

FLAC MICHAEL- MAS RESEARCH PROJECT 2024

TCD & QUB



THE HUMAN RIGHTS RAMIFICATIONS OF A UNITED IRELAND

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**THE HUMAN RIGHTS
RAMIFICATIONS
OF A
UNITED IRELAND**

A Student-Led Research Report By

TRINITY COLLEGE, DUBLIN



QUEEN'S UNIVERSITY, BELFAST

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THE HUMAN RIGHTS RAMIFICATIONS OF A UNITED IRELAND

A Foreword from the Head Legal Research Officer

In a short speech I delivered at Trinity College earlier in the academic year, I described this project as the ‘first of its kind for Trinity FLAC’. I said this for three reasons. Firstly, the project is invaluable in its contemporaneous significance; for, though recent market research polls have shown an ever-increasing desire for unification in the next 15—20 years, it has been argued that it is ‘questionable whether the Irish government is currently providing at least an equivalent level of protection of human rights as is provided in Northern Ireland’.¹ Secondly, this project represents the first occasion on which students from different universities (Trinity College, Dublin and Queen’s University, Belfast) have had the opportunity to work together in achieving the laudable and monumental aims of a Trinity FLAC research report. In addition to such a feat, this is – thanks to the generosity of the Trinity Alumni Trust – the first Trinity FLAC report to be published in both physical and virtual format. As such, the opportunity to lead this semester’s research project alongside my two research peers, Madailein and Grace, was one I am ever-so proud of and will undoubtedly always forever be grateful for.

As alluded to above, this research project proposes to explore areas of divergence as between human rights protections in Northern Ireland and the Republic of Ireland. While academic discourse on the legal ramifications of a united Ireland is a century old, it has been on a steady incline ever since the promulgation of the Good Friday agreement in 1998. Indeed – going back to that year, we may describe it as pivotal one for the U.K., Northern Ireland specifically. For one, it saw the

¹ Michael Farrell, ‘10 years on, Ireland’s human rights act has failed to deliver’ (*The Journal*, 29 September 2013)

promulgation of both the Good Friday Agreement; and, relatedly, that of the Human Rights Act. These agreements, it seems to me, were part of the most momentous political development to have had happened to Northern Ireland since its setting up in 1921.

When introducing the Bill on Good Friday of 1998, then-Taoiseach Bertie Ahern described the deal as one which would allow both Governments to form ‘closer and stronger links’. Signed between, on one hand most of Northern Ireland’s political parties, and on the other between the British and Irish governments, the Agreement allows – amongst other important things – for firm dedication to the achievement of reconciliation and the vindication of human rights. It also affords Northern Ireland with the possibility of self-determination at the behest of the Secretary of State, on the condition that there be ‘the agreement and consent of a majority of the people of Northern Ireland’, upon declaration of which both houses of Parliament will be bound to offer their full support.

Though the agreement represented a watershed political moment, it would only be to downplay the damaging influence of the Troubles were we not to admit that (*i*) there was much difficulty in practically implementing the Agreement, and; (*ii*) much trust remained to be built between the affected communities. In fact, some have gone as far as to argue that the Troubles only ended eight years following the promulgation of the 1998 Agreement.² Whatever we may describe as marking the end of the Troubles, it remains vividly clear from this report that we may only make one thing of those Acts supposed to mark its end: that they have failed at both a domestic and inter-State level to meet their ends.

² Richard Killeen, *A Brief History of Ireland* (Running Press 2012) 301

Understood in a context of a mutual interpretational interdependence, both Acts form the bedrock of any future cohesion between North and South. Therefore, it is imperative any discrepancies in implementation and interpretation be resolved as quickly as possible. That is if we are willing to be prompt (yet efficient) in give effect to the common weal. Unsurprisingly, an even greater plight belies some higher and lower meta-structures from which rights in both States are derived. Indeed, as this report also shows, divergences as between certain constitutional and statutory provisions, together with at times varying jurisprudence, makes the need for deep structural reform all-the-more pressing.

In hoping to give effect to this need, Part I. of this project focuses on the foundational political and legal aspects that underpin the workings of the Irish and Northern Irish legal systems. The focus is made domestic, supra-national, and international. After having laid the foundations, Part II. of this project evaluates 11 specific areas of human rights divergence as between the North and the South of the Island – with each part concluding on a set of recommendations. Finally, Part III. of the project lays out alternative political structures that could be adopted in the case of a United Ireland.

It is much-hoped that this report be seen as a pertinent follow-up to the work already conducted by the Irish Research Council's very own North-South Legal Mapping Project, individual human rights authors, and politicians from both sides of the island.

Sincerely thanking everyone who contributed to this amazing endeavour,

Sébastien Laymond

Head Legal Research Officer

A Foreword from Prof. Brice Dickson

I warmly welcome this impressive report produced by students from Trinity College Dublin and Queen's University Belfast and I applaud the Trinity FLAC group for publishing it. It is hugely uplifting to see students from across the island collaborating in such a productive manner.

The question of what a united Ireland should look like if it were to come to pass is certainly a topical one, even if the opinion polls still suggest that the criterion for calling a border poll – that it is likely that a majority of the electorate in each part of Ireland would vote in favour of a united Ireland – will not be fulfilled for at least the next few years. Reports issued in early 2025 on surveys conducted for the ARINS project create the impression that support for a united Ireland is growing in Northern Ireland but also that in the Republic there is a diminishing willingness to change the status quo in ways that would accommodate the island becoming more 'British' through the absorption of around a million unionists.

Clearly there needs to be a lot more work done on what kind of united Ireland we would all be letting ourselves in for before referendums in both parts of the island can be held. People in the North have learned that lesson from the chaotic way in which the UK's decision on whether to exit from the European Union was managed. The report you are reading makes a valuable contribution to the thinking on what the options could be on a range of important issues. It is interesting to see that it focuses on eleven areas of divergence between the two separate jurisdictions at present, several of which relate to personal rights. The analyses are helpful even if a united Ireland does not

materialise any time soon because they provide a useful starting point for legal reform in each jurisdiction acting alone.

The reflections in Parts A and C of the report – as well as the succinct recommendations at the end – also provide much food for thought. I commend the whole document and predict that it will move the dial on the united Ireland debate, though precisely how much and in what direction it is hard to say.

Brice Dickson, Emeritus Professor of International and Comparative Law,

Queen's University Belfast,

10 February, 2025.

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A. OVERVIEW OF PRINCIPLES

I. Ireland & Northern Ireland: A Historical-Political Division

i. A Historical Overview of the Republic-North Division

The Legal Systems of the Republic of Ireland and Northern Ireland

by Mark Coyle

A. The Republic of Ireland

a. The Constitution

The Constitution of Ireland was ratified by the people in 1937 and it is the fundamental law of the State, meaning it takes precedence over other, inferior, sources of law.¹ It contains principles and guarantees of fundamental rights that can be judicially enforced and to this extent any law that is sought to be passed by the State must conform with the Constitution in order to be valid. The Constitution can be amended, but only by popular referendum by the people.²

b. Common Law

The second source of law that is applied in Ireland is the common law. The common law can be described as consisting of hundreds of thousands of decisions which the courts have previously

¹ Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* (7th ed., Bloomsbury Professional 2020) 7

² Tanya Ní Mhuirthile, Catherine O'Sullivan and Liam Thornton, *Fundamentals of the Irish Legal System- Law, Policy and Politics* (Roundhall 2016) 51

delivered and due to the doctrine of precedent, is a binding force of law. To this extent, Ireland as a common law system can be distinguished from more common civil law jurisdictions who follow more comprehensive codes.³ Ireland, like many common law jurisdictions, has seen an increase in the extent of the codification of laws, with a significant number of areas such as commercial law and land law now being placed on a statutory footing. However, areas such as tort law and contract law are governed almost completely the common law, where precedent (the application of a principle of law as laid down by a higher court on a previous, similar case⁴) will be seen as authoritative.

c. Legislation

Legislation is another source of law, and it can be distinguished from the common law on the basis that it is created specifically through the exercise of law-making. Article 15.2 of the Constitution designates the Oireachtas as the sole and exclusive law-making body of the State.⁵ Delegated legislation can be enacted bodies that are conferred with this power under statute. In this way, legislation can alter existing common law rules or can create new rules to govern emerging areas in need of regulation.

d. EU Law

As a member of the European Union (EU), Ireland must also adhere to EU law. The EU possess its own legal system which contains a body of laws.⁶ As a result of Irelands accession to the EU, they agreed to be bound by the concept of the supremacy of EU laws, which means a conflicting national

³ Byrne and McCutcheon (n. 1) 538

⁴ Allison Kenneally and John Tully, *The Irish legal System* (Clarus Press 2013) 115

⁵ Byrne and McCutcheon (n. 1) 7

⁶ *ibid* 8

provision must yield to EU law. Article 29.4 of the Irish Constitution was amended to reflect this arrangement. The primary sources of EU law are its Treaties. The Treaties govern the relationship between the EU and its member states and has established agreements on matters such as the free movement of citizens and free movement of goods.⁷ When implementing EU law, Ireland is also bound by the Charter of Fundamental Rights which consolidates various rights protections. Two key sources of EU law are that of regulations, which are binding in their entirety and are directly applicable, as well as directives, which set out goals that member states are to achieve but allow the member state to decide how to achieve this goal.

e. International Law

This is the body of law that governs states relationships with one another as well as rules that affect individuals and businesses through international human rights treaties and trade agreements.⁸ As the Irish legal system is a dualist legal system an international measure must be specifically incorporated by domestic instrument in order to become a part of national law.⁹ An example of this is the European Convention of Human Rights (ECHR) which has been ratified by the State. This offers a mechanism for the protection of an individual's rights which is adjudicated by the European Court of Rights.

⁷ Ní Mhuirthile, O'Sullivan and Thornton (n. 2) 191—194

⁸ Byrne and McCutcheon (n. 1) 9

⁹ *ibid*

B. Northern Ireland

As part of the United Kingdom (UK), Northern Ireland predominantly follows the laws that are set out in the UK. Similarly to the Republic of Ireland, Northern Ireland is a common law system, and its two main sources of law are legislation and the common law.

The UK is one of only three countries (along with New Zealand and Israel) that has not written down its constitution in one single document. The Constitution of the UK is contained in various documents such as in Acts of Parliament, decisions by the courts and constitutional conventions (long-standing custom and practice).¹⁰

a. Legislation

In general, Northern Ireland will follow laws that are established by Parliament. The UK Parliament enjoys parliamentary sovereignty, meaning that as a result of the unwritten Constitution, the Parliament can make laws without having to worry about offending a higher norm.¹¹ The Government of Ireland Act 1920 saw Northern Ireland acquiring its own parliament in Stormont. This was the first ever regional Parliament within the UK. The Act conferred extensive powers to the Parliament of Northern Ireland for “*the peace, order and good governance of the province*”.¹² This gave the Parliament extensive scope to make laws in relation to matters such as criminal justice, education, local government, policing, health and social services, agriculture and industrial development.

¹⁰ *ibid*

¹¹ Brice Dickson, *Law in Northern Ireland* (2nd ed., Hart Publishing 2013) 19

¹² *ibid* 6

The Northern Ireland Act 1998 set up the Northern Irish Assembly which gives it the power to enact legislation on certain matters that are not 'excepted or reserved' matters for the Parliament in Westminster, such as matters of foreign affairs, defence and income tax.

Backdrop to the North-South Division

by Sébastien Laymond

The Republic of Ireland's *de facto* partition from Northern Ireland, some hundred years ago now, marked but one step in a larger development of worldly nationalism.¹ The immediate aftermath of the Easter Rising², Sinn Féin's victory in the subsequent 1918 General Election, the later War of Independence³, and four poorly-received Home Rule bills, the *de facto* North-South partition was effected by the 1921 Anglo-Irish Treaty. As its constitutive text read:—

‘Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia [...]’.⁴

Of note, the 1921 Treaty was preceded by a 1919 Declaration of Independence, which sought to establish what was termed the ‘Irish Republic’. Its jurisdictional scope was to extend all throughout the Island. This declaration, though chilling in its verbiage and laudable in its aims, failed to be recognised on the international stage – it not meeting the more constitutive standards of Statehood established at the time.⁵ The text of the 1921 agreement was later supplanted by the provisions of the 1922 Constitution, Article 2 of which read that all powers of government and all governmental authority was derived from the people of Ireland. Common to both North and South, King George V was to remain head of the Island. Ireland's adoption of this separatist ideology was – on a wider

¹ A.J. Rose, ‘Partition and Ireland’ (1955) 27(3) *Aust. Q.* 67, 69

² April 24th, 1919 — April 29th, 1919

³ 1919—1921

⁴ §1, 1921 Agreement

⁵ Fred L. Morrison, ‘Recognition in International Law: A Functional Reappraisal’ (1967) 34 *Chic. L.R.* 857

scale –preceded by the United States’ declaration of independence (as it then was), France’s establishment of a constitutional republic, the Balkan States emerging as independent nations.

From its separation in 1921 until the enactment *Bunreacht na hÉireann* (‘The Irish Constitution’) on December 29th, 1937, the Republic of Ireland as we now know it was termed the ‘Irish Free State’ or ‘*Saorstát Éireann*’. A year preceding the establishment of *Saorstát Éireann*, a fourth attempt at Home Rule was successfully issued by Parliament at Westminster. The Government of Ireland Act, 1920⁶ only had effect in what is now known as Northern Ireland. It did nonetheless provide for the South to have its own Parliament – an institution which proved sacrosanct in the promulgation of the 1922 Constitution.⁷ While the 1922 Constitution was rather strong in its emphasis on a *form* of independence, with certain Articles attempting to separate the newly-formed nation State from the notion of parliamentary sovereignty⁸, the word ‘British’ is all-the-while repeated 40 times across the whole document – discounting any substantive alternatives. In effect, this semi-separatist, semi-subjugated structure of government was largely the product of the legal framework that had been made available to the drafters at the time⁹ – whose ideology was later furthered by the Irish Civil War.¹⁰

Pursuant to the provisions of the 1920 Act, Northern Ireland came into existence as a separate legal entity on May 3rd 1921. As such, the 1920 Act has frequently (though misleadingly) been seen as the Constitution of Northern Ireland. It granted the Parliament of Northern Ireland the right to enact legislation ‘for the peace, order and government of the province’¹¹: *qua*, the power to make laws of

⁶ 10 & 11 Geo. 5 c. 67.

⁷ *cf.* s. 1 of the Government of Ireland Act 1920 (‘Establishment of Parliament of Southern and Northern Ireland’).

⁸ Article 65 was clear in this respect, permitting judicial review by a High Court of *any* law, having regard to the provisions of the Constitution.

⁹ Brice Dickson, *Law in Northern Ireland* (2nd ed., Hart 2013) [1.10]

¹⁰ June 28th 1922 — May 24th, 1923.

¹¹ *cf.* s. 4(1).

considerable scope on criminal, policing, local government, and health matters – all under the form of secondary legislation.¹² *Per* the 1920 Act, certain matters were to remain ‘excepted’¹³ and ‘reserved’¹⁴; that is, in indiscriminate form, matters of imperial concern and matters relating to the armed forces, copyright law, postage, registration of deeds, *etc.* This position was later re-affirmed *via* the enactment of the Ireland Act 1949¹⁵, which guaranteed that Northern Ireland would not cease to remain a part of the United Kingdom ‘without the consent of the Parliament of Northern Ireland’.¹⁶ Though not of immediate relevance, devolution was to again occur in 1973¹⁷ and 1974¹⁸ so as to afford the United Kingdom with a more direct hand in its attempted management of the troubles, and finally in 1998, whereupon an end was brought to years of direct rule and Northern Ireland received its current political *status quo*.¹⁹

On the other hand, the political situation on the Southern side of the island was unsteady. Four issues in particular called for pressing attention through the form of absolute independence from the United Kingdom: (i) the need to complete the implementation of Fianna Fáil’s republican constitutional project; (ii) the feebleness of the 1922 Constitution’s establishment of a separation of powers as demonstrated in the Supreme Court’s controversial holding in *State (Ryan) v. Lennon*²⁰; (iii) the problem of degradation of rights as provided under the 1922 Constitution, and; (iv) the identification of drafting weaknesses in the 1922 Constitution.²¹ In effect, the 1937 Constitution –

¹² Dickson (*op. cit.*) [1.13].

¹³ *cf.* s. 4.

¹⁴ *cf.* s. 9.

¹⁵ 12, 13 & 14 Geo. 6 c. 41

¹⁶ *id.* s. 1(2)

¹⁷ Northern Ireland Constitution Act 1973 (c. 36)

¹⁸ Northern Ireland Act (c. 28)

¹⁹ Northern Ireland Act 1998 (c. 47)

²⁰ [1935] I.R. 170

²¹ Donal K. Coffey, ‘The Need for a New Constitution: Irish Constitutional Change 1932–1935’ (2012) 48 *Ir. Jur. (ns)* 275

ushered in in part ‘thanks’ to the passing of George V in 1936²² – served to offset many of these issues, though Ireland’s political status remained uncertain. It was only in 1948 that Ireland was formally and explicitly made into a Republic.²³

Briefly put, such was the process by which partition was established.

²² Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (RIA 2012) 32

²³ Republic of Ireland Act 1948

*ii. The 1937 Constitution and the Westminster Model: Two Separate Modes of Governance***The 1937 Constitution and the Westminster Model: Two Separate Modes of Governance**

by Rachelle Bailey & Niamh Hughes

A. General Introduction to Chapter

The partition of Ireland in 1922 saw the division of not just the island, but two separate systems of governance. Following the Good Friday Agreement in 1998, Northern Ireland established a system of devolved government while the Republic of Ireland maintained a unitary parliamentary system of government. The influence of British governance and law still remains on the island today, with the existence of the common law system that replaced indigenous Brehon law. Despite the similarities in the legal system and parliamentary style government, there remains a divergence in governance and legal frameworks. The Republic of Ireland has an established constitution created in 1937 and as a member of the European Union, adheres to European laws and regulations. This differs from the United Kingdom, who left the EU in 2023 and does not maintain a written constitution. This section will examine the different systems of governance in Northern Ireland and the Republic, identifying areas of convergence and contrast.

B. The 1937 Constitution

The 1937 Constitution or the *Bunreacht na hÉireann*, showed a significant divergence from the previous 1922 constitution. The recognition of fundamental and unenumerated rights including that of protection of the Family, private property, and equality all stem from natural law and Christian-

Democratic influences¹. In addition, the document's nationalist overtones reflect the purpose of the document in establishing the Republic of Ireland with an 'inalienable, indefeasible, and sovereign right to choose its own form of Government.'² Article 5 describes Ireland as a 'sovereign, independent state,' underscoring a clear-cut separation from British governance in favour of a new parliamentary system that is further expanded upon in the rest of the document.

The 1937 Constitution features a tripartite separation of powers between three branches of government: the executive, the legislative and judiciary. Articles 12-14 establishes the position of the President of Ireland who is the directly-elected head of state. The role of President is largely ceremonial, as the head of state has limited powers in comparison to other government positions. The few powers of the President include: the appointment of members of government and the nomination of judges.³ In contrast with other presidential systems, the role of the President in Ireland is one of a non-executive member of parliament, the parliament established in the Constitution as the Oireachtas or legislative branch⁴.

The provision of legislative power is found in Article 15.2.1, which vests the 'sole and exclusive power for making laws in the state' to the Irish parliament⁵. The Oireachtas consists of two houses, the lower Dail Eireann and the upper Seanad Eireann, a 60-person senate that features partially appointed and elected members, similar to the British parliamentary system⁶. The Dail is the house of representatives, consisting of elected constituency representatives known as Teachta Dails or TDs,

¹ Tim Murphy, 'The Irish Constitution in Context' (2019) 109(431) *I.Q.R.* 332

² Article 1

³ Article 13.1, Article 35.1

⁴ Article 15.1.1°

⁵ Article 15.2.1°

⁶ David Kenny & Conor Casey, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016—2019' (2021) *P.L.* 355

similar to that of MPs in the Westminster model. The Dail has considerably the most power in the Irish system such as the powers to pass laws, to nominate and remove the head of government or Taoiseach⁷. The Taoiseach is both a member of the legislative branch and the executive branch, acting as both a TD and as head of government, the same as British prime ministers in the UK system. The Constitution permits the Taoiseach to nominate members of the executive branch who are appointed by the President with the consent of the Dail per Article 28.⁸ Thus, under the 1937 Constitution, the power of the executive branch derives from the legislature.

The judiciary established by Articles 34-37 is an independent branch in the Irish system of governance. The Constitution gives the power of justice in Article 34.1 to the courts, which consists of the courts of first instance, the High Court, and the Supreme Court.⁹ The Supreme Court consists of no more than nine justices, including a Chief Justice, all of whom are appointed by the President per Article 35¹⁰. The power of the courts with constitutional interpretation determining constitutional validity of laws in the Irish system is what proves to be a primary divergence from the UK system of government which depends on various sources of law, as opposed to reliance on a single codified written document.

In accordance with Article 46, the Constitution can be amended by public referendum which starts as a bill in the Dail that is passed through the Oireachtas, signed by the President and submitted for the public to vote on¹¹. The nature of Irish referendums makes the Constitution a highly adaptable

⁷ Article 13.1, Article 28.1

⁸ Article 28.1

⁹ Article 34.1—2

¹⁰ Article 35.1

¹¹ Article 46.3

document to changing societal attitudes over time. Numerous referendums have been held since 1937, the most notable ones including the legalisation of abortion, the passage of the Good Friday Agreement and the permission of Ireland to join the European Union.

Article 29 of the 1937 Constitution focuses on international agreements, stating that every international agreement prior to entry by Ireland must be presented and approved by the Dail¹². The Supreme Court also has power of reviewing treaties signed by the Government to ensure compatibility with the Constitution per the rule set out in *Crotty v An Taoiseach* [1987]¹³. The power of judicial review of laws by the Court is also informed by Article 26, where the President can refer legislation for review by the Court to determine constitutional compatibility and invalidate laws they find does not adhere to the Constitution.¹⁴

C. The Westminster Model

The United Kingdom consists of the nations of England, Scotland, Wales and Northern Ireland, with its central government based in Westminster. Since the 1990s, Scotland, Wales, and Northern Ireland have all established devolved governments,¹⁵ whereby powers and functions of the Westminster Parliament have been transferred to a subordinate national legislature.¹⁶ However, the Westminster Parliament remains supreme and retains full responsibility for England in addition to some important reserved policies affecting the rest of the UK, including tax and national security.

¹² Article 29.5.1°

¹³ *Crotty v. An Taoiseach* [1987] IESC 4

¹⁴ Article 26.1.1°

¹⁵ Referendums in Scotland and Wales in 1997 led to devolution and the creation of the Scottish Parliament and the National Assembly for Wales ('The Senned').

¹⁶ Emily Albon & Sanmeet Kaur Dua, *Elliott & Quinn's English Legal System* (22nd ed., Pearson 2024) 161

The UK does not have a codified, written constitution; instead, it consists of statutes passed by Parliament and common law. Doctrines such as parliamentary sovereignty, the rule of law and the separation of powers are fundamental features of the UK constitution. Moreover, the British Monarchy is known as a ‘constitutional monarchy’, meaning that the monarch is the head of state and must act in accordance with the constitution. However, the monarch’s powers are limited and it is the government which ‘exercises real executive power’.¹⁷ The branches of government are as follows: the legislature, which consists of the House of Commons and the House of Lords, in addition to the legislative abilities of the devolved governments; the executive branch refers to the central government, to include the Prime Minister and the cabinet; and the judiciary consists of the court system, with the Supreme Court being the UK’s highest court.

The majoritarian political system in the United Kingdom has become the basis of the ‘Westminster model’ of democracy. There is much debate over the essential elements of the Westminster model, although Arend Libjart has attempted to define the model according to ‘ten interrelated elements’¹⁸, such as ‘cabinet dominance’¹⁹, ‘constitutional flexibility’²⁰ and a ‘two-party system’²¹. However, it should be noted that the UK political system does not always adhere to the Westminster model. Changes to the political landscape in the UK in recent years (such as the use of coalition governments, devolution and the increase in use of referendums) has resulted in the model existing as a theoretical example of a majoritarian system, rather than an accurate depiction of the UK political structure. Nonetheless, since the UK’s withdrawal from the European Union (‘Brexit’) in December

¹⁷ *id.* 10

¹⁸ Arend Libjart, *Patterns of democracy: government forms and performance in thirty-six countries: Vol. II* (YUP 2012) 10

¹⁹ *id.* 12.

²⁰ *id.* 18.

²¹ *id.* 13.

2020, it has been argued that there could be a resurgence in the ‘Westminster model’ as principles such as ‘parliamentary sovereignty’ have been strengthened, now that the UK is not bound by EU laws.²²

D. Northern Ireland

The signing of the Belfast Agreement – also known as the “Good Friday Agreement”- on 10 April 1998 marked the end of three decades of conflict (“The Troubles”) in Northern Ireland. The Agreement consists of an international treaty between the British and Irish governments, in addition to a multi-party agreement between the British government, Irish government and political parties in Northern Ireland. The Agreement was approved by simultaneous referendums in Northern Ireland and the Republic of Ireland on 22 May 1998, thereafter coming into force on 2 December 1999.

The peace agreement provided for a new system of governance which was established through the Northern Ireland Act of 1998. A consolidating structure was enacted through the creation of the ‘Northern Ireland Executive’ and the ‘Northern Ireland Assembly’ (‘the Assembly’) to facilitate power-sharing between nationalists and unionists. The Assembly is the devolved legislature, comprised of 90 members (MLAs) who are elected every five years. The executive is chaired by the first minister and deputy first minister, a joint office representative of the two largest parties in the Assembly.

Under the Northern Ireland Act, the Assembly is afforded legislative control over many ‘transferred matters’, such as education, housing, and local government. However, the Assembly does not have

²² Gianfranco Baldini, ‘Back to the Westminster model? The Brexit process and the UK political system’ (2022) 43 *Int. Pol. Sc. Rev.* 329

legislative control over certain ‘excepted matters’²³ (such as national security), or ‘reserved matters’²⁴ (such as civil aviation) which remain within the competence of the Westminster government. Lastly, following the devolution of justice matters to the Assembly in 2010, the Department of Justice was established. It is responsible for five agencies, including the Northern Ireland Courts and Tribunal Service and the Northern Ireland Prison Service. The Court of Appeal is the highest court in Northern Ireland, with the Supreme Court (based in London) being the highest and final court of appeal. Human rights are protected in Northern Ireland under the UK-wide Human Rights Act (1998). Numerous other pieces of Northern Irish specific equality legislation have also been enacted. However, there have been increased calls for a Bill of Rights to be established in Northern Ireland, as provided for under the Belfast Agreement.²⁵ The Northern Ireland Act of 1998 established some key institutions for the promotion and protection of human rights in Northern Ireland, including the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission.

Conclusion

It is clear that although there are some similarities in the two systems, such as the common law legal system, since the UK’s withdrawal from the EU the differences are more apparent. As the United Kingdom, and thereby Northern Ireland, is no longer a member of the EU, it no longer shares common rules and regulations with the Republic of Ireland by virtue of EU membership. At a fundamental level, the lack of written constitution in the United Kingdom makes comparison of human

²³ A list of excepted matters can be found in Schedule 2 of the Northern Ireland Act 1998.

²⁴ A list of reserved matters can be found in Schedule 3 of the Northern Ireland Act 1998. Consent to legislate on such areas can be granted to the Assembly by the Secretary of State.

²⁵ *cf.* p. 17, §3[4]

rights protections and key principles in the two jurisdictions much more difficult. However, it is argued that if Northern Ireland were to enact a Bill of Rights, as provided for in the Good Friday Agreement, the merging of the two systems at a later date could be much more effective. Lastly, the use of the referendum (as seen in the Republic of Ireland) has increased in popularity in the United Kingdom, used by voters in Northern Ireland to approve the Good Friday Agreement and across the UK in the Brexit referendum of 2016. It is likely that this mechanism could be a key feature of a future shared system.

The Eminence and Existence of Fundamental Rights Within Both the 1937 Constitution and the Westminster Model

by Kathryn Polson & Ella Chepak

I. Introduction

When it comes to the protection and approach to human rights in the Irish legal landscape, the 1937 Constitution and its interpretations hold a key foundational understanding. 1937 is a codified document. Contrasting with the Westminster model, where rights are inferred from parliamentary legislation and judicial precedents. In the UK, rights are often statutory, found in laws like the Human Rights Act 1998 and ECHR obligations, but they do not carry the same constitutional weight as in Ireland, where they are part of a supreme law that the courts can enforce against the state.¹

1937 is heavily influenced by natural law and Catholic moral principles, highlighted in the preface, which inform its framework for imbuing individual rights². The following paragraphs will explore the ways in which the Constitution enshrines fundamental human rights as well as the pros and cons of this system. Further on throughout this chapter, an analysis of the Westminster Model will be shown, as well as a final examination of how these systems differ.

¹ Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice' (2012) 48 *Ir. Jur. (ns)* 71; Eoin Carolan, 'The Evolution of Natural Law in Ireland' in Rosalind Dixon & Adrienne Stone (eds), *The Evolution of Natural Law in Ireland* (CUP 2018)

² Desmond M Clarke, 'The Role of Natural Law in Irish Constitutional Law' (1982) 17(2) *Ir. Jur. (ns)* 187

II. A. Natural Law and Foundation of Rights in Ireland

Aileen Kavanagh's article 'The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice' defines natural law as 'objective moral principles that exist independently of human enactment and can be discerned by reason.'³ The ideals of this philosophy are heavily reflected in the Constitution, which is the ideal that fundamental human rights are not granted by the state but are inherent to human dignity: '[a]ll citizens shall, as human persons, be held equal before the law'.⁴ This aligns with Thomistic principles, which argue that moral truths are discoverable by reason and should guide the protection of individual rights.⁵ The concept of unenumerated rights has allowed for the protection of rights not explicitly listed in the Constitution. This has made the Constitution more adaptable to societal changes.

Additionally, the influence of Catholic morality, which is especially seen in the Constitution's preamble, can be interpreted as endorsing the protection of human dignity and rights, even if societal values evolve.⁶ However, this religious influence can be viewed as a tension with concerns that revising the Constitution to reflect contemporary values might dilute its foundational principles and moral character. While others question if it should be reinterpreted to reflect modern, pluralistic values, or should it retain its moral and religious traditions as a marker of Irish identity.

The *X Case*⁷ is an example of this looking into the tension between the ideals of 1937 and an evolving Ireland. The case looks at a minor's right to seek an abortion in Britain after becoming pregnant

³ Kavanagh (*op. cit.*)

⁴ *id.*

⁵ Oran Doyle, 'Legal Positivism, Natural Law, and the Constitution' (2009) 31 *D.U.L.J.* 206; Clarke (*op. cit.*)

⁶ Carolan (*op. cit.*)

⁷ *X v. Attorney General* [1992] IESC 1

through rape. Kavanagh argues that the application of the natural law principles outlined in the Constitution recognize rights as well as asserting moral truths.⁸ However, when it came to the X case it was a new area of regulation that had not been challenged yet. What is considered moral differed from person to person and their beliefs in abortion. Ultimately, the courts ruled that abortion is permitted in Ireland under certain circumstances where there is a risk to the mother's life.⁹

a. Eminence of Fundamental Rights

The basis of natural law compliments the idea that fundamental rights exist independently of state law, and the constitution's purpose is to recognise and protect rights. This is a convergence of the Westminster Model, which relies more heavily on current politicians to prioritise unenumerated fundamental rights. Rights such as bodily integrity, marital privacy, and dignity have been judicially recognised even if not explicitly stated in the Constitution, demonstrating the reach of natural law principles in protecting citizens.¹⁰

Further, in 1937 rights were entrenched, meaning they could only be appealed through certain procedures; to alter them requires a national referendum. This leads to a more influential role for the Irish Parliament, Oireachtas, which can legislate if it is bound by the constitution.¹¹ Laws passed by the Oireachtas that violate fundamental rights can be challenged and invalidated by the courts.¹²

⁸ Kavanagh (*op. cit.*)

⁹ Patrick Hanfin, 'Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy?' (1996) 3 *Eur. J. Health L.* 179; Grainne de Búrca, 'The Domestic Impact of the EU Charter of Fundamental Rights' (2013) 49 *Ir. Jur. (ns)* 49

¹⁰ de Búrca (*op. cit.*); Doyle (*op. cit.*)

¹¹ Kavanagh (*op. cit.*); Carolan (*op. cit.*)

¹² Doyle (*op. cit.*); Clarke (*op. cit.*)

*Ryan v. Attorney General*¹³ would be a key case in which the right to bodily integrity is derived from natural law principles as a fundamental right. The plaintiff, Ryan, argued that the fluoridation of water was infringing on her right to bodily integrity. The courts sided with Plaintiff, basing their holding largely on natural law principles; however, the fluoridation law was upheld. This was still a landmark case for the Courts and Irish rights alike, which began to recognise that, through the vagueness of the Article 40.3.2°, certain (natural) rights could be implied. It is under this that fundamental personal rights are protected.

b. Judicial Interpretation and Balance

The Doctrine of Enumerated Rights makes the assumption that the Constitution recognises their existing rights that are not specifically stated by law; however, they are protected: '[t]he Constitution implies the existence of certain rights which, while not expressly enumerated, are recognised and protected as fundamental rights essential to the dignity of the individual'.¹⁴ When it comes to rights such as these, it is often up to judicial interpretation to make sure these rights stay protected. Courts often act on behalf of fundamental rights, expanding protections for citizens based on interpretations. The benefit to this system would be allowing courts to play an active role in the enforcement of fundamental rights; courts have authority in reviewing laws, striking down what is deemed unconstitutional, etc.¹⁵

¹³ [1965] IR 294.

¹⁴ *McGee v. Attorney General* [1974] IR 284.

