Commission.

What is not considered, however, is what level of “facilitation” is required to be provided by the UK Government, in particular regarding the funding of these bodies, an issue which is likely to be centrally important after Brexit, given the many human rights and equality issues that are almost certain to arise. Coincidentally, the European Commission has recently published a Recommendation on standards for equality bodies, which sets out systematically the Commission’s understanding of best practice, which will

⁴¹ C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5357.

provide a “soft-law” standard against which to assess the statutory agencies’ exercise of its powers in this context.⁴²

A different process is set out for the domestic implementation, monitoring and enforcement of the labour and social rights under the level-playing field provisions of the Protocol. Article 6 of Annex 4 to the Protocol provides that “the United Kingdom shall ensure effective enforcement” of the non-regression obligation, and of “its laws, regulations and practices reflecting those common standards”. The Article goes further, however, in requiring that the UK “shall maintain an effective system of labour inspections, ensure that administrative and judicial proceedings are available in order to permit effective action against violations of its laws, regulations and practices, and provide for effective remedies, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect.”

⁴² Commission Recommendation of 22 June 2018 on standards for equality bodies, C(2018) 3850 final.

4. Rights in the Future Relations Agreement

We have seen that no alternative to the arrangements established in the Protocol can come into play until the UK makes up its mind, at least in broad terms, what it wants in terms of future relations with the EU. Soon after Brexit in March 2019 (assuming that it happens), the UK will want to negotiate with the EU a future relations agreement speedily. But in order to progress such an agreement, the UK will have to decide whether it wants a customs union, a free trade area agreement, some or most of the elements of the single market, or a Canada-style free trade agreement with additional elements (presumably on services). It is clear that no consensus has emerged in the UK Government on any of these alternatives.

The Political Declaration does little to clarify what the UK wants, since it leaves the door open to a wide spectrum of options, from a Canada-style free-trade agreement, to the establishment of a Ukraine-style Deep and Comprehensive Free Trade Area. These difficult EU-UK negotiations cannot begin, in any meaningful way, until the UK Government's internal negotiations have produced an agenda for a new round of EU-UK talks. It is likely that Northern Ireland will have to live with the interim arrangements established by the Protocol for some time, with the uncertainty that results from that.

It was suggested earlier that the Political Declaration can provide some clues regarding how rights issues would be treated in a Future Relations Agreement, but it is important not to exaggerate the extent to which this is true. This is because there is a direct correlation between the depth of the economic relations that is requested by the UK and the scope and depth of the rights obligations that are likely to be required by the EU as part of such an arrangement. The closer the economic relations, the more the EU will require a regulatory "level playing field", which will include social, employment, environmental and human rights commitments by the UK. It is difficult to know in advance, therefore, how a future agreement will address rights issues with any great precision, before we know which of the various economic relationships the UK is going to try to secure.⁴³

We have seen that, except to the extent that they are included under the non-discrimination and equality rights provisions of Article 4 of the Protocol, and in the provisions dealing with the customs and Single Market arrangements, the rights of all in Northern Ireland to be able to continue to enjoy social and worker rights deriving from or supported by EU law, are not addressed in detail in the draft Withdrawal Agreement, and may have to be addressed in the Future Relations Agreement. So too, the rights of all in Northern Ireland to be able to continue to enjoy human rights generally, including rights deriving from the European Convention on Human Rights, is

⁴³ For a discussion of the way social and human rights are treated under the Canada free trade agreement, see Lorand Bartels, Human Rights, Labour Standards and Environmental Standards in CETA, University of Cambridge Faculty of Law Legal Studies, Research Paper Series, 13-2017, available at: <http://www.law.cam.ac.uk/ssrn/>.

not addressed in the Withdrawal Agreement, and it too will have to be addressed in the Future Relations Agreement.

On both of these issues (social and worker rights and human rights), the Political Declaration is relatively positive, at least to the extent of providing an opening for further negotiation and clarification. It would appear, as could be expected, that the Political Declaration at the very least does not close down further negotiations on these issues. But we can go further than that. We can also identify in broad terms that the EU's intention is that the UK and the EU should be on a level-playing field and that both social and worker rights and the ECHR are critically important elements of this level-playing field, and are therefore a key basis on which future relations must be built.

The approach to be taken in the Future Relations Agreement can be seen as in three parts. The first part sets out the underlying principles that will govern and underpin future cooperation between the UK and the EU-27. The second part sets out more specific substantive requirements for UK participation in particular areas. The third part sets out the governance arrangements for ensuring that the commitments will be enforceable. We shall see that there is a distinction drawn between the way that social and workers' rights are treated, and the way that human rights are dealt with.

A. Principles

Turning, first, to the values underpinning future co-operation, the Political Declaration is clear at the level of principle. "The Union and United Kingdom are determined to work together to safeguard the rules based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests."⁴⁴ This, and the similarly phrased paragraph 3,⁴⁵ although set out in the usual abstract language, clearly mirror key provisions in the existing EU Treaties that set out the values that the European Union is founded on.

The Political Declaration goes further than that commitment to "safeguard" workers' rights when it turns to "human rights and fundamental freedoms". Commitments to the latter are considered to underpin the future relationship. The language difference is important because it signals that the preservation of human rights and fundamental freedoms will be regarded as a necessary part of the future agreement, as paragraph 6 makes clear:

"The Parties agree that the future relationship should be underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation. The Parties agree that these values are an essential prerequisite for the cooperation envisaged in this framework."

⁴⁴

Para 2.

⁴⁵

Para 3: "The Union and the United Kingdom agree that prosperity and security are enhanced by embracing free and fair trade, defending individual rights and the rule of law, protecting workers, consumers and the environment, and standing together against threats to rights and values from without or within."

What this means in practice is set out in paragraph 7. “The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.” For those with suspicious minds, the use of the term “framework” spells potential trouble.⁴⁶ Is the UK’s commitment to respect the “framework” of the ECHR weaker than the commitment by the EU-27 to “remain bound by” the Charter of Fundamental Rights? The answer would appear to be that it is not, for two reasons. First, the reference to the ECHR “framework” may best be interpreted as a reference to the institutions of the Convention, including the European Court of Human Rights, the Committee of Ministers etc, as well as the substantive rights set out in the Convention; second, this provision must be read together with the provisions dealing with security co-operation, discussed below, in which more robust language is used.

Suspicion may also be generated by paragraph 18, which provides in part: “The Parties will retain their autonomy and the ability to regulate economic activity according to the levels of protection each deems appropriate in order to achieve legitimate public policy objectives such as public health, animal health and welfare, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, and promotion and protection of cultural diversity.” It is unclear how this “autonomy” protection relates to the protection of fundamental rights, or the protection of workers’ rights. On one reading, this may simply be another way of stating what the UK can do within the framework of the qualified rights under the ECHR, with “autonomy” substituting for the margin of appreciation.⁴⁷ The drafting of any future Agreement will clearly be critical in resolving these ambiguities.

B. Specific substantive obligations

Turning now to the second part of the strategy in the Political Declaration, the treatment of specific areas rather than the overall principles, there are three areas in which rights play a major role. The first relates to free movement. Paragraph 50 notes “that the United Kingdom has decided that the principle of free movement of persons between the Union and the United Kingdom will no longer apply,” and that new “mobility arrangements” will need to be established. Not surprisingly, the Political Declaration is sketchy as to what such an arrangement might consist of. A few principles are sketched out. First, paragraph 51 provides, that the “mobility arrangements will be based on non-discrimination between the Union's Member States and full reciprocity.” As importantly there is a repetition, in paragraph 56, of the provision in the Withdrawal Agreement regarding the Common Travel Area:

⁴⁶ The House of Lords European Union Committee has asked the UK Government to clarify the implications of the use of “framework” in this context, House of Lords, European Union Committee, 24th Report of Session 2017–19, HL Paper 245, Brexit: the Withdrawal Agreement and Political Declaration, HL 245, 5 December 2018, para 197.

⁴⁷ I am grateful to Gordon Anthony for this point.

“Any provisions will be without prejudice to the Common Travel Area (CTA) arrangements as they apply between the United Kingdom and Ireland.”

The second specific area considered relates to the requirements set out in paragraph 79, which establishes the need to have provisions in any Future Relations Agreement regarding the future economic relationship to be open and “fair”. This is the so-called “level playing field” provision that mirrors the equivalent provision in the Withdrawal Agreement relating to customs and Single Market rules. It is envisaged that the Future Relations Agreement will “build[] on the level playing field arrangements provided for in the Withdrawal Agreement”. This “should cover state aid, competition, social and employment standards, environmental standards, climate change, and relevant tax matters”. The inclusion of social and employment standards is significant, as it opens up the possibility that EU social standards, or something similar, will continue to operate in the UK.

How far such standards would apply will depend, as we have said earlier, and the Political Declaration makes this clear, on the depth of the economic relationship that will be agreed. The less deep the relationship, the less deep will be the need for the level playing field provisions, and vice versa; they will be, in the words of paragraph 79 “commensurate with the overall economic relationship”. It continues: “The Parties should consider the precise nature of commitments in relevant areas, having regard to the scope and depth of the future relationship. These commitments should combine appropriate and relevant Union and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement as part of the future relationship.”