¹⁵ Doyle (*op. cit.*); Clarke (*op. cit.*)

McGee v. Attorney General would be an example of this, looking into both bodily integrity and marital privacy. The plaintiff challenged her right to import contraceptives, which were illegal under Irish law at the time.¹⁶

c. *Judicial Overreach*

While this has since looked at the positives towards the Constitution, it also comes with some negatives, including judicial overreach. As previously outlined, the 1937 Constitution's natural law basis leaves room for judicial interpretation and reliance on protecting rights; this may lead to overreach. Kavanagh's argument expands on this by looking into how courts extend constitutional protections beyond what the legislature intended.¹⁷ It can also be argued that courts may allow their own moral issues to undermine the democratic process. Ultimately, raising concerns about the legitimacy of judicial activism in constitutional interpretation. Clarke, in his article 'The Role of Natural Law in Irish Constitutional Law,' argues that the invocation of natural law by the judiciary, which is not always explicitly defined or agreed upon, can create uncertainty about the boundaries of constitutional rights.¹⁸

While this fault does have its flaws, it also allows for an element of trust to be placed in the legal and justice systems, something of great importance. It goes back to the original Thomistic principles the Constitution is founded on, in which an assurance is given that the governing bodies will act in a way that the majority of people feel speaks for them.

¹⁶ *cf.* fn. (13)

¹⁷ Kavanagh (*op. cit.*)

¹⁸ Clarke (*op. cit.*)

B. Inconsistent Application

Clarke argues that the term "natural law" is often used ambiguously in Irish jurisprudence, masking a variety of interpretations that may not all be philosophically coherent.¹⁹ And considering this term comes from a great philosophical background, this is not entirely incorrect and can lead to confusion in legal reasoning. There is an argument that some natural law theories, particularly those derived from Catholic teachings, are philosophically indefensible yet still play a role in judicial decisions²⁰. The concept of "natural rights" sometimes overshadows the need for clear legal rules and procedures, which can undermine legal certainty and lead to subjective judicial interpretation²¹

III. A. The United Kingdom and Fundamental Rights

Both the United Kingdom and Ireland's governmental system is the Westminster model whereby responsibilities and powers are divided into three institutions - the legislature, the executive and the judiciary. In contrast to the 1937 Constitution, however, is that the cornerstone of this system in the UK is the principle of parliamentary sovereignty. Thus, Parliament may legislate contrary to fundamental rights. Moreover, the UK does not have a written, entrenched constitution or bill of rights. The Human Rights Act ('HRA'), 1998 is the key statutory document of rights in the United Kingdom. It is the closest the UK has to come to something which mimics a codified bill of rights, yet it remains a non-entrenched Act of Parliament.

¹⁹ *id.*

²⁰ *id.*

²¹ Carolan (*op. cit.*); Doyle (*op. cit.*)

Thus, the eminence of fundamental rights under the Westminster Model in the UK remains at a stark difference with the 1937 Constitution. The following sections details the ways in which the UK has enshrined and transplanted ECHR obligations as part of their protection of rights under the Human Rights Act, and the pros and cons of this approach.

B. Eminence and Existence of Fundamental Rights in the United Kingdom

Prior to the enactment of the HRA, a number of scholars advocated for the creation of the UK's own written constitution with an entrenched Bill of Rights and a constitutional court providing checks and balances on the legislature and the government.²² Scarman noted that developments such as devolution in Northern Ireland pre-the Good Friday Agreement, the UK's membership of the Common Market and the Welfare State pointed to developments for a 'radical reappraisal' of the legal apparatus and the legislative and administrative functions of the UK.²³ However, instead of creating a 'homegrown' Bill of Rights – like the 1937 Constitution – the UK legislature introduced the HRA.

At the time, most Member States of the European Union had incorporated the European Convention of Human Rights (ECHR) into their national law – Ireland, however, only introduced its own Human Rights Act in 2003. The HRA marked the transplantation of ECHR rights into UK national law. The HRA also faced the task of balancing the longstanding doctrine and respect of Parliamentary sovereignty in the UK and the somewhat increased role for the judiciary.

²² Leslie Scarman, 'Fundamental Rights: the British Scene' (1978) 78(8) *C.L.R.* 1575

²³ *id.*

a. Balancing Parliamentary Sovereignty, the Judiciary, and Fundamental Rights

In adopting the HRA, there was a political instance on preserving the principle of Parliamentary sovereignty. This means, as stated by Lord Hoffmann in *ex parte Simms*²⁴, that ‘Parliament can, if it chooses, legislate contrary to the fundamental principles of human rights’. However, Lord Hoffmann went on to state that the principle of legality means that ‘Parliament must squarely confront what it is doing and accept the political cost’ of ‘overriding fundamental rights’.²⁵

Section 4 of the HRA allows judges to make a ‘declaration of incompatibility’: such declarations are not legally binding on parliament and have no direct legal impact on validity or effect of the legislation.²⁶ Moreover, under the HRA the courts must read legislation as compatible with rights insofar as is possible.²⁷

Section 19 of the HRA ensures the fundamental nature of the principle of parliamentary sovereignty by allowing Parliament to enact legislation ‘notwithstanding’ any apparent incompatibility with rights.²⁸ The decision to authorise judicial review of rights whilst constraining the power to invalidate legislation which is inconsistent with rights for Heibert introduces a ‘serious ambiguity about the function of the HRA [...] and about where political legitimacy resides for resolving institutional disagreements about how rights appropriately guide or constrain legislation’.²⁹

²⁴ *R. v. Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33

²⁵ *id.*

²⁶ Article 4 of the Human Rights Act 1998

²⁷ Article 3 of the Human Rights Act 1998

²⁸ Article 19 of the Human Rights Act 1998

²⁹ Janet L Heibert ‘The Human Rights Act: Ambiguity about Parliamentary Sovereignty’ (2013) 14(12) *Germ. L.J.* 2253

Thus, the function of judicial review under the HRA may be described as ‘merely a flattering way of describing statutory interpretation’.³⁰ Judicial review operates differently under the 1937 Constitution in which the judiciary has the ability to strike down legislation which contravenes fundamental rights – a process known as strong-form judicial review. Constitutional scholars have argued that the operation of judicial review in the UK under the HRA is weak-form judicial review, heavily influenced by judicial deference towards Parliament.³¹ However, recent case law suggests that a more liberal approach in the courts has developed, as opposed to the strict confines of rules on statutory interpretation.³² Lord Hoffmann continued in *ex parte Simms* that:—

‘[i]n the absence of express language or necessary implication to the contrary, the court therefore presumes that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the [UK], though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document’.³³

Aileen Kavanagh has argued that judicial review under the HRA is not as weak as those who believe the system in the UK is weak-form judicial review.³⁴

The HRA sought to balance the principle of parliamentary sovereignty with an increased yet somewhat limited role of the judiciary. In practice, however, whilst the judiciary remains deferential to Parliament, a more liberal approach to judicial review has started to develop. Moreover, in practice, Parliament has only made a negative statement of incompatibility under section 19 on four

³⁰ Scarman (*op. cit.*)

³¹ Mark Tushnet, *Weak Courts, Strong Rights* (PUP 2008)

³² Philip Sales, ‘Rights and Fundamental Rights in English Law’ (2016) 75(1) *C.L.J.* 86

³³ *cf. fn.* (24) [53]

³⁴ Aileen Kavanagh, ‘What’s so Weak About “Weak-Form Review”? The case of the UK Human Rights Act 1998’ (2015) 13(4) *Int. J. Const. L.* 1008

occasions, with only two being of major importance.³⁵ Thus, indicating that both the judiciary and Parliament have consistently compliant and deferential to ECHR rights.

C. Transplanting ECHR Norms versus 'Homegrown' Rights

The HRA was a particularly innovative approach to rights protection. It involved the 'transplantation' of international human rights - the European Convention of Human Rights - into the UK system of parliamentary sovereignty. Some see the HRA as a hybrid model, combining parliamentary sovereignty and judicial supremacy³⁶ whereas others see the HRA as embodying the system of 'weak-form' judicial review as opposed to the strong form judicial review guaranteed under the 1937 Constitution.³⁷ The ECHR is protected in Ireland under the European Convention on Human Rights Act 2003, and Ireland has a long-standing readiness to make preliminary references to the CJEU, the Irish courts have been much less ready to interpret and apply provisions of the EU Charter of Fundamental Rights.³⁸

Amos has highlighted a number of issues with transplanting ECHR norms into national law as opposed to a homegrown bill of rights.³⁹ Namely, that despite the benefits of economic efficiency with such a mechanism, in the majority of claims under the HRA, UK courts 'simply do not wish to enter into a dialogue with the ECtHR and are happy to accept Convention jurisprudence and

³⁵ Aileen Kavanagh, 'Underuse of the Override' in Aileen Kavanagh (ed.), *The Collaborative Constitution* (1st ed., CUP 2023)

³⁶ Jeffrey Goldsworthy, 'Homogenizing Constitutions' (2003) 23 *O.J.L.S.* 483, 484

³⁷ Tushnet (*op. cit.*)

³⁸ Grainne de Búrca, 'The Domestic Impact of the EU Charter of Fundamental Rights' (2013) 49 *Ir. Jur. (ns)* 49

³⁹ Merris Amos 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35(2) *H.R.Q.* 386

apply it domestically'.⁴⁰ The House of Lords held in *ex parte Ullah* that absent a 'strong reason' they regard themselves bound by Convention jurisprudence.⁴¹

D. Facilitating Rights Culture

The HRA created the Joint Committee on Human Rights (JCHR) which provides another reason for the government to explain and justify proposed legislation and its consistency with rights alongside section 4 of the HRA. Hiebert has opined that the model adopted by the HRA makes the key assumption that rights will be protected not simply through after-the-fact evaluations by courts but by establishing obligations and opportunities for rights review by Parliament, Ministers and public authorities that are distinct from, and prior to, judicial review.⁴² Somewhat differently from the 1937 Constitution, the HRA aims to facilitate a culture of rights through the JCHR by engaging in rights-based discussions prior to the enactment of legislation.

⁴⁰ *id.* 391

⁴¹ *R. v. Special Adjudicator, ex parte Ullah* [2004] UKHL 26

⁴² Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4 *Int. J. Const. L.*

II. Supra-National and International Human Rights:

Fundamental Notions

i. Philosophical Overview

The Sources and Justifications for Human Rights

by Anne Hinz and Ava Donohue

Human rights are defined as a ‘set of moral principles’ whose justifications lie ‘in the province of moral philosophy’.¹ Natural law theory and Kantian philosophy are predominant sources of these human rights. Natural law theory posits ‘there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation’ and ‘that man-made laws which conflict with these principles are not valid law’.² Philosophers and theologians have added much to this theory throughout history. Cicero argued that natural law was unchanging over time and societies³; Thomas Aquinas related natural law to ‘conferring certain immutable rights upon individuals as part of the law of God’⁴; and Hobbes and Hume emphasized the concept of survival in natural law’s importance of the laws of equity and justice to promote association of individuals.⁵ While there are many different interpretations and modifications of natural law theory, it is consistently connected to the concept of morality. Natural law theory is a direct source of human rights law because human

¹ Jerome J Shestack, ‘The Philosophic Foundations of Human Rights’ (1993) 20 *H.R.Q.* 201, 202

² H.L.A. Hart, *The Concept of Law* (3rd ed., OUP 2012) 156

³ Joel Feinberg and Jules Coleman, *Philosophy of Law* (7th ed., Wadsworth 2004) 9

⁴ Shestack (*op. cit.*) 201

⁵ Hart (*op. cit.*) 191

rights law is based on a foundation of ‘what rights one possesses by virtue of being human’.⁶ Natural law provides the basis perspective that laws have a moral aspect; from this perspective politicians can account for the enactments of laws that provide answers over what is considered an infringeable right for a human. In essence, one can derive these rights based on the understanding of what is moral that natural law provides.

Immanuel Kant’s philosophy is another prominent source of human rights. Kant professed that people had ‘different desires and ends’, emphasizing that goals and motivations between citizens were not uniform.⁷ As a result, Kant argued that laws cannot be very specific to ensure that the needs and goals of all people were allowed. Kant proposed that moral law needed to be ‘prior to all purposes and ends’ to have the central focus be personhood and ‘the capacity to take responsibility as a free and rational agent for one system’s ends’.⁸ This concept leads to human rights law being broad. Human rights do not have a specific type of person or path as a focus and instead allow all humans to have the rights needed to pursue their own needs and goals. Kant further developed this idea in his definition of ‘moral worth’ in which ‘no action can have supreme kind of worth [...] unless its whole motivating power derives from the thought that it is required by duty’.⁹ From this philosophy one can claim that society has a duty to protect individual freedom to follow one’s desires and needs. Human rights law is a direct product of this understanding because they ensure the rights of all humans in its jurisdiction.

⁶ Shestack (*op. cit.*) 203

⁷ *id.* 221

⁸ *id.* 216

⁹ Feinberg & Coleman (*op. cit.*) 304

One justification of human rights is the concept of justice. Afterall, human rights are ‘an end of justice’.¹⁰ The concept of justice asserts that ‘individuals are entitled in respect of each other to a certain relative position of equality or inequality’.¹¹ Justice establishes a balance within a society in its rule ‘treat like cases alike’.¹² John Rawls names liberty and people having ‘an equal right to the most extensive total system of equal basic liberties’ as the first priority of justice, and distributive justice as the second priority.¹³ Both liberty and distributive justice ensure personal freedoms in a society; liberty prevents oppression from authority and distributive justice ensures opportunity and resources for all. Justice is a justification for human rights because it provides a foundation for the equality that is essential to human rights. Human rights rely on the equality and fairness that justice ties to the protection of individual rights.

The social contract theory is also an important justification for human rights. The social contract theory claims that the obligation to obey the law arises ‘between members of a particular society out of their mutual relationships’.¹⁴ John Locke argued that humans entered a ‘social contract’ with each other to ‘form a community and set up a body politic’;¹⁵ this community was mutually beneficial because all were protected from nature while keeping one’s rights. If the new government neglected its duty to protect natural rights, ‘it forfeited its validity and office’.¹⁶ The social contract theory provides a justification for human rights because it gives reasoning for the importance of protecting rights. If human rights laws were ignored or eradicated, there would be no institution in place

¹⁰ Shestack (*op. cit.*) 218

¹¹ Hart (*loc. cit.*)

¹² *id.*

¹³ Shestack (*op. cit.*) 219

¹⁴ HLA Hart, ‘Are There Any Natural Rights?’ (1955) 35 *J. Phil.* 86

¹⁵ *id.*

¹⁶ *id.*

protecting individual rights; consequently, governments would have the ability to invade on personal rights and subsequently forfeit their validity and benefit.

ii. On Dualism

Simplistic Overview of Dualism Within Both Northern Ireland and the Republic of Ireland

by Dennis Aydin and Raina Bosniac

I. A. Northern Ireland

Dualism, in the context of Northern Ireland can be understood on two levels, legal and socio-political. In legal systems, dualism refers to the separation between national and international law, requiring acts of domestic legislation to incorporate international treaties.¹ This is the case in Ireland and the UK. One example is the European Convention of Human Rights, which had to be incorporated through the Human Rights Act, 1998.²

Socio-politically, dualism in Northern Ireland refers to the division between two major communities: unionists, who seek continued association with the United Kingdom, and Nationalists, predominantly Catholic, who advocate for a united Ireland.³ This division remains a defining characteristic of Northern Ireland's historical and contemporary identity.⁴

B. Historical Context

The roots of dualism in Northern Ireland are deeply rooted in its history. The Protestant

¹ David Fennelly, *International Law in the Irish Legal System* (Thomson Reuters (Round Hall) 2014) 2.

² John Laws, 'Monism and Dualism' (2000) 53(2) *La Revue Administrative* 18

³ Patrick J. Roche, 'Northern Ireland and Irish Nationalism: A Unionist Perspective' (1994) 15 *The Ir. Rev.* 70

⁴ *id.*

community has traditionally identified with a British Identity, while Catholics have aligned more closely with Irish identity. This division, initially religious, grew to encompass cultural, political and social dimensions, leading to systemic inequalities. These tensions escalated into a protracted conflict known as 'The Troubles', lasting from the late 1960s until the signing of the Good Friday Agreement in 1998.

The Good Friday Agreement was a landmark attempt to reconcile these divisions by establishing a power-sharing government. It required cooperation between Unionists and Nationalists, providing a framework for governance that aimed to reduce conflict. However, despite these efforts, societal divisions persist, underscoring the continued relevance of dualistic thinking.⁵

C. Contemporary perspectives

Dualism remains a prominent feature of modern Northern Irish society. Political representation exemplifies this divide, with parties like the Democratic Unionist Party (DUP) representing Unionist interests and Sinn Féin advocating for Nationalist perspectives.⁶ This binary political landscape often complicates efforts toward reconciliation and shared governance. However, there is a growing awareness of a 'middle ground' that seeks to transcend traditional dualistic framework. This perspective emphasises inclusivity and recognises the complexity of modern Irish identities.

⁵ Sean O'Riordan, 'Catholic-Protestant Relations in Ireland' (1961) 12(1) *The Furrow* 15

⁶ Rory Carroll, 'Unionism Is in Crisis in Northern Ireland – Meanwhile Sinn Féin Is an Election-Winning Machine' *The Guardian* (London, 24 May 2023)

D. Case studies of dualistic thinking

Several cultural and political practices illustrate the enduring influence of dualism.

The Good Friday agreement for instance, while it has successfully reduced violence, its power-sharing framework entrenches the division by formalising Unionist and Nationalist designations within governance structures.⁷ Furthermore, events such as the 12th of July parades, emblematic of Unionist identity, and St Patrick's Day celebrations, symbolising Nationalist pride, often highlight communal tensions.⁸ These events can serve as flashpoints for division but also as opportunities for dialogue and understanding.

E. Challenges to traditional dualism

Critiques of dualism argue that focusing solely on the Protestant-Catholic binary oversimplifies Northern Irish society. Increasingly, the region is home to diverse communities, including minority ethnic groups. Scholars like Fitzmaurice question the applicability of dualism, arguing that it may obscure the nuances of identity and belonging in contemporary society.⁹

F. Legal Dualism and Monism

It is worth noting that in legal theory, dualism and monism describe the relationship between national and international law. In a dualist system like the UKs, international law requires incorporation through domestic legislation, while in a monist system, international and national law

⁷ Roche (*op. cit.*)

⁸ *id.*

⁹ Fennelly (*op. cit.*) 14

are viewed as part of a unified legal order.¹⁰ Critics of monism and dualism argue that this debate is often artificial, as in practice the application of either of these principles varies across jurisdictions.

G. Conclusion

The future of identity and belonging in Northern Ireland hinges on moving beyond traditional dualism. While dualism has shaped its history and continues to influence its governance and culture, a more inclusive approach that recognises diverse identities may provide a pathway to greater cohesion and understanding. The interplay between legal dualism and socio-political dualism offers insight into how Northern Ireland can navigate its complex past and present towards a more integrated future.

II. A. Republic of Ireland

The Irish legal system is a common law one, and consequently dualist.¹¹ This is provided for in article 29.6 of the Irish constitution:—

‘[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

¹⁰ Fennelly (*op. cit.*)

¹¹ Department of Foreign Affairs, ‘Incorporation into Irish Law’, *Treaties*, <<https://www.gov.ie/en/publication/30694-treaties/#incorporation-into-irish-law>> (last accessed 31 January, 2025)

1. the said European Union or the European Atomic Energy Community, or institutions thereof,
 2. the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
 3. bodies competent under the treaties referred to in this section,
- from having the force of law in the State’.

Under international law, a dualist country only incorporates law through legislative Acts passed by its legislation. In Ireland’s case, the relevant legislative body being the Oireachtas. In a dualist state, national legislation, rather than international law, is centred; as a result, there are cases in Irish legal history where the court ruled against international law. For example, in the 2004 case *N.S. v. Judge David Anderson*¹², the Irish High Court refused to utilise the United Nations Convention on Refugees (1951) because it was not a part of domestic law, despite Ireland’s previous accession to the Convention in 1956.

¹² [2004] IEHC 440

iii. How They Mix with Domestically-Sourced Rights in Both Nations

Supra-National and International Human Rights: Fundamental Notions

by Abigail Donohoe and Emerson Toomey

I. Introduction

This section will discuss the differences between supra-national, international and domestically sourced rights and how they interact with each other in both Ireland and the UK. Firstly, we shall outline how the implementation of international and EU law has influenced domestic legislation and the similarities in the adoption of international treaties in both states. Secondly, we will discover differences in the interpretation of human rights and citizenship in Ireland and Northern Ireland, specifically focusing on the areas of housing, the Good Friday Agreement, and policing.

I. A. Dualism compared to monism

One of the similarities between Ireland and the UK is that they are both dualist states, yet they differ when it comes to complying with and following international law. In the Irish Constitution, Article 29.6 states that “no international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas”.¹ Thus, all international treaties, unless Ireland consents to be bound to them², are not enforceable to domestic law unless they are incorporated into law by the

¹ cf. Art. 29.6

² cf. Art 29.4.2°

Oireachtas. Similarly, In the UK, without legislation, international law has no effect on UK legal order, but courts often use international treaties to help decide when questioning municipal law³.

While Ireland does not find itself bound to international law, it has granted the European Court of Human Rights and the European Commission of Human Rights higher status when considering these bodies' judgements in the European Convention on Human Rights Act 2003⁴. The only framework to be bound to international law is through amendments to the Constitution, such as the Eighteenth Amendment of the Constitution Act of 1998, which allowed the State to ratify the Treaty of Amsterdam⁵. Furthermore, any international treaty that has a charge attached to it has to be approved by the Dáil⁶. Moreover, Ireland has implemented many elements of international treaties into law, for example, the United Nations Convention on the Rights of the Child into national children's law and as a key part of family law and youth justice.⁷ This is evidenced further in the establishment of student councils in all schools to incorporate the right of the child 'to be heard in any judicial and administrative proceedings affecting the child'.⁸

Dualism in the UK has hindered the enforcement of individual rights under international law, such as in Scotland where judges refused to consider international treaties at all until the *T, Petitioner case* in 1997⁹ which cited international treaties in the absence of relevant family law. However, this was changed by the Human Rights Act 1998 which made 'Convention rights', which are rights protected

³ David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Aust. Y.B.I.L.* 105

⁴ European Convention on Human Rights Act 2003

⁵ *cf.* Art. 29.4.8°

⁶ *cf.* Art. 29.5.2°

⁷ Laura Lundy, Ursula Kilkelly, and Bronagh Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21(3) *Int. J. Children's Rights* 442

⁸ Convention on the Rights of the Child – Art. 12.2

⁹ [1997] S.L.T. 724

by the European Convention on Human Rights, part of municipal law in the United Kingdom.¹⁰ Under s. 3 of the Human Rights Act, 1998, all legislation has ‘to be read and given effect in a way which is compatible with the Convention rights’. The Human Rights Act, 1998 and the European Convention on Human Rights Act, 2003 are both similar with word-for-word replicates of the European Convention on Human Rights. For example, Article 5 in both Acts refers to the Right to Liberty and Security.¹¹

Yet, while this act increases the protection of international human rights, the Human Rights Act 1998 is partly excluded from the Safety of Rwanda (Asylum and Immigration) Act, 2024. In the 2024 Act, sections 2, 3, and 6 to 9 of the Human Rights Act were disapplied¹², which prevented the courts from applying the Convention rights to the Safety of Rwanda Act, removed human rights obligations from public bodies, and prevented any consideration of case law which would interfere with the 2024 Act. The Safety of Rwanda Act, 2024 demonstrated that domestically sourced rights are given priority over international rights and the United Kingdom’s willingness to disregard European Convention rights.

II. Human rights and citizenship in Ireland *vs.* Northern Ireland/the UK

When considering a comparison of human rights and citizenship between Ireland and the United Kingdom, it makes sense to firstly look at housing. The right to housing is protected and defined in many articles of international law, including Article 25(1) of the Universal Declaration of Human Rights.¹³ The European Convention on Human Rights provides indirect protection towards the

¹⁰ Human Rights Act 1998

¹¹ *id.* Art. 5; European Convention on Human Rights Act 2003, s. 5

¹² Safety of Rwanda (Asylum and Immigration) Act 2024, s. 3

¹³ Mercy Law Resource Centre ‘The Right to Housing in Ireland’ (May 2016)

right to housing in Articles 1-3, 5, 6, 8, and 14, while the European Union Law provides related rights regarding protection against discrimination and protections for migrant workers and consumers seeking housing purchase and rentals.¹⁴

In the United Kingdom, specifically, citizens are provided with the right to an adequate standard of living, the right to adequate housing, and protection against forced evictions due to Article 11 of the ICESCR, Article 25 of the UDHR, and general comments 4 and 7 under Article 11 (1) of the Covenant, respectively.¹⁵ There are also protections regarding the rights of children, discrimination against women and people with disabilities, and migrant workers.¹⁶

These protections are overseen by the United Nations Committee on Economic, Social and Cultural Rights (UNCRC), which outlines the obligations that participating nations must realize to provide the right to housing. While these rights have been given, there are still concerns regarding rising numbers of unhoused populations and the rights of Travellers in Northern Ireland. In response, the UNCRC Ad Hoc Committee on a Bill of Rights has been tasked with the design of a Bill of Rights to incorporate economic, social, cultural and environmental rights to build on the framework of ECHR protections.¹⁷ The Northern Ireland Housing Executive (NIHE) has also passed a series of orders to prepare schemes for reparation work, secure housing for homeless populations, and to address housing-related anti-social behaviour.¹⁸

¹⁴ *id.*

¹⁵ Katie Boyle and Aidan Flegg, 'The Right to Adequate Housing in the UK – An Explainer' (Briefing – Economic, Social and Cultural Rights Pt. III: May 2022)

¹⁶ *id.*

¹⁷ *id.*

¹⁸ *id.*

In stark contrast, there is no legal right to housing in Ireland, though the Irish Constitution provides protections for property rights.¹⁹ There is also legislation, in the form of the Housing Acts 1966-2014, regarding social housing and protection against discrimination when seeking housing.²⁰ Housing Act 1988, in particular, sets the definition of homelessness as a person who does not have access to accommodation that they can reasonably occupy or lives in a hospital, county home, shelter, or other institution because they have no other accommodation and are unable to gain one with their resources.²¹

Thus, under broader European law, Irish citizens have protections against discrimination when seeking housing and when seeking social housing. The lack of a right to housing, a basic human right, is an exacerbation of the Irish housing crisis – which has reached a record high of 14,700 unhoused people across the country.²² In contrast, British citizens have a right to housing, though there are still concerns to be addressed regarding the implementation of said rights. It is important for Ireland to move to reflect the UK's basic human rights regarding housing so that it exists across the island and can continue to evolve from there.

Perhaps the most notable comparison of human rights and citizenship across Ireland and Northern Ireland is the Good Friday Agreement, as well as a consideration of its impact on citizens of both countries. The Good Friday Agreement, reached on 10 April 1998, was an agreement between the

¹⁹ Mercy Law Resource Center (*op. cit.*)

²⁰ *id.*

²¹ *id.*

²² Focus Ireland 'Homeless statistics and figures Ireland' (2024) <<https://www.focusireland.ie/knowledge-hub/latest-figures/>> (last accessed 31 January, 2025)

British and Irish governments that established a devolved government in Northern Ireland and established a soft border between the two nations.²³

Cooperation between Ireland and Northern Ireland is a fundamental element of the Good Friday Agreement. The creation of the North/South Ministerial Council, which brings together the administrations of both governments to act on matters of mutual interest, has allowed for the development of a working relationship between both nations.²⁴ This is especially important in the aftermath of Brexit towards a continuation of an equivalent standard of the protection of rights across the island. The Good Friday Agreement initially presupposed that both nations would remain members of the European Union.²⁵ While this is no longer the case, the Agreement allows ‘all people of Northern Ireland’ – a population of roughly 1.8 million – ‘to identify themselves as Irish or British or both’ and confirms ‘their right to hold both British and Irish citizenship’.²⁶ As such, those who choose to exercise their entitlement to Irish citizenship are also entitled to exercise their right to European citizenship.²⁷

In addition to citizenship protections, the human rights and equality provisions of the Good Friday Agreement are upheld by the European Union through a collection of supporting frameworks and enshrined in the EU Charter of Fundamental Rights.²⁸ These include, but are not limited to, employment and non-discrimination protections. Both Ireland and Northern Ireland are subject to the

²³ Chris McCrudden, ‘The Good Friday Agreement, Brexit, and Rights’ (Royal Irish Academy 2017) <<https://pureadmin.qub.ac.uk/ws/files/148588609/TheGoodFridayAgreementBrexitandRights.pdf>> (last accessed 31 January, 2025)

²⁴ Article 50 Working Group, ‘Good Friday Agreement and the peace process: Information note from Ireland to the Article 50 Working Group’ (Department of Foreign Affairs 2017) <https://www.dfa.ie/media/dfa/eu/brexit/keydocuments/Info_Note_GFA_FINAL.pdf> (last accessed 31 January 2025)

²⁵ McCrudden (*op. cit.*)

²⁶ *cf.* fn. (24)

²⁷ *id.*

²⁸ *id.*

fundamental rights jurisprudence, which includes fundamental rights and equality protections, of the Court of Justice of the European Union, and the two nations accord a similar status to EU-derived rights.²⁹

A third comparison of policy to take into consideration is the use of force by the police services across both countries. Britain and Ireland have very different policies regarding what weapons they are permitted to use while performing their duties. In the United Kingdom, police are expected to use force, if necessary, in a way that is ‘lawful, proportionate and reasonable in the circumstance’ according to the 1967 Criminal Act.³⁰ The use of particular weapons in Northern Ireland – namely, firearms and tasers – are guided by the Police Service of Northern Ireland (PSNI).³¹ They are also governed by the Human Rights Act of 1998, which incorporates the rights contained in the European Convention on Human Rights into UK law.

In Ireland, guidelines on police use of force in Ireland have not been made public. However, under the 1976 Criminal Justice Act, members of the Garda Síochána have been granted the ability to ‘use reasonable force in order to compel a person to comply with a requirement to stop a vehicle’.³² There is a high threshold for the use of a firearm or taser, and, as such, the Gardai employ the use of pepper spray at a rate 500 times higher than the British Metropolitan Service.³³

²⁹ McCrudden (*op. cit.*)

³⁰ *cf.* s. 3 thereof.

³¹ *id.*

³² *cf.* s. 8

³³ Conor Lally, ‘Gardai’s “use of force” with pepper spray to be carefully monitored’ *The Irish Times* (Dublin, 7 March, 2020)

General attitudes towards police are more positive in Ireland³⁴ than in the United Kingdom.³⁵ This may be, in part, due to the differing case law guiding use of weaponry. There have been, to date, no cases against Ireland at the European Court of Human Rights involving police use of force that have concluded with findings of a violation. There have been several against Britain, notably including *McCann and Others v. United Kingdom*³⁶ and *Da Silva v. United Kingdom*.³⁷ The United Kingdom may find that following Ireland's lead regarding use of non-lethal weaponry may be beneficial regarding both community trust and violation of international law.

III. Conclusion

Thus, it is clear that there are differences between the adoption and protection of international rights in Ireland and the UK. Despite both countries' ratification of the European Convention on Human Rights, they have different paths to putting international treaties into law, but their respective acts are similar. In Ireland, the constitution must be altered or, as is also the case in the UK, new legislation must be approved by the government to incorporate international law into domestic law. Moreover, the UK has a different view on these laws, such as the Human Rights Act of 1998, which has been included and excluded from newer legislation, however there was no such case of this in Ireland.

When looking at Human Rights more closely, the stark difference between the two states on the matter of housing could be an issue in the question of unification as UK citizens have a right to

³⁴ Helen Gleeson and Molly Byrne, ' "Some of them are alright": The effects of experiences with community police officers on Irish young people's attitudes toward the police' (2015) 1 *I.J.A.S.S.* 70

³⁵ Arisa Kimaram, Luke Tryl, Conleth Burns, and Tyrone Surmon, 'Where are the police? Britons' attitudes to anti-social behaviour and the police' (More in Common, January 2023)

³⁶ [1995] 21 E.C.H.R. 97

³⁷ App. No. 5878/08 (2010)

adequate housing, yet Irish citizens have no such protection. The question of European rights was also examined through the Good Friday Agreement as Northern Ireland citizens can choose their citizenship, which can afford them more rights as some citizens can claim UK, Irish, and EU rights. Furthermore, the difference in policing between the states is also vast as UK police have a lower threshold to use lethal force than An Garda Síochana. We found that the differences between Ireland and the UK, while large at points, are equivalent to the many similarities discovered through our research, namely in the provision and protection of fundamental human rights.

B. AREAS OF DIVERGENCE

I. The Irish Language

Finn Doherty and Daniel Hegarty

A. Réamhrá

Ba í an Ghaeilge teanga an chomh-oileán seo ar feadh na mílte bliain sular díláithrigh an Béarla í de réir a chéile ar feadh na gcéadta bliain. Mar sin féin tá an teanga fós ina meabhrúchán tábhachtach ar stair na hÉireann agus ar gach duine a thugann an t-oileán mar bhaile. Tá sé fós á labhairt ag líon beag daoine agus tá iarracht déanta ag rialtais Éireannacha i ndiaidh a chéile tuiscint ghinearálta agus líofacht na Gaeilge a mhéadú. Gné thábhachtach de bhunreachtanna na stát iolracha nua-aimseartha is ea mionchearta teanga agus scrúdaíonn an chaibidil seo conas a dhéantar iad a chosaint i bpoblacht na hÉireann agus sa tuaisceart.¹

B. Poblacht na hÉireann

Tá sé cumhdaithe in Airteagal 8 de Bhunreacht na hÉireann, gurb í an Ghaeilge teanga náisiúnta na hÉireann agus meastar gurb í an phríomhtheanga oifigiúil í. Anuas ar sin ainmníonn Airteagal 8 an Béarla mar an dara teanga oifigiúil. I gcás easaontais idir na leaganacha Béarla agus Gaeilge den Bhunreacht nó den reachtaíocht, is é téacs na teanga náisiúnta a bheidh I réim. Forálann Airteagal 8 freisin, áfach, go bhféadfar foráil a dhéanamh le dlí maidir le húsáid

¹ Canadian Charter of Rights and Freedoms, s 16

isiach ceachtar den dá theanga i gcás na meastar gur gá sin. Tabharfaidh an chaibidil seo forbhreathnú gairid ar léirmhíniú breithiúnach ar na forálacha seo nach bhfuil, go ginearálta, tar éis cosaint láidir a thabhairt do chearta lucht labhartha na Gaeilge.

Le breis 's 60 bliain, ainneoin pleananna agus scéimeanna an rialtais, ní raibh aon reachtaíocht shuntasach ann maidir le stádas na Gaeilge. Ní go dtí 2003 a chruthaigh Acht na dTeangacha Oifigiúla ceart reachtúil don chaoi ar chóir caitheamh leis an nGaeilge i gcáil oifigiúil.² Cruthaíodh leis an Acht freisin oifig an Choimisinéara Teanga a áiríonn a ndualgais agus a chumhachtaí monatóireachta agus im scrúdú a dhéanamh ar chomhlíonadh dualgais na Ghaeilge ag comhlachtaí poiblí. I measc na ndualgais sa bhreis tá comhairle curtha ar an bpobal agus ar chomhlachtaí poiblí maidir le chearta agus dualgais na Gaeilge. Leasaíodh an tAcht in 2011 lena chinntiú go bhféadfar aon Acht Oireachtais a fhoilsiú ar líne i dteanga oifigiúil amháin sula ndéantar é a phriontáil agus a fhoilsiú go comhuaineach sa dá theanga oifigiúla.³

Cé go gcabhraíonn an fhoráil reachtúil seo le cearta na Gaeilge a chosaint agus a chur chun cinn, tá a thionchar ar chearta na Gaeilge teoranta go praiticiúil. Thairis sin, níor tháinig sé ar an saol ach le déanaí. Mar thoradh ar sin, tháinig forbairt chearta na Gaeilge den chuid is mó ó léirmhíniú na cúirte ar Airteagal 8. Bhí an léirmhíniú seo neamhréireach agus scrúdaiodh ar bhealach éagsúla é.⁴

Is é an ceart chun dlíthíochta trí Ghaeilge an fhoirm is coitianta ina dtagann cearta Gaeilge chun cinn sa chúirt. I *Mac Gambnia* chinn an chúirt go bhféadfadh duine a cheart a dhearbhu i nGaeilge

² Official Languages Act 2003

³ Civil Law (Miscellaneous Provisions) Act 2011, s 62

⁴ Gerry Whyte, 'Constitutional Protection for the Irish Language in Ireland' (Academia: Research Paper, 2014)

a chroscheistiú os comhair binse, in ainneoin gur thuig sé Béarla go foirfe.⁵ Diúltaíodh don argóint gur cur amú ama an bhinse a bhí ann. Mar sin féin, tá sé ráite ag cásdlí ina dhiaidh sin nach bhfuil sé de cheart ag dlíthithe imeachtaí dlí iomlána a sheoladh trí Ghaeilge, nó rogha teanga a fhorchur ar pháirtithe eile.⁶ Níl sé de cheart ach oiread go gcuirfí ar a thriail ag giúiré a bhfuil eolas maith ar an nGaeilge aige.⁷ Is gnách gur bhreathnaigh na cúirteanna ar chearta na Gaeilge i ndlíthíocht mar chearta cultúrtha a chosaint, agus gan an ceart ar cheartas nádúrtha a chosaint.⁸ Mar sin, is gnách go mbíonn ciall phraiticiúil ag gabhálaí na gcúirteanna, ach is deacair iad a aontú le stádas teoriciúil agus bunreachtúil na Gaeilge mar theanga náisiúnta.

Bhí leisce ar na cúirteanna freisin dualgas a chur i bhfeidhm go docht ar an stát aistriúchán a dhéanamh. I 1963 chinn an Ard-Chúirt go raibh cead ag an stát rogha a dhéanamh idir Béarla agus Gaeilge d'éagmais reachtaíochta.⁹ Tá na cúirteanna tar éis a bheith beagán níos déine maidir le haistriúchán ar Rialacha na nUaschúirteanna agus tá dualgas ar an stát na rialacha seo a aistriú chun an ceart chun dlíthíochta trí Ghaeilge a sheasamh.¹⁰ Afách, bhí leisce ar na cúirteanna dul thar oibleagáidí cúnga maidir le haistriúchán. Cé go gcaithfear doiciméid oifigiúla atá riachtanach a bheith ann chun gnó dlíthiúil a dhéanamh agus a chur ar fail sa dhá theanga, déantar, léirmhíniú cúng ar an téarma 'doiciméadúchán oifigiúil', áfach.¹¹

⁵ *An Stát (Mac Fhearraigh) v Mac Gamhnia* [1980–1998] IR (Special Reports) 99, 107

⁶ *Ó Monacháin v An Taoiseach* [1980–1998] TÉ (Tuairiscí Speisialta) 1, [1980–1998] IR (Special Reports) 71

⁷ *MacCárthaigh v Éire* [1999] 1 IR 186, [1980–1998] TÉ (Tuairiscí Speisialta) 57, [1980–1998] IR (Special Reports) 127

⁸ Whyte (n 5), 3; *MacCárthaigh v Éire* [1999] 1 IR 186, [1980–1998] TÉ (Tuairiscí Speisialta) 57, [1980–1998] IR (Special Reports) 127

⁹ *Attorney General v Coyne and Wallace* (1967) 101 ILTR 17

¹⁰ *Delap v An tAire Dlí agus Cirt, Éire agus an tArd Aighne* [1980–1998] TÉ (Tuairiscí Speisialta) 46, [1980–1998] IR (Special Reports) 116.

¹¹ *Ó Gribín v. An Chomhairle Mhúinteoirteachta* [2008] 3 IR 266

C. Conclúid Maidir Le Certa na Gaeilge I Bpoblacht na hÉireann

Tháinig ceann de na ráitis ba láidre i bhfabhar cearta Gaeilge ó Hardiman J in *Beoláin v Faby* áit ar mheasadh go raibh teip an stáit i leith aistriúcháin ar fhormhór Achtanna an Oireachtais tar éis 1980 a sholáthar míbhunreachtúil.¹² B'fhéidir toisc go raibh an sárú chomh soiléir sin ina aghaidh ar an mbunreacht, chuir Hardiman J an-bhéim ar thábhacht na Gaeilge agus ar a stádas bunreachtúil.¹³ Mar a thugann an Dr Whyte faoi deara, áfach, tá bearnaí suntasacha fós idir an rud a mheas Hardiman J a bheith faoi shainordú bunreachtúil agus saol na gcainteoirí Gaeilge.¹⁴ Tá stádas na Gaeilge i reacht daingnithe ag Acht na dTeangacha Oifigiúla, agus fáiltítear roimh ardú na teanga chuig stádas teanga oifigiúil de chuid an AE, cé gur fhorbairt uafásach déanach é. Níl aon léirmhíniú láidir déanta ar chearta Gaeilge, afách, agus tá siad fós faoi dhliteanas a chur ar leataobh ar mhaithe le praiticiúlacht agus éifeachtúlacht.

D. The Irish Language in the North of Ireland

The story of the Irish language on the island of Ireland is undoubtedly a complex one. From the Norman invasion of Ireland in the late 12th century to the partition of Ireland with the Anglo-Irish treaty, right up to the present day, Irish language speakers have faced a variety of legislative obstacles when it comes to the speaking of our ancestral tongue. Nowhere is this more relevant than in the Context of Northern Ireland. In this project, I intend to outline both the historical and contemporary context of Irish language rights and highlight the need for equal language rights in Northern Ireland.

¹² [2001] 2 IR 279

¹³ [2001] 2 IR 279, 340

¹⁴ Whyte (n 5), 15

The status of Irish in Northern Ireland can be said to be a continuation of historical legislation enacted in Ireland under English, and later British, rule. As early as 1360, where King Edward III of England signed a royal decree entitled, 'Writ, against people associating with the Irish, using their language, or sending children to be nursed among them'. Along with the Statutes of Kilkenny in 1366, and the 'Act for English Order, Habite, and Language' in 1537, there was a concerted effort by London to cull the use of Irish in Irish society, and establish English as the dominant language. This culminated in 1737, 'An Act that all proceedings in Courts of Justice within this Kingdom shall be in the English Language', eliminating the rights of Irish speakers to use their native language in court, or higher institutions of society.¹⁵ The decline of the Irish language after the famine further exasperated its declining use in legislation, the Monolingual Irish speaking population went from 2.5 million in 1841, to just 20,953 at the turn of the millennia according to the 1901 census.¹⁶ The stigma around the Irish language being a dead language in UK political spheres had existed for decades before this also, the most prominent example being the 1871 census when it opined 'there can be no error in the belief that within relatively a few years the Irish language will have taken its place among the languages that have ceased to exist'.¹⁷ Sentiments surrounding the Irish language from British legislators such as this perpetuated in post partition Northern Ireland, evidence of this being the Public Health and Local Government (Miscellaneous Provisions) Act (Northern Ireland), 1949 which stated all street signs in Northern Ireland be in English exclusively, as well as all censuses

¹⁵ Ó Laighin, Pádraig Breandán, 'Reachtaíocht Teanga'(2012) 153—154

¹⁶ Suzanne Romaine, 'Irish in the Global Context' in Caoilfhionn Nic Pháidín & Seán Ó Cearnaigh (eds.), *A new view of the Irish language* (Cois Life 2008) 5

¹⁷ *id.* 4

conducted in Northern Ireland omitting a question on the Irish language from 1911 until 1991, leaving an 80 year gap for statistical information based on language patterns in the region.¹⁸

While many of these acts mentioned have been repealed, (apart from the act of 1537), and the signing of the Good Friday Agreement (1998) would in theory create a more amicable environment for the Irish language, with the latter recognising that linguistic diversity is ‘part of the cultural wealth of the island of Ireland’¹⁹ hostilities surrounding the use of Irish was still prevalent in Northern Irish political discourse. Steven King, a personal assistant to an Ulster Unionist MP, maintained that ‘[t]he Irish Gaelic Language movement’ has always ‘been allied to the cause of Irish separatism, the antithesis of Irish, and Ulster Unionism’. In 1997, The British newspaper *The Telegraph* called signange in Irish on the campus of Queens University Belfast, ‘[a] minor irritant’.²⁰

In the present day, attitudes around the Irish language are much less contentious, particularly after the passing of the Identity and Language (Northern Ireland) Act, 2022 where just over 100 years since partition the Irish language was given official status in the North, and finally repealing the 1737 Act banning the use of Irish in court, there are still legislative barriers to cross. For instance, despite the act promising to install a Northern Irish Commissioner for the Irish language, whose principal responsibility it would be to ‘enhance and protect the use of the Irish language by public authorities in the provision of services to the public or a section of the public in Northern Ireland’.²¹ As of January 2025 there has been no progress made in recruiting or appointing an Irish language commissioner in the last two years. The Northern Ireland Human Rights Commission

¹⁸ Diarmait Mac Giolla Chríost and John Aitchison, ‘Ethnic Identities and Language in Northern Ireland’ (1998) 30(4) *Area* 301, 304

¹⁹ Good Friday Agreement 1998

²⁰ Chríost and Aitchison (*loc. cit.*)

²¹ Identity and Language (Northern Ireland) Act 2022; s. 7(b)(1)

recommended in their annual report in 2022 an Irish Language strategy where the Department of Communities in Northern Ireland engage with an Irish language commissioner. However, while, setting up strategies for the protection of the Irish language was a legal duty stated by the Northern Ireland Act, 1998, and reiterated further in the New Decade, New Approach Deal 2020, and further by the Identity and Language Act, 2022, no strategy has of yet been formed. In an article published by the Northern Ireland Legal Quarterly, Róisín Á Costello argues that while the 2022 Act, as well as the previously mentioned acts, represents positive change towards achieving equal rights for minority language rights, Northern Ireland, Legislation in Northern Ireland ultimately fails to satisfy the minimum Criteria for Regional and Minority Languages.²²

To conclude, legislation regarding the Irish Language in Northern Ireland has historically been influenced by colonial laws which aimed to purge the Irish language from state institutions and dissuade its use among its speakers. While the last 30 years has been monumental for language equality rights in the North, as well as a shift in cultural and political attitudes towards the Irish Language, practically there is still much more work to be done to achieve true language equality in Northern Ireland.²³

E. Divergence between the ROI and NI with respect to Irish language rights

While the position in the Republic is lamentable, the rights of Irish language speakers still enjoy significantly more protection than in the North. This is largely a result of the constitutional status

²² Róisín Costello, 'The Identity and Language (Northern Ireland) Act 2022 and compliance with the European Charter on Regional and Minority Languages' (2024) 74(2) *N.I.L.Q.* 68

²³ Laurie Maher, 'Ireland as an official language in Northern Ireland: One year after passing in the house of commons' (Raoul Wallenberg Institute: 29th October, 2023) §, [2]

of Irish in the Republic, which, although it has been whittled down for the sake of practicality, cannot be completely ignored as part of the basic law of the state.

On the other hand, the Northern Irish state has a completely different constitutional tradition with respect to Irish language rights and has historically worked to undermine Irish. Despite the reforms of recent years which at least acknowledge the existence of the language, Irish was historically attacked by legislation which severely curbed the rights of its speakers to use it in any public or official setting. Today, while there may be an absence of restrictions, there is an absence of strong and enforceable rights which mandate government action to aid the historically oppressed language.

The language rights available to Irish speakers in the Republic can and should be criticised, but they remain significantly stronger than the rights available to those in the North. Simple steps toward aiding the speakers of one of the two languages of this island, such as the appointment of a Commissioner for the Irish Language as provided for, will narrow the gap in terms of rights protection between the two States.

II. Reproductive Rights including Surrogacy

by Ciara Murray, Aoife Doheny, Caoimhe MacCarthy, Zhaolu Wang (Sina) and Odhrán Lagan

I. Introduction

Reproductive rights have undergone significant development in both Ireland and Northern Ireland in recent years. In Ireland, many decades of contentious debate around access to abortion resulted in the 2018 referendum. The Abortion (Northern Ireland) (No. 2) Regulations, 2020 similarly extended the right to abortion up to 12 weeks to Northern Ireland, whereas previously it was legalised only in the rest of the UK. The legal regime in Ireland and Northern Ireland has faced criticism for not ensuring sufficient access to health-care services. One way both jurisdictions have dealt with these issues is introducing safe access zones.

In contrast, the law around surrogacy in Ireland is currently in a grey area. The Health (Assisted Human Reproduction) Act, 2024 has established a regulatory framework for surrogacy in Ireland. Though this legislation has prohibited commercial surrogacy, ethical concerns still persist around risks of exploitation, child welfare, recognition of parentage, and the complexities of international surrogacy. Under current Northern Irish law, surrogacy agreements are not legally binding, and the surrogate is the child's legal parent at birth.

A. Abortion in Ireland

This section deals with the development of the law concerning abortion in Ireland. It deals with the contentious legal developments and debates leading up to the 2018 referendum, outlines the contents of the resulting legislation, and summarises critiques of the existing legislation. The

development of the law in this area reflects how public opinion around such contentious and religious issues has changed, as well as the increasing influence of international human rights instruments.

a. Background and Historical Development

Prior to 1983, there was no Constitutional provision prohibiting abortion. In response to the pivotal Supreme Court decision *McGee v Attorney General*,¹ which cemented the constitutional right to marital privacy, the Pro-Life Amendment Campaign was launched in 1981, with the specific aim of maintaining and extending Ireland's abortion prohibition.² This led to the Eighth Amendment, which was passed in 1983. Article 40.3.3° of the Constitution therefore read:—

'[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right'.

The wording of this amendment created a paradigm where the constitutional rights of the mother were pitted against the right of the unborn foetus.³ This balancing of rights was considered in *X v. Attorney General*.⁴ After acting on information provided by the DPP the Attorney General put an injunction on X, a fourteen year old victim of rape, preventing her from leaving the country to seek medical care. The Supreme Court decided against the State, declaring that the State had a duty to have "due regard" for the life of the mother - such a risk to life could include the threat of suicide.⁵

¹ [1973] I.R. 284.

² Siobhán Mullally, 'Debating Reproductive Rights in Ireland' (2005) 27(1) *H.R.Q.* 78, 90.

³ Fiona de Londras, Máiréad Enright, 'A rights-based approach to abortion' in Fiona de Londras & Máiréad Enright (eds.), *Repealing the 8th: Irish Abortion Law* (Bristol University Press 2018) 33, 39.

⁴ [1992] 1 I.R. 1.

⁵ *id.*

In 1992 a second constitutional amendment was held and passed, protecting the right to travel and to provide and obtain information on abortion. A Constitution Review Group was formed and recommended a constitutional amendment to give effect to the X judgement.⁶

The 25th Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill was held in 2002, and was rejected. This would have removed the threat of suicide as a ground for abortion and increased the criminal penalties for assisting a woman having abortion to 12 years.⁷

For much of the history of abortion legislation in Ireland, women have been forced to travel to the UK to access health care.⁸ Women who are poor or marginalised face financial and logistical barriers to this travel.⁹

Increasing pressure came from international human rights bodies and organisations. In 2010 the ECtHR found Ireland was in violation of its human rights obligations for failing to provide criteria or procedures for women to lawful access abortion.¹⁰ In 2014, the UN Human Rights Committee further criticised Ireland's abortion laws and recommended legislative and constitutional changes.¹¹ In 2017 the Citizens' Assembly recommended that the Eighth Amendment should not be retained in full.¹²

⁶ Mullally (*op. cit.*) 96

⁷ *id.* 99

⁸ *id.* 100—101

⁹ *id.* 100—102

¹⁰ *A, B and C v. Ireland*, App. no. 25579/05 (ECtHR, 16th December 2010)

¹¹ de Londras and Enright (*op. cit.*) 44

¹² The Citizens' Assembly, 'First Report and Recommendations of the Citizens' Assembly: The Eight Amendment of the Constitution' (The Citizens' Assembly, 29 June 2017) <https://citizensassembly.ie/wp-content/uploads/2023/02/FirstReport_EIGHTAMENDMENT.pdf> (last accessed 10 December 2024)

The Thirty Sixth Amendment of the Constitution was passed in 2018. Article 40.3.3° now reads: ‘provision may be made by law for the regulation of termination of pregnancy.’ The Health (Regulation of Termination of Pregnancy) Act, 2018 came into effect from the 1st of January 2019.

b. Current Legal Framework

Grounds for abortions

The Bill covers several headings for the termination of pregnancy - risk to life or health; risk to life or health in an emergency; conditions likely to lead to death of foetus; early pregnancy. Sections 9 and 11 include provisions for examinations of two medical practitioners, with the requirement that the opinions formed are reasonable and in good faith.

Under s. 9, termination can be carried out when there is a risk to the life or of serious harm to the health of the pregnant women; that the foetus has not reached viability; or it is appropriate to carry out the termination to avert such a risk.

Under s. 10, the termination can be carried out if a medical practitioner is of the opinion there is an immediate risk to life or serious harm to the health of the pregnant women, or it is immediately necessary to carry out the termination to avoid that risk.

Under s. 11, the termination of pregnancy can be carried out when there is a condition affecting the foetus that is likely to lead to the death of the foetus before or within 28 days of birth, which is much longer than that allowed by the Northern Irish legislation.

Under s. 12, termination can be carried out if a medical practitioner is of the opinion the pregnancy has not exceeded 12 weeks. S. 12(3) requires that the termination of pregnancy can only take place after a three-day waiting period. S. 12(4) confirms there is no exception when the wait period would mean the pregnancy exceeds 12 weeks and becomes legally barred from termination under this provision.

Section 16 allows for reviews of decisions made under s 9, 10, 11 of the Act.

Conscientious objection

S. 22 of the act provides that no medical practitioner, nurse, or midwife could be obliged to carry out a termination of pregnancy which they have a conscientious objection to. S. 22(3) obliges such practitioners to make alternative arrangements for the transfer of care of the patients concerned.

Offences

The 2018 Act retains provisions pertaining to criminal offences. S. 23(1) makes it an offence for any person to end the life of the foetus outside of the provision of the Act. S 23(2) provides that it will be an offence for a person to provide the means for termination, or to be 'reckless' as to the supply of such provisions. S 23(3) stipulates that these provisions will not apply to a woman in respect of her own pregnancy.

Section 23(4) makes it an offence for a person to aid or abet, counsel, or procure a pregnant woman to end the life of the foetus. S 23(5) imposes a potential prison term of up to 14 years.

B. Abortion in Northern Ireland

The law around abortion in Northern Ireland changed dramatically in 2020 with the introduction of the Abortion (Northern Ireland) (No. 2) Regulations, 2020. The current framework is similar to that in the Republic of Ireland. Abortions are legal in all cases for the first 12 weeks of a pregnancy and continue to be legal in certain cases from 12 weeks onward.

This section traces the development of the law up to this point, describes the Regulations, and provides a brief description of its implementation.

a. Background

Under the Abortion Act 1967, abortion is legal in England, Scotland and Wales.

Section 1(1) states that abortion is not an offence if carried out by a medical professional, provided that: (i) the pregnancy has not exceeded 24 weeks or (ii) termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman or (iii) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated or (iv) there is a substantial risk that if the child were born it would suffer from severe physical or mental abnormalities.

This section amends sections 58 and 59 of the 1861 Offences Against the Person Act, which criminalised abortion in all circumstances except where the life of the mother is at serious risk. The 1861

Act has not been repealed, meaning that abortion is still criminalised in cases not covered by the 1967 Act.

The jurisdiction of the Abortion Act 1967 does not extend to Northern Ireland. Historically, the only cases in which abortion was available was if the mother's life or health was seriously at risk.¹³

This changed on 22 October 2019 when the UK Government passed the Northern Ireland (Executive Formation Etc) Act, 2019, which repealed the application of the 1861 Act in Northern Irish law.

As a result, abortion is no longer a criminal offence in Northern Ireland, but only up to the point at which another piece of legislation, namely section 25 of the Criminal Justice Act (Northern Ireland) 1945, applies.¹⁴

Section 25 of the 1945 Act makes it a criminal offence to abort a foetus if the child is capable of being born alive. Abortions such cases can only be carried out in good faith for the sole purpose of preserving the life of the mother.¹⁵

c. Abortion (Northern Ireland) (No 2) Regulations, 2020

Both the Northern Ireland (Executive Formation Etc) Act, 2019 and the subsequent Abortion (Northern Ireland) (No 2) Regulations, 2020 ('the 2020 Regulations') were enacted following an important 2019 ruling in the UK Supreme Court.

In Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the

¹³ Explanatory Memorandum to the Abortion (Northern Ireland) (No. 2) Regulations 2020, [6.2].

¹⁴ *id.* [6.12]

¹⁵ *id.*

Northern Ireland Act 1998 ('the 2018 ruling'),¹⁶ a majority of the Supreme Court held *obiter* that the criminalisation of abortion in Northern Ireland was a human rights violation. This case was brought by the Northern Irish Human Rights Commission (NIHRC), which argued that Northern Irish law around abortion violated Article 8 of the European Convention on Human Rights, the right to family and privacy.

Although the NIHRC lost on a procedural issue of standing,¹⁷ a majority of judges (Lord Mance, Lord Kerr, Lord Wilson, and Lady Hale) ruled that had the case been properly brought, the Court would have found that there had been a violation of Article 8 ECHR, as it prohibits abortion in cases of rape, incest, or a fatal foetal abnormality. Lord Kerr and Lord Wilson held that these also violate Article 3, the right not to be subjected to inhumane or degrading treatment.

This ruling, combined with the 2018 Irish referendum on the constitutionality of abortion,¹⁸ increased pressure for legislative change in Northern Ireland. This change was introduced in 2020.

The purpose of the Northern Ireland Abortion (Northern Ireland) (No 2) Regulations, 2020 is to make legal provision for abortion, not just decriminalising it but making positive steps to facilitate access to abortion services for pregnant women.

The Regulations were originally introduced in March 2020, but due to the unprecedented Covid-19 situation, usual parliamentary procedures could not be observed and the regulations were revoked.

¹⁶ [2018] UKSC 27

¹⁷ The Court ruled that there must be an actual or potential victim in the proceedings to comply with *locus standi* requirements in section 69(5) of the Northern Ireland Act 1998.

¹⁸ Shona Wilson Stark, 'In *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27: A Declaration in All but Name?' (*UK Constitutional Law Association*, 12 June 2018) <<https://ukconstitutionallaw.org/2018/06/12/shona-wilson-stark-in-re-northern-ireland-human-rights-commissions-application-for-judicial-review-2018-uksc-27-a-declaration-in-all-but-name/>> (last accessed 02 February 2025)

They were quickly reintroduced in early April.¹⁹

In line with the Republic of Ireland, under section 3 of the 2020 Regulations, abortion services are provided up to 12 weeks into a pregnancy at the request of the pregnant woman, provided that a registered medical professional has issued a certificate authorising it.

Under section 4, abortion is available between 12 to 24 weeks of a pregnancy where the continuation of that pregnancy poses a more serious risk to the mental or physical health of the woman than a termination would.

Under sections 6 and 7, abortion is available beyond 24 weeks where there exists a fatal foetal abnormality or risk to the pregnant woman's life.

Under section 12, an exception is made for conscientious objectors within the medical field. There is no duty to provide abortions, except where necessary to save a woman's life.

This comparatively shorter timeframe was introduced to respect the context of the Northern Irish executive,²⁰ and in reflection of the fact that 92% of abortions in England and Wales are performed at 12 weeks or earlier.²¹

d. Implementation

According to the Northern Ireland Abortion and Contraception Task Group, 7,681 abortions were

¹⁹ According to the Explanatory Memorandum, revocation and reimplementing was considered the most seamless option: Explanatory Memorandum to the Abortion (Northern Ireland) (No. 2) Regulations 2020, [3.4].

²⁰ *id.* [7.2]

²¹ *id.* [7.14]

carried out between 31 March 2020 and 15 February 2024.²²

The Task Group outline four areas in which gaps still exist: the lack of provision for abortion pills, the unavailability of first trimester screenings, ‘fragile’ services such as the existence of one consultant in regional surgical abortion service, and the lack of guidance around conscientious objection.

However, the report also acknowledges positive developments, such as the inclusion of abortion services information on the NI Direct website and the distribution of flyers. They note that the introduction of ‘safe access zones’ has made physically accessing services easier.²³ ‘Safe access zones’ became a feature of abortion services following the 2018 ruling of *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill*,²⁴ in which the UK Supreme Court held that these zones did not violate protestors’ ECHR rights.

Under section 5(2)(a) of the Bill, it is a criminal offence to intentionally or recklessly ‘influence’ anyone within the safe access zone (a designated area up to 250 metres away from clinics) outside an abortion clinic. This includes users of services, those accompanying them, and clinic staff.

The issue was whether this section disproportionately interfered with protestors’ rights to freedom of conscience, expression and freedom of assembly as protected by Articles 9, 10 and 11 of the European Convention on Human Rights. The Attorney General referenced the fact that the Bill does not expressly provide for a ‘reasonable excuse’ defence.

The UK Supreme Court found the Bill to be compatible with ECHR, and further held that the

²² Northern Ireland Abortion and Contraception Task Group, ‘Report on Sexual and Reproductive Health in Northern Ireland’ (FRSH, 2014) <<https://fsrh.org/Common/Uploaded%20files/documents/niact-review-2024-final.pdf>> 16 (last accessed 02 February, 2025)

²³ *id.*

²⁴ *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32

‘reasonable excuse’ defence is not a requirement for compatibility. Criminal courts can examine each case on an individual basis to determine whether a charge brought under statute is proportionate.

As of 29 September 2023, there are 8 access zones in operation outside clinics in Northern Ireland.

e. Recommendations for Reform

Several recommendations for reform have been made in an independent review conducted by Marie O’Shea.²⁵ The most prominent objection is to the three day wait period, which has been shown to result in only 2% of women choosing to continue their pregnancy; the reasons women decided not to continue are not clear.²⁶ The three day wait, in practice, creates needless obstacles to women seeking healthcare on a time scale that is already limited because of the 12-week limit. Additionally, the continuation of criminal sanctions may lead to cautious, risk averse decision making on the part of medical practitioners.²⁷ These factors result in continued stigma and shame for women whose circumstances do not definitely fall within the categories prescribed by legislation.

Similar to Northern Ireland, legislation allowing for safe access zones has been introduced this year. According to Section 2 of the Health (Termination of Pregnancy Services) (Safe Access Zones) Act, 2024, conduct which impedes access to service will be prohibited within 100 meters of an entrance or exit of a general practitioner, obstetrician, and gynaecologist. The Irish legislation differs

²⁵ Mary O’Shea, ‘The Independent Review of the Operation of the Health (Regulation of Termination of Pregnancy) Act 2018’ (Department of Health, 28 February 2023)

²⁶ *id.* 89

²⁷ *id.* 62

significantly from the Northern Ireland regulation as they are not specific to health centres providing abortion.

C. Surrogacy in Ireland

Surrogacy, as according to Citizens Information, is ‘where a *surrogate mother* agrees to become pregnant and carry a baby to term for another couple or individual’.²⁸ It has become increasingly relevant in Ireland as an alternative path to parenthood.²⁹ This section explores the current legal landscape surrounding surrogacy in Ireland, contrasts commercial and altruistic models, and assesses the impacts on accessibility and ethics.

a. Current Legal Framework

There is an absence of legislation surrounding surrogacy in Ireland.³⁰ Without specific frameworks governing surrogacy in terms of its complex legal, social and ethical concerns, such practices are left in a legal gray area – neither legal nor illegal.³¹ This lack of regulation leads to uncertainty regarding the legal status of parents and children born through surrogacy arrangements, such as legal parental recognition, leaving significant challenges for intended parents and surrogates.

²⁸ Citizens Information, ‘Birth, Family and Relationships’ <<https://www.citizensinformation.ie/en/birth-family-relationships/adoption-and-fostering/surrogacy/>> (last accessed 02 February, 2025)

²⁹ MHC, ‘Surrogacy’ (2023) <<https://www.mhc.ie/latest/insights/surrogacy-in-ireland>> (last accessed 02 February, 2025)

³⁰ Citizens Information (*op. cit.*)

³¹ *id.*

Recognizing these challenges, the Health (Assisted Human Reproduction) Bill proposed in March 2022 came into official enactment on July 2nd, 2024, seeking to address legal gaps in human reproduction, including surrogacy. Key provisions include:

- D. Setting the permitted legal standards for pursuing surrogacy in Ireland;
- E. Establishing the Assisted Human Reproduction Regulatory Authority (AHRRA);
- F. Requiring at least one intending parent to have a genetic link to the child;
- G. Mandating that surrogacy agreements be non-commercial and pre-approved by the AHRRA;
- H. Outlining the process for transferring parentage from the surrogate to the intended parents, and;
- I. Affirming the child's right to access information about their genetic origin.

The Act primarily focuses on domestic surrogacy, leaving a regulatory gap for Irish citizens who pursue surrogacy abroad.

b. Types of Surrogacy

Altruistic Surrogacy

Altruistic surrogacy, where the surrogate receives no financial compensation beyond 'reasonable expenses',³² is tolerated in Ireland but lacks formal legal recognition. These 'reasonable expenses', as according to and legalized by section 58 of Health (Assisted Human Reproduction) Act, 2024, are

³² Elite IVF, 'Altruistic Surrogacy' (2024) <<https://www.elite-ivf.com/what-is-altruistic-surrogacy/#:~:text=Altruistic%20surrogacy%20is%20a%20type,necessary%20medical%20and%20legal%20expenses>> (last accessed 02 February, 2025)

the ‘reimbursement of medical costs, loss of earnings, and other pregnancy-related expenses to the surrogate’.³³

Nevertheless, the Act strictly prohibits any payments that could be construed as commercial in nature.³⁴ However, there is limited availability of altruistic surrogacy in Ireland due to the absence of legal structure and the scarcity of willing surrogates to carry the child,³⁵ which will be further explained later.

Commercial Surrogacy

Commercial surrogacy, where surrogates are compensated beyond expenses, is prohibited in Ireland both nationally and internationally (section 57 and 93 of the HAHR Act). This may be due to ethical concerns and risk of exploitation of (economically) vulnerable women and those in developing countries, by coercing them into surrogacy arrangements for financial gain. Although this ban on commercial surrogacy reflects Irish people’s attention to the rights and commodification of women’s bodies within Ireland, in reality, it drives intended Irish parents to seek less regulated arrangements and surrogates from abroad, such as Ukraine and the U.S.³⁶ This reliance introduces additional legal and logistical problems³⁷, particularly regarding the recognition of parentage under Irish law.

³³ Law Society, ‘Parental orders limited to permitted surrogacies’ (2024) <<https://www.lawsociety.ie/gazette/top-stories/2024/sepember/parental-orders-limited-to-permitted-surrogacies2/>> (last accessed 02 February, 2025)

³⁴ PKHL, ‘Surrogacy in Ireland’ (2024) <<https://www.pkhl.ie/services/surrogacy-ireland-route-parenthood#:~:text=The%20responsibilities%20and%20obligations%20of,Commercial%20surrogacy%20arrangements%20are%20prohibited>> (last accessed 02 February, 2025)

³⁵ Jane Brazil, ‘A Pre-Birth Approval Model for Altruistic Gestational Surrogacy in Ireland’ (TCLR Online, 2022) <<https://trinitycollegelawreview.org/a-pre-birth-approval-model-for-altruistic-gestational-surrogacy-in-irish-law/>> (last accessed 02 February, 2025)

³⁶ Growing Families, ‘Surrogacy Abroad’ (2023) <<https://www.growingfamilies.org/surrogacy-abroad-what-irish-citizens-need-to-know/>> (last accessed 02 February, 2025)

³⁷ Reuters, ‘Which countries allow commercial surrogacy?’ (2023) <<https://www.reuters.com/world/which-countries-allow-commercial-surrogacy-2023-04-05/>> (last accessed 02 February, 2025)

c. Accessibility and Challenges

Legal Recognition of Parentage

A major challenge in domestic surrogacy is the legal recognition of parentage. Under Irish law, ‘the woman who gives birth is legally recognized as the child’s mother, regardless of genetic links’.³⁸ This was affirmed in the case of *MR & Anor v. An tArd Chláraitheoir & Ors*, which clarified that legal motherhood is determined by birth, not genetics.³⁹

As a result, intended parents must navigate complex legal processes to obtain legal recognition and guardianship. For the intended father, if genetically related to the child, this involves applying for a declaration of parentage and guardianship. The intended mother, however, can only establish her parental rights through adoption, even if she is genetically related to the child.⁴⁰

Nonetheless, the Health (Assisted Human Reproduction) Act, 2024 aims to ease this process by providing a new mechanism – a ‘parental order’ – to transfer parentage from the surrogate to the intended parents.⁴¹ However, this process is subject to strict criteria, including the requirement for at least one intended parent to have a genetic link to the child.⁴²

International Surrogacy

International surrogacy arrangements present additional challenges. Irish citizens engaging in surrogacy abroad face legal uncertainties when returning to Ireland with their child, as they have to

³⁸ <https://www.citizensinformation.ie/en/birth-family-relationships/adoption-and-fostering/surrogacy/>

³⁹ <https://ie.vlex.com/vid/r-v-an-tard-793962893>

⁴⁰ <https://www.citizensinformation.ie/en/birth-family-relationships/adoption-and-fostering/surrogacy/>

⁴¹ <https://legalblog.ie/surrogacy-2/>

⁴² https://www.mhc.ie/latest/insights/surrogacy-in-ireland-2?utm_source=chatgpt.com

navigate the legal patchwork in both the host country and Ireland.⁴³ This dual compliance not only delays the recognition of parentage and creates barriers to the child's integration into Irish society, but it may also lead to protracted legal battles and emotional distress for the families.⁴⁴

Economic, Geographic, and Legal Barriers

Surrogacy in Ireland is further hindered by economic, geographic, and legal barriers. Additionally, the absence of domestic surrogacy options forces intended parents to rely on international arrangements, which can be logistically challenging and emotionally taxing.⁴⁵ Finally, the complex legal processes required to secure parentage discourage participation and perpetuate inequities in access to reproductive services.

These legal complexities contribute to significant barriers to surrogacy in Ireland, making international arraignment inaccessible for many:

1. Economic barriers: high costs may cast a monetary burden – medical procedures, legal fees, travel expenses, and financial compensation for surrogates in legalized commercial surrogacy countries.⁴⁶
2. Geographic barriers: time taken to obtain visa and relevant surrogacy documentation add logistical challenges and costs.⁴⁷

⁴³ Law Society, 'Gazette' (2022) <<https://www.lawsociety.ie/gazette/top-stories/2022/april/ireland-is-not-laggard-on-paid-for-surrogacy--official/>> (last accessed 02 February, 2025)

⁴⁴ GOV.ie, 'Policy Proposals on international surrogacy' (2023) <<https://www.gov.ie/en/press-release/b5e0d-government-ap-proves-policy-proposals-on-international-surrogacy-and-recognition-of-past-surrogacy-arrangements/>> (last accessed 02 February, 2025)

⁴⁵ *id.*

⁴⁶ WOCB, 'Ireland' (2023) <<https://worldcenterofbaby.com/countries/ireland/>> (last accessed 02 February, 2025)

⁴⁷ MHC (*op. cit.*)

3. Legal barriers: intended parents face difficulties obtaining travel documents for their child or establishing their legal parenthood in Ireland, while the lack of legislation makes Irish IVF clinics 'reluctant to facilitate local surrogacy arrangements'.⁴⁸
4. Social and cultural barriers: stigma and lack of understanding surrounding surrogacy can create additional challenges for intended parents and children born through surrogacy.⁴⁹

d. Ethical Considerations

Exploitation Risks

Potential exploitation of vulnerable women is a central ethical concern in surrogacy. Critics of surrogacy argue that it commodifies women's bodies, exploits those in economically weak situations, and leads to unwilling coercion, 'especially with international surrogacies in poorer countries'.⁵⁰ Recently in February, a Greek clinic offering commercial surrogacy services online was found to 'impregnate women brought by human traffickers from poor countries like Georgia and Albania against their will'.⁵¹ Furthermore, the problematic impact of surrogacy on women's autonomy and bodily integrity remains unaddressed⁵², as such practice may reduce women to mere means of reproductive capacity, reinforcing gender inequalities.

⁴⁸ Growing Families (*op. cit.*)

⁴⁹ Anna Arvidsson, Polly Vauqueline, Sara Johnsdotter, and Birgitta Essén, 'Surrogate mother – praiseworthy or stigmatized: a qualitative study on perceptions of surrogacy in Assam, India' (2017) 10(1) *India Glob. Health Act.* 1

⁵⁰ *cf. fn.* (43)

⁵¹ Ron Shinkman, 'Eight Fertility Clinic Employees Arrested, Clinic Shut Down By Green Government' *Inside Reproductive Health* (22 February, 2024) <<https://www.fertilitybridge.com/news-articles/digest02222024>> (last accessed 02 February, 2025)

⁵² Pat Leahy, 'Officials warn against "double standard" on commercial surrogacy' *The Irish Times* (27 January, 2022) <<https://www.irishtimes.com/news/social-affairs/officials-warn-against-double-standard-on-commercial-surrogacy-1.4786522>> (last accessed 02 February, 2025)

In addition, the ethical implications of international surrogacy are particularly complex. While it provides an option for those unable to pursue surrogacy domestically, it raises concerns about the potential exploitation of women in countries with less stringent regulations. As according to *The Critic*, ‘what goes unexplained is why any woman in another country would be willing to go through pregnancy (using a donor egg), childbirth and possible long-term gynaecological consequences only to give up her baby at birth for altruistic reasons to commissioning adults based in Ireland’.⁵³ The Irish Human Rights and Equality Commission has flagged exploitative surrogacy as an emerging form of human trafficking, highlighting the need for careful consideration of cross-border arrangements.

Child Welfare

Child welfare is another critical consideration. For instance, the potential psychological impact on children born through surrogacy and their right to know their genetic and gestational origins are a concern. The Health (Assisted Human Reproduction) Act, 2024 attempts to address some of these concerns by requiring a genetic link to at least one intending parent and mandating counseling for all parties involved.⁵⁴ It also ensures the child's right to access information about their origins upon reaching adulthood.⁵⁵

⁵³ Jill Nesbitt, ‘Ireland’s surrogacy scandal’ *The Critic* (09 July, 2024) <<https://thecritic.co.uk/irelands-surrogacy-scandal/>> (last accessed 02 February, 2025)

⁵⁴ Law Society, ‘Be My Baby’ (2024) <<https://www.lawsociety.ie/gazette/in-depth/2024/may/be-my-baby/>> (last accessed 02 February, 2025)

⁵⁵ GOV.ie (*op. cit.*)

Furthermore, the commodification of children is also a concern. Critics argue that legalizing surrogacy is ‘legalizing [*sic*] the sale of children’.⁵⁶ Supporters counter that intended parents’ motivations are rooted in a desire to create families, not to acquire commodities.⁵⁷

Cultural Influences

Ireland’s historically strong Catholic influence has contributed to ethical hesitations around surrogacy.⁵⁸ Catholic teachings emphasize the sanctity of natural conception and oppose practices like surrogacy which is deemed as ‘taboo’⁵⁹ that deviates from traditional reproductive norms. While contemporary Irish society has become more secular, this cultural context contributes to ethical hesitations and influences public policy discussions.

e. Conclusion

Ireland’s surrogacy landscape is complex, with recent legislation addressing domestic arrangements but gaps remaining for international surrogacy. The Health (Assisted Human Reproduction) Act, 2024 establishes a regulatory framework, prohibiting commercial surrogacy while allowing altruistic arrangements. Ethical concerns persist regarding exploitation, child welfare, and legal recognition of parentage, particularly in cross-border cases.

⁵⁶ Brenda Power, ‘Ireland’s new surrogacy law is legalising the sale of children’ *The Sunday Times* (22 September, 2024) <<https://www.thetimes.com/world/ireland-world/article/irelands-new-surrogacy-law-is-legalising-the-sale-of-children-6hsr0b5mf>> (last accessed 02 February, 2025)

⁵⁷ *cf. fn.* (54)

⁵⁸ Catholic Bishops, ‘Assisted Human Reproduction: Facts and Ethical Issues’ (2008) <<https://www.catholicbishops.ie/2008/02/07/assisted-human-reproduction/>> (last accessed 02 February, 2025)

⁵⁹ Growing Families (*op. cit.*)

D. Surrogacy in Northern Ireland

Surrogacy occurs ‘when a woman carries a baby for someone who is unable to conceive or carry a child’.⁶⁰ Despite this simplistic definition, gaps have continued to persist between Northern Ireland and the Republic of Ireland due to legislation or a lack thereof. This section will address the fundamental issues in Northern Ireland, highlighting the areas requiring redress.

a. Societal Attitudes

It is important to first acknowledge the cultural differences between Northern Ireland and the Republic of Ireland. The former, despite seeing the legalisation of same-sex marriage in 2020, continues to experience inconsistent societal acceptance for LGBT families, which is further complicated by surrogacy concerns.⁶¹ However, the geographical landscape plays a great role in societal attitude, with conservative views tending to dominate outside of urban areas.⁶² These influences must be recognised given the relatively new concept of ‘surrogacy’ in mainstream media.

b. Legal Considerations

Surrogacy is legal in the UK. However, ‘surrogacy arrangements’ are not legally enforced.⁶³ Therefore, in the case of conflict or disagreement, pre-made agreements are not legally binding, with courts prioritising child welfare over decisions previously made internally within a family. Child

⁶⁰ Q.U.B., ‘Care in Surrogacy in Northern Ireland Guidance for Intended Parents and Surrogates’ (Queen’s University Belfast, 2019)

⁶¹ Northern Ireland (Executive Formation etc) Act 2019, s. 8

⁶² Patrick Kelleher, ‘LGBT Life in Rural Ireland: “You Can Feel like You’re the Only One”’ *The Irish Times* (28 September, 2019) <<https://www.irishtimes.com/life-and-style/people/lgbt-life-in-rural-ireland-you-can-feel-like-you-re-the-only-one-1.4017385>> (last accessed 02 February, 2025)

⁶³ Q.U.B. (*op. cit.*)

welfare issues may include the transfer of custody post-birth, intended parents refusing to take responsibility for the child post-birth, and problems with the surrogate's expectations after pregnancy, including the expected level of contact and type of relationship with the child. These challenges are only compounded by the unenforceable nature of agreements, leaving the court to resolve such conflict.

Additional risks are contained within the Surrogacy Arrangements Act 1885, which stipulates that the advertisement of seeking a surrogate or an intended parent is a legal offence in Northern Ireland.⁶⁴

c. Parenthood

A 'Parent Order' is required to enshrine the intended parents legally as the official parents of the child from surrogacy. It is important to note that the lack of enforceability of agreements in Ireland as previously mentioned, results in a 'Parent Order' being a mandatory action to achieve legal status parentally.⁶⁵ However, uncertainty resides in the possibility of a change of mind by the surrogate. Comparably, the Republic initially considers the surrogate as the legal mother, with typically one additional parent being able to apply for guardianship. However, the proposed Assisted Human Reproduction Bill, 2022 would simplify this discrepancy, by establishing the legal parents pre-birth. Notably, this is only relevant to altruistic, not international surrogacy. Whilst similar challenges

⁶⁴ *id.*

⁶⁵ *id.*

exist in the Republic, the new Bill would require final consent post-birth, potentially posing additional challenges for the intended parents after pregnancy.

Additionally, to be registered as legal parents, it takes a period of at least 6 weeks for this to occur, hence creating issues regarding parenthood and consent concerning medical implications within this period.⁶⁶ Problems have tended to arise for LGBT+ couples. With only one of the intended parents being recognised initially, this poses problems with medical consent, with it undermining the role of the intended parent who is not on the birth certificate.⁶⁷

Sperm donors through a Human Fertilisation and Embryology Authority (HFEA) licensed clinic, backs the rights of egg donors. Notably, an egg donor will continue to be considered as the legal mother under UK law.⁶⁸ Comparatively, sperm donors lack this legal right, as their name does not appear on the birth certificate, and they have no legal obligations to the child.

d. Financial Issues

Cost of surrogacy

Paying a surrogate mother is not illegal in the United Kingdom.⁶⁹ However, court authorisation is needed for the application of parenthood concerning 'reasonable expenses'. Notably, the High Court has taken a relaxed approach to this in the international setting. This a notable difference

⁶⁶ Sophie Flint, 'The Legal Solutions for Surrogacy in Northern Ireland' *Wilson Nesbitt* (7 August, 2024) <<https://wilson-nesbitt.com/the-legal-solutions-for-surrogacy-in-northern-ireland/>> (last accessed 01 December, 2024)

⁶⁷ Aine McGlinchey, 'Surrogacy: Derry Dads Call for Simpler Laws in the UK' *BBC News* (05 May, 2023) <<https://www.bbc.co.uk/news/uk-northern-ireland-65486716>> (last accessed 02 February, 2025)

⁶⁸ GOV.uk, 'Legal Rights for Egg and Sperm Donors' (2024) <<https://www.gov.uk/legal-rights-for-egg-and-sperm-donors>> (last accessed 02 February 2025)

⁶⁹ Aine McGuinness, 'How Does Surrogacy Work in Northern Ireland?' *Wilson Nesbitt* (20 June, 2022) <<https://wilson-nesbitt.com/how-does-surrogacy-work-in-northern-ireland/>> (last accessed 1 December 2024)

between the legality of ‘reasonable expenses’ and the prohibited act of paying a surrogate for this service must be acknowledged.

e. Maternity and Paternity Allowances

The birth mother is guaranteed the equivalent to maternity leave, despite being a surrogate.⁷⁰ The intended parents are entitled to adoption leave provided they are eligible and apply for a Parental Order. This is applicable to surrogacy overseas additionally.⁷¹

Statutory paternity leave requires the intent to apply for a parental order within 6 months after birth with an expectation that it will be accepted, and to meet the eligibility requirements for this leave.⁷² However, the surrogate’s partner can not apply for paternity leave as they lack responsibilities concerning the child.⁷³ Issues including parental orders, legality of sale and financial costs must be addressed to ensure coherency and consistency for intended parents.

E. Conclusion

Reproductive rights still remain highly contentious in both jurisdictions. In light of potential unification, it is clear that legislation around abortion and surrogacy will need to be brought in-line. In relation to abortion, both regimes are similar, with the main difference being the compressed

⁷⁰ ‘Time off and Pay for Parents in Surrogacy Arrangements’ (Maternity Action March 2018) <<https://www.maternityaction.org.uk/wp-content/uploads/Surrogacy-2018.pdf>>.

⁷¹ ‘Time off and Pay for Parents in Surrogacy Arrangements’ (Maternity Action March 2018) <<https://www.maternityaction.org.uk/wp-content/uploads/Surrogacy-2018.pdf>>.

⁷² ‘Surrogacy - Paternity Leave and Pay - Acas’ (Acas 4 September 2024) <<https://www.acas.org.uk/paternity-rights-leave-and-pay/paternity-leave-and-pay-for-surrogacy>> accessed 1 December 2024.

⁷³ Natalie Gamble, ‘Paternity and Maternity Leave for Surrogacy - Brilliant Beginnings’ (Brilliant Beginnings 27 June 2020) <<https://brilliantbeginnings.co.uk/paternity-and-maternity-leave-for-surrogacy/>> accessed 1 December 2024.

timeline imposed in Northern Ireland. Both jurisdictions have been criticised for failing to ensure sufficient access to health-care, especially through the mandatory 3-day waiting period in Ireland and the gaps in the provision of abortion services in Northern Ireland.

Surrogacy remains a much more under-developed and emerging area of law. In Ireland, the introduction of legislation in 2024 explicitly endorses an altruistic model of surrogacy. Under current Northern Irish law, surrogacy agreements are not legally binding, and the surrogate is the child's legal parent at birth. Legal parenthood can only be transferred by parent order or adoption after the child is born.

III. LGBTQ+ Rights and Same-Sex Civil Partnerships

by Mythili Jaikrishnan, Darine Abunimh and Roxane Monmarche-Fontainz

A. Parenthood

LGBTQ+ families now hold equal standing in terms of legal recognition for adult partnerships. Marriage is available to everyone, and the cohabitation redress scheme offers a safety net for all adults in qualifying, close, two-person relationships. However, as will be discussed, acknowledging and safeguarding parent-child relationships within LGBTQ+ families remains more complex.

a. Ireland

One central challenge in achieving equality for same-sex families in Ireland is the legal recognition of parent-child relationships. Irish law often links parental rights to biological connections, creating significant barriers for same-sex couples, especially in situations involving assisted reproductive technologies such as surrogacy or donor conception.¹

Many same-sex parents are forced to undergo prolonged, expensive, and emotionally draining legal processes, such as adoption or obtaining court orders, to secure legal recognition of their parentage. These burdens create significant disparities between same-sex families and their heterosexual counterparts.²

¹ Lydia Bracken, "'Heteronormativity at Every Turn': The Legal Recognition of Same-Sex Parents in Ireland" (2023) *LGBTQ+ Family: An Interdisciplinary Journal* 1

² Equality for Children, 'Press Release 21st January 2022' (2022) <<https://equalityforchildren.ie/updates-posts/press-release-21st-january-2022>> (last accessed 02 February, 2025)

b. Northern Ireland

Similar to Ireland, legal implications complicate the path to parenthood for LGBTQ+ families in Northern Ireland. Legal frameworks often fail to fully recognize or protect the family structures of LGBTQ+ individuals. Parentage laws predominantly rely on biological and heteronormative models, which exclude non-biological parents in same-sex relationships from automatic legal recognition.³

The emotional toll of these challenges is profound. LGBTQ+ individuals navigating the path to parenthood often face discrimination, stigma, and societal pressures, compounded by the lack of institutional support. The legal ambiguities surrounding parentage can lead to feelings of insecurity and exclusion, not only for the parents but also for the children, who may grow up in families that are not fully recognized by the state. These legal and emotional hurdles reinforce societal biases, marginalizing LGBTQ+ families and perpetuating inequalities.

B. Surrogacy and Donor-Assisted Human Reproduction

a. Ireland

In Ireland, surrogacy is allowed but unregulated by specific laws.⁴ Currently, the surrogate is the legal mother, and only a genetically related intended father can be recognized as the legal father at birth. Non-gestational or non-genetically related intended parents lack legal recognition.⁵

³ D Mackle and F Bloomer, 'LGBTQ+ Community's Journey to Parenthood: Considering the Health Inequalities and the Legal Implications that Exist in the Pursuit of Parenthood for the LGBTQ+ Community in Northern Ireland' (ARK Policy Brief 19, August 2021)

⁴ MMCE, 'Everything You Need to Know About Surrogacy Explained' (2024) <https://mmce.ie/everything-you-need-to-know-about-surrogacy-explained/> (last accessed 02 February, 2025)

⁵ Citizens Information, 'Surrogacy in Ireland' (1 July, 2024) <<https://www.citizensinformation.ie/en/birth-family-relationships/adoption-and-fostering/surrogacy/>> (last accessed 02 February, 2025)

The Health (Assisted Human Reproduction) Act, 2024 aims to regulate surrogacy, limiting it to domestic, gestational, and altruistic arrangements. However, for male same-sex couples, only the genetically related father can gain legal recognition under current law.⁶

The Children and Family Relationships Act, 2015 seeks to establish regulations for determining parentage in cases of assisted reproduction, excluding surrogacy. Initially, this section would have allowed intended parents—whether in same-sex or opposite-sex relationships—to apply to the court for a declaration of parentage for a child born via surrogacy.⁷ Under Head 12, the parents of a child born through surrogacy would be the genetic contributor and their consenting partner, with both contributors recognized as parents following a court application.⁸

Limitations do exist, say if a surrogate refused to transfer parentage to married opposite-sex genetic parents, it could breach the child's constitutional right to be raised by their genetic, married parents under Articles 42A and 41 of the Irish Constitution.⁹ However, for male same-sex couples, where only one partner is the genetic parent, the argument is weaker.¹⁰ The genetic father could seek guardianship or access, but the couple lacks constitutional protections, making it harder to claim a rights violation.¹¹

⁶ *id.*

⁷ Beatrice Cronin, 'Children and Family Relationship Act 2015: review of certain commenced provisions' (2016) *Ir. Soc. Worker* 3

⁸ *id.*

⁹ *id.*

¹⁰ *id.*

¹¹ *id.*

b. Northern Ireland

Surrogacy is legal in Northern Ireland, but the lack of strict regulations has long left the practice unregulated.¹² In March 2021, the Northern Ireland Assembly took a significant step forward by passing the Child Arrangements Bill, aimed at modernising surrogacy laws. This bill proposes key reforms, including establishing legal parenthood for intended parents, providing greater protections for surrogates and children, and introducing clear criteria for surrogacy arrangements.¹³ These criteria include a minimum age of 18 for intended parents, a genetic link to the child, and mandatory counselling. While widely regarded as a positive development for surrogacy rights, the bill still requires further legislative approval before becoming law.¹⁴

In 2022, Patrick and Jon Coyle made history as the first same-sex couple in Northern Ireland to become parents through surrogacy.¹⁵ Their landmark journey underscored the evolving legal and social landscape for LGBTQ+ families, representing a pivotal moment in the region's progress toward reproductive rights and family diversity. Though advancements in this area have been relatively recent, public support for LGBTQ+ families in Northern Ireland continues to grow, signalling a shift toward greater acceptance and inclusivity.

¹² 'Is Surrogacy Legal in Northern Ireland?' *Wilson Nesbitt* (01 August, 2024) <<https://wilson-nesbitt.com/is-surrogacy-legal-in-northern-ireland/>> (last accessed 02 February, 2025)

¹³ 'Will Surrogacy Law Change in Northern Ireland?' *Wilson Nesbitt* <<https://wilson-nesbitt.com/will-surrogacy-law-change-in-northern-ireland/>> (last accessed 02 February, 2025)

¹⁴ *id.*

¹⁵ Shane O'Brien, 'Patrick and Jon Coyle: First Gay Couple in Northern Ireland to Have Baby through Surrogacy' *IrishCentral* (15 February, 2022) <<https://www.irishcentral.com/news/patrick-jon-coyle-northern-ireland-surrogacy>> (last accessed 02 February, 2025)

C. Adoption and Guardianship

a. Ireland

The Adoption (Amendment) Act, 2017 broadened the eligibility criteria for adoption, allowing married couples, civil partners, cohabiting couples, and individuals to adopt.¹⁶ Under the updated Act, LGBTQ+ individuals and couples have equal access to both domestic and international adoption, on the same terms as heterosexual applicants.¹⁷ All prospective adopters are required to undergo suitability assessments by TUSLA, the Child and Family Agency.

However, domestic adoption remains uncommon for LGBTQ+ families as suggested by surveys. This is unsurprising given that only 728 domestic adoption orders were granted in Ireland from 2010 to 2020, with fewer than ten stranger adoptions finalised each year. Most domestic adoption orders were granted with regards to step-parent adoptions.¹⁸ Although Irish law allows for joint adoption and second-parent adoption for gay and lesbian applicants, only 60% of adoptive parents who adopted abroad reported that both they and their current or former partner are legally recognized as parents in Ireland. An analysis of responses indicates possible ambiguity in how this question was understood, suggesting that the actual percentage of respondents with full legal recognition may be lower than 60%.¹⁹

¹⁶ Adoption Act 2010, s. 33 (as amended by Adoption (Amendment) Act 2017, s. 16)

¹⁷ *id.* s. 34

¹⁸ AAI, 'Celebrating 10 Years of the Adoption Authority of Ireland: 2010-2020' (15 December 2020) <https://aai.gov.ie/images/Celebrating_10_Years_of_the_Adoption_Authority_of_Ireland.pdf> (last accessed 02 February, 2025)

¹⁹ Lydia Bracken, 'LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships' (2021, University of Limerick)

On the other hand, guardianship, as offered by Part 4 of the Children and Family Relationships Act 2015 broadens the category and allows more adults to gain long-term decision-making authority over children. This framework can sometimes help LGBTQ+ families navigate legal challenges due to the lack of joint parental recognition, though it is bound by limitations.

Irish law remains centred around mothers and marital status: mothers are automatic guardians, as are both parents in heterosexual marriages.²⁰ Section 6C of the Act now allows non-parents to seek guardianship through the court. Eligible applicants include step-parents or cohabitants living with the child's parent for three years and involved in the child's care for at least two, as well as foster or informal caregivers who have looked after the child for over 12 months when no other guardians are available. For LGBTQ+ families, this provision allows non-recognized parents to seek guardianship after two years.

b. Northern Ireland

Adoption by unmarried and same-sex couples became legal in Northern Ireland following landmark rulings by the High Court in 2012 and the Court of Appeal in 2013,²¹ which found the region's ban on same-sex adoption discriminatory and a violation of human rights. This ruling brought Northern Ireland in line with the rest of the UK regarding LGBTQ+ adoption rights.

The attitude towards LGBTQ+ family life was recorded in 2013, with the results showing generally positive attitudes: 50% of respondents believed lesbians should have equal access to IVF (with 37%

²⁰ Guardianship of Infants Act 1964, s. 6

²¹ *The Northern Ireland Human Rights Commission's application* [2012] N.I.Q.B. 77

opposed); a slight majority supported adoption rights for gay couples (40% in favour, 33% opposed) and lesbian couples (45% in favour, 28% opposed); and twice as many respondents agreed that both lesbian and gay couples with children qualify as a 'family'. This was unfortunately the last time such questions were posed by an official survey.

It is also to be noted that, by 2018, nearly five years after the law change, reports indicated that out of 30 same-sex couples who applied to adopt, only 2 had successfully had a child placed with them—a placement rate of 1 in 15.

D. Same Sex Civil Partnership

a. Ireland

Civil Partnership Act 2010

In Ireland, the legal Act regarding same sex civil partnerships and marriages is called the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

In the first part of the Act under the second point, a civil partnership registration is defined. It means that there is the need of a registration of a civil partnership under section 59(d) (as inserted by section 16 of this Act) of the Civil Registration Act, 2004.

The crucial amendment made by the Civil Partnership Act is that under Part 1 Section 3. It states that persons of the same sex can be parties of a civil partnership.

Conditions

Section 59(d) of the Civil Partnership Act 2010 explains special conditions that have to be respected in accordance with the law. First, the parties have to be present to sign the partnership. Then, they

also have to orally express their consent to the partnership as well as bringing two witnesses over 18 years old. The signature has to happen in a place open to the public. Some exceptions can occur if one of the parties is too ill according to a medical certificate and cannot attend a place that is open to the public.

Some important declarations should be made (Section 59(d) 1—3) by the parties. It consists of any of the parties does not know of any impediment to the civil partnership registrations. They also have to declare that they have the intention to live with another and also support the party. It is not precisely implied if the support has to be financial. Finally, the last mandatory declaration is to accept the other party as a civil partner in accordance with the law.

One last important mention is that this act is only available for person of the same sex, Part 11 Section 107 (e) clearly states that if the parties of the civil partnership are not of the same sex, then the partnership can be granted a decree of nullity.

b. Northern Ireland

With the Civil Partnership Act, 2004, Northern Ireland granted the availability for person of same sex to form a civil partnership. According to the first part of the Act in its introduction Section 1 (a) (iii), '[a] civil partnership is a relationship between two people of the same sex. which is formed when they register as civil partners of each other in Northern Ireland (under Part 4)'.

Conditions/eligibility

Under Part 4, chapter 1 section 137, the formation of the civil partnership happens through a registration. This registration happens with the signature of the civil partnership document in presence of the civil partnership registrar, two witnesses to be 16 years of age or older and the parties involved.

It can also be added that in accordance with Part 4 chapter 1 137 (5) of the Act no religious service is to be used while the registrar is officiating as the signing of a civil partnership schedule.

Under s. 138, to be eligible to the registration of the civil partnership, the parties have to be 16 years old or over, not a civil partner or married. Another ineligibility is if they are within prohibited degrees of relationship. It means if they are too closely related. Finally, the parties have to be capable of understanding the nature of civil partnership. Other specific conditions apply if one of the parties is not a relevant national (s. 139). Under s. 144, the place of registration can be a registration office, or a place approved under subsection (3). Under s. 145 a parental consent is needed for young persons under the age of 18, a specific form has to be followed.

E. Marriage

a. Ireland

2015 Marriage Act (Marriage Equality Act)

Same sex marriages have been allowed since 2015 in Ireland. For the same-sex marriage to be lawful, the same-sex civil partnership has to be dissolved. The Marriage Act, 2015 does not oblige any religious body to recognise a particular form of marriage ceremony.

Conditions/Form

The parties have to be of the same sex. Regarding the dissolution of civil partnership, when the marriage of two parties is solemnised, the civil partnership is automatically dissolved (Part 7C, s. 59K). There is also a specific time schedule that has to be followed. First, according to the

Amendment of section 46 (1) of Act of 2004, point 9 (a) (i) the parties have to notify any registrar in writing form their wish to be married not less than three months to the date the marriage is to be solemnised or at any time prior to the marriage if the parties are already subsisting in a civil partnership. There is also a possibility to recognise foreign relationships.

The implication of the authorisation of the same sex marriages has repercussions to the vocabulary employed in several others acts related to the marriage, therefore the words ‘husband’ or ‘wife’ have to be changed to ‘spouse’.

b. Northern Ireland

Since January 13th, 2020, same sex marriages are allowed in Northern Ireland, through the provisions of the The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations, 2019. As such, parties being of the same sex no longer to be a ground on which a marriage is void.

Conditions/Form

The prohibition on religious marriage of same-sex couples has been removed. There is no real clarity on whether a religious body is forced to celebrate the marriage. Foreign marriages can also be recognised under certain conditions. Globally, all the prerequisites for a different sex marriage also apply for same sex marriages.

F. Conclusions

The legal frameworks governing marriage, parenthood, and family structures for LGBTQ+ individuals in Ireland and Northern Ireland share broad similarities but diverge in key respects. One of the

most significant differences lies in parentage laws. Both jurisdictions heavily rely on biological connections to determine legal parenthood, disadvantaging same-sex couples, particularly in cases of assisted reproduction and surrogacy. However, Ireland has taken steps toward reform through the Health (Assisted Human Reproduction) Act, 2024 – albeit with limitations for non-biological parents in male same-sex couples. In contrast, Northern Ireland’s surrogacy laws remain largely unregulated; though the Child Arrangements Bill proposes substantial reforms, including automatic legal recognition for intended parents. Adoption laws in both jurisdictions grant LGBTQ+ couples equal rights, but practical barriers persist. While Ireland’s Adoption (Amendment) Act, 2017 allows same-sex couples to adopt, the small number of domestic adoptions and legal uncertainties surrounding international adoptions create obstacles. Northern Ireland saw legal change earlier, with courts striking down same-sex adoption bans in 2012 and 2013, but adoption rates for same-sex couples remain low. Marriage and civil partnership laws exhibit fewer disparities. Ireland introduced same-sex marriage *via* referendum in 2015, thus replacing civil partnerships; whereas Northern Ireland only legalized same-sex marriage in 2020. Civil partnerships remain an option in Northern Ireland but were effectively phased out in Ireland following marriage equality. Conclusively, both Ireland and Northern Ireland should grant automatic legal recognition to non-biological parents in same-sex families, removing reliance on biological ties. Surrogacy laws should be afforded more comprehensive regulation, ensuring intended parents are recognized from birth. Adoption processes should be streamlined to improve access for LGBTQ+ couples. Finally, both jurisdictions should ensure full equality in marriage and civil partnerships, thereby removing residual restrictions.

IV. Socio-Economic Rights and Judicial Interpretation

by Homesh Rajesh

I. Introduction

This section will explore how Socio-Economic rights may be Interpreted within the Judiciary of a United Ireland. I will explore how the prospect of unification raises critical questions of how constitutional, legal and policy frameworks address the Socio-Economic Rights of this hypothetical nation. This will be achieved by analysing the areas of divergence of Socio-Economic Rights within the Constitutions of both Ireland and the United Kingdom. Next, I will explore the distinctions between rights recognised within Irish and Northern Irish case law. Finally, I will evaluate academic perspectives of how Socio-Economic Rights should be enforced by the Judiciaries of both nations.

II. Socio Economic Rights within the Republic and Northern Ireland

Article 45 of the Irish Constitution¹ clearly sets out the principles of Social Policy the Irish State shall afford to its populace, to be followed by both the Oireachtas and Judiciary in procuring and interpreting laws. Article 45 defends universal principles of welfare, achieved by protecting a 'social order' of which 'justice and charity' are enshrined. Similarly, the Human Rights Act, 1998² derived from the European Commission of Human Rights sets out the fundamental rights and freedoms that the populace of Northern Ireland is entitled to. This Act uniformly affords universal Social and

¹ Article 45

² The Human Rights Act 1998

economic protection, protections which defend rights to Property³, Education⁴, and Expression⁵ among many others. Though this Act does not oblige the United Kingdom's governance to act in a manner articulated by the Irish Constitution, clear lines are drawn which defend the key concepts on Socio-Economic Rights which are universal to both legislations. However, though the Northern Irish population benefits from certain socio-economic benefits which are not enjoyed by the South, for instance the duty of the Government to 'adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need' articulated in the Northern Ireland Act.⁶ Additionally, every person who meets the definition of 'not intentionally homeless' has the right to be provided with accommodation by their local housing authority⁷; whereas the Republic of Ireland owes no duty to house its population. However, it is clear that the Irish population is afforded a greater scale of socio-economic rights and protections in its constitution, as the ECHR which mainly outlines rights enjoyed by the North is also accepted in Irish Law. Although, this is all subject to how the Judiciary utilises these broad rights.

III. Judicial Diversion in Key Cases

Within the Irish Courts it is clear how these rights are acknowledged and understood. *T.D. v. Minister for Justice*⁸ is a bright-line example of such clarity. Therein, ex-Minister for Education, Michael Woods, had repeatedly failed to meet deadlines to provide the applicants with a new educational facility which would meet their needs. A case was brought on the basis that such inaction constituted

³ The Human Rights Act 1998, s. 2, Art. 1

⁴ The Human Rights Act 1998, s. 2, Art. 2

⁵ The Human Rights Act 1998, s. 1, Art. 10

⁶ Northern Ireland Act, s. 28

⁷ Wendy Wilson and Cassie Barton, *Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland* (House of Commons Library, Briefing Paper No 7201, 5 April 2018)

⁸ *T.D. v. Minister for Education* [2001] IESC 101

an abrogation of their constitutional right to education. The High Court and Supreme Court both dismissed the claim, failing to order a mandamus, stating ‘it simply offends in principle the doctrine of separation of powers’. The