The third specific area of relevance is the envisaged security partnership, and in particular the provisions dealing with law enforcement and judicial cooperation in criminal matters. Again, we find in paragraph 83 that “the closer and deeper the partnership the stronger the accompanying obligations”. It continues: “It should ... be underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence and giving effect to the ECHR, and adequate protection of personal data, which are both essential prerequisites for enabling the cooperation envisaged by the Parties, and to the transnational *ne bis in idem* principle and procedural rights. It should also reflect the Union’s and its Member States’ commitment to the Charter of Fundamental Rights of the European Union.”

My understanding is that, at least with regard to security co-operation, continued adherence by the UK to the ECHR will be required.⁴⁸ It would be hard to envisage a commitment to adhere to the ECHR in only one area of a State’s activities, and so this commitment appears to reduce the anxiety, noted above, that paragraph 7 refers only to a commitment to respect “the framework” of the ECHR. Paragraph 83 also appears to open up the possibility that the Charter of Fundamental Rights would also play a role in the envisaged security arrangements. We should also remember that the UK is obliged to remain a party to the ECHR as a result of the B-GFA.

⁴⁸ Which may not go very far if, for instance, there is an article 15 derogation from article 5 ECHR. But at least they remain in the tent. I am grateful to Gordon Anthony for this point

The fourth specific area of relevance relates to the peace process in Northern Ireland. Paragraph 139 provides: “Both Parties affirm that the achievements, benefits and commitments of the peace process in Northern Ireland will remain of paramount importance to peace, stability and reconciliation. They agree that the Good Friday or Belfast Agreement ... must be protected in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the 1998 Agreement.”

This provision is important but there is an interesting omission from the paragraph. Paragraph 139 is clearly drawn from the December 2017 joint report, but there is a significant provision in the latter that does not appear in the former. The latter commits the UK and the EU to ensure “no diminution” of rights in Northern Ireland as a result of Brexit, as we have discussed above. Paragraph 139 of the Political Declaration does not include any equivalent commitment, and it is unclear why that has been omitted. There are two contrasting explanations. On the one hand, it may be because there will be diminution, undeniably. On the other hand, an argument could be made that the omission is because the commitment has already been entered into in the Protocol.

Finally, the future relations agreement will include general exceptions and safeguards. These are flagged up in paragraphs 136 and 137. The former notes that “national security is the sole responsibility of the Member States of the Union and the United Kingdom respectively,” and provides that the “future relationship should provide for appropriate exceptions regarding security.” Para 137 goes further, providing that the future relationship “should address the possibility for a Party to activate temporary safeguard measures that would otherwise be in breach of its commitments in case of circumstances of significant economic, societal or environmental difficulties.” It is provided, however, that this provision “should be subject to strict conditions and include the right for the other Party to rebalancing measures.” In addition, the “proportionality of measures taken will be subject to independent arbitration.”

C. Governance

Mention of arbitration bring us to our third major issue, the overall governance arrangements envisaged by the Political Declaration. There are three levels of governance envisaged as operating between the EU-27 and the UK. First, there is a commitment to “regular dialogue” (paragraph 124). Strategic direction and dialogue “should include dialogue between the Parties at summit, ministerial and technical level, as well as at parliamentary level.” In addition, the parties “should encourage civil society dialogue”.⁴⁹

Second, arrangements are contemplated for the management and implementation of future relations under the future agreement. “The Parties should establish a Joint Committee responsible for managing and supervising the implementation and operation of the future relationship, facilitating the resolution of disputes as set out below, and making recommendations concerning its evolution.”⁵⁰ In order to reduce the potential for disputes in the

⁴⁹ Paragraph 125. More details are set out in paragraphs 126-128.
⁵⁰ Paragraph 129.

future, the EU-27 and the UK “will seek to ensure the consistent interpretation and application of the future relationship.”⁵¹

Third, there are proposals for “the resolution of disputes and enforcement”. This third level has various elements. The arrangements for dispute settlement are significantly based on the arrangements for dispute settlement and enforcement provided for in the Withdrawal Agreement, and those in turn were based in part on the EU-Ukraine Agreement:⁵²

- the Parties should first make every attempt to resolve any matter concerning the operation of the future relationship through discussion and consultation;
- if either Party deemed it necessary, it should be able to refer the matter to the Joint Committee for formal resolution;
- the Joint Committee “may agree to refer the dispute to an independent arbitration panel at any time, and either Party should be able to do so where the Joint Committee has not arrived at a mutually satisfactory resolution within a defined period of time”;⁵³
- the decisions of the independent arbitration panel will be binding on the Parties;
- if a dispute raises “a question of interpretation of Union law, which may also be indicated by either Party, the arbitration panel should refer the question to the CJEU as the sole arbiter of Union law, for a binding ruling”;
- the arbitration panel should decide the dispute in accordance with the ruling given by the CJEU;
- where a Party considers that the arbitration panel should have referred a question of interpretation of Union law to the CJEU, it may ask the panel to review and provide reasons for its assessment.

Where a Party “fails to take measures necessary to comply with the binding resolution of a dispute within a reasonable period of time, the other Party would be entitled to request financial compensation or take proportionate and temporary measures, including suspension of its obligations within the scope of the future relationship.” The future relationship “will also set out the conditions under which obligations arising from parts of any agreement between the Union and the United Kingdom may be suspended,” including as foreseen in Article 178 of the Withdrawal Agreement. Either Party may refer the proportionality of such measures to the arbitration panel.

In several respects -- the references to thematic dialogue, regulatory cooperation and joint committees overseeing the implementation of the agreement – the proposed mechanism is found in all modern EU fair trade agreements. Where the declaration goes further is in addressing the possibility of having a reference procedure in line with the EU-Ukraine DCFTA and the EU-Switzerland Framework Agreement. But this type of procedure generally applies with respect to disputes over EU single market legislation and has not generally been applied to human rights requirements included in EU agreements with third countries.⁵⁴ How far this is just another example of the

⁵¹ Paragraph 131.

⁵² Paragraph 132. The EU-Ukraine Association Agreement allows the arbitration tribunal to refer questions of EU law to the CJEU. Article 322 of the Ukraine Association Agreement, provides that where a dispute raises a question of interpretation of a provision of EU law in the areas to which the dispute resolution procedure applies, the arbitration panel shall not decide the question, but shall request the CJEU to give a ruling on the question. The ruling of the CJEU is binding on the arbitration panel.

⁵³ Paragraph 133.

⁵⁴ I am grateful to Billy Melo Araujo for this point.

parties leaving their options open, or how far it indicates a potentially significant change of policy by the EU, remains to be seen.

5. What happens next?

As regards the protection of rights in Northern Ireland, the package agreed at the end of November, comprising the Withdrawal Agreement, the Protocol, and the Political Declaration, is neither as good as existing membership in the European Union, nor as bad as the UK withdrawing from the EU without an agreement.⁵⁵ It is also better, in certain respects, than the February draft Withdrawal Agreement proposed by the Commission.

Implying that little has changed from the Commission's February draft, and that Northern Ireland is in as bad a position from the equality and human rights perspective as some of us thought it was in February and March, lacks credibility, and will lead to a less than optimum strategy for the future. In particular, the decision by civil society in Northern Ireland to work closely and co-operatively with Dublin and Brussels has paid dividends and should be acknowledged.⁵⁶ All that said, the Withdrawal Agreement is far from perfect.⁵⁷ And securing these gains will be challenging.⁵⁸

The immediate question is whether the House of Commons will approve a motion agreeing to the Withdrawal Agreement. If it is not approved, there will of course be significant pressure from the UK Government to reduce the protections in the Protocol, and this could threaten the protection of rights in the Protocol. In these circumstances, it will be important to ensure that the rights protections in the Withdrawal Agreement are regarded as the basic minimum.

I suggested, in chapter 1, that it is worth considering the Withdrawal Agreement in detail because, even if the Agreement is not approved, any future agreement will need to deal with very similar problems. We have now examined these problems in some depth. Even if it is not approved, none of these issues will go away. They will simply have to be addressed in a different context. Close study of how the Protocol dealt with them will still be required.

If the Agreement is approved by Parliament, and the UK Government is in a position to bring forward legislation implementing the Withdrawal Agreement, it will be important to monitor closely the details of the Bill and its passage through Parliament. We have had significant experience in the past (not least over the implementation of the Belfast-Good Friday Agreement in the Northern Ireland Bill) where there was significant slippage between the international agreement and the domestic incorporation of the Agreement as proposed initially by the UK Government. Past experience calls for a critical assessment of draft measures implementing the Withdrawal Agreement. It will

⁵⁵ Dagmar Schiek reaches a similar conclusion, *Brexit and the island of Ireland – any news from the EU's revised offer for a withdrawal agreement?*, Northern Ireland Legal Quarterly blogspace, available at: <https://nilq.qub.ac.uk/index.php/nilq/navigationMenu/view/blog>.

⁵⁶ For an informed account, see Tony Connolly, *Brexit: Rights, wrongs and the Good Friday Agreement*, 15 October 2018, RTÉ Website, available at: <https://www.rte.ie/news/analysis-and-comment/2018/10/13/1002730-brexit-rights-good-friday-agreement>.

⁵⁷ One informed initial analysis stated: "there will be disappointment and concern that the provisions are limited, that the mechanisms on implementation and enforcement appear relatively weak and that promises given to Irish citizens from December 2017 have been neglected (at this stage)." Colin Harvey, *Safeguarding Rights and Equality in Northern Ireland*, BrexitLawNI Blog, available at: <https://brexitlawni.org/blog/safeguarding-rights-and-equality-in-northern-ireland/>

⁵⁸ I am grateful to John Temple Lang for many of the following points.

also be important for these measures to be subject to rigorous equality impact assessments, under section 75 of the Northern Ireland Act 1998.

The legal situation described above is complex. It is likely to produce anomalies and apparently irrational results. There is an undesirably significant scope for controversy and antagonism within Northern Ireland over the consequences. The CJEU is certain to be asked to resolve at least some of the issues, and there will be those who would continue to complain about taking orders from a foreign Court. This is especially likely if the CJEU is obliged to straighten out the situation through judgments that will be described as "judicial legislation". Some will continue to resist as far as possible the involvement of the EU, and to minimise the number of rights given or guaranteed by the new agreements. In order to minimise controversy and ill-feeling in future, Withdrawal Agreement implementation measures, and the Future Relations Agreement, should try to deal with all the foreseeable issues, and not leave issues to the courts any more than is unavoidable.

Once the Protocol comes into effect, if it does, it will be vital to ensure that there is close scrutiny of its operation in practice, and ensure also that full use is made of the various mechanisms for redress. These mechanisms should be "stress-tested" as soon as possible, not least because they will form the basis for the Future Relations Agreement. In this context, close attention needs to be paid to who is appointed to serve on the various bodies that will be responsible for implementing the Protocol in various ways: in particular, the equality and human rights commissions in Ireland and Northern Ireland, and the arbitration panels responsible for dispute settlement.

There are several elements in the Protocol that depend on future actions to be taken by the Irish Government (in the case of citizenship rights), by the UK Government (in the case of the dedicated mechanisms implementing Article 4), and by the Irish and UK Governments jointly (in the case of some aspects of citizenship rights, and the Common Travel Area). Close attention to the detail of each of these initiatives will be necessary if they are not to go badly wrong. In this context, informing the Irish electorate, commentariat and politicians of the issues will be of importance. It will be of more than passing interest to see whether a distinction can be maintained between addressing whether the legitimate concerns of Irish citizens resident in Northern Ireland can be accommodated.

The future role of the UK Government (and the Northern Ireland Executive and Assembly if and when they are re-established) is also critical. We have seen that the Withdrawal Agreement and the Political Declaration are concerned with rights issues in Northern Ireland from the perspective of EU competences, and leaves the larger issue of the future of rights in Northern Ireland to others. As de Mars, Murray, O'Donoghue, and Warwick rightly suggest, there is the danger that a significant gap in the provision of rights between Northern Ireland and Ireland will emerge over time, contrary to the B-GFA.⁵⁹ It will be up to whichever Government is responsible for Northern Ireland in the future to ensure that the rights protections in the Withdrawal Agreement are a floor and not a ceiling.

⁵⁹ Sylvia de Mars, Colin Murray, Aoife O'Donoghue, and Ben Warwick, Briefing on: The Protocol on Ireland/Northern Ireland (November 2018).

Finally, work is likely to begin soon on putting flesh on the bones of the Future Relations Agreement. We have seen that there are several positive elements as to what that Agreement should contain, not least regarding the European Convention on Human Rights, but it is important that the substantive protections in the Protocol are regarded as the basic minimum to be built on and, if possible, improved on, rather than regarding them as a temporary expedient that can be quietly scrapped when the dust has settled.

Further reading

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About the author

Christopher McCrudden FBA MRIA is Professor of Human Rights and Equality Law, Queen's University Belfast, and William W Cook Global Professor of Law of Law, University of Michigan Law School. He is a member of the Bar of England and Wales, and of Northern Ireland, and a member of Blackstone Chambers. He is grateful for comments on an earlier draft from: Katy Hayward; John Temple-Lang; Billy Melo Araujo; Conor Gearty; Brian Doherty; Gordon Anthony, Philip Lewis, David Phinnemore, Daniel Halberstam, Caroline McCrudden, as well as those who preferred to remain unacknowledged publicly.

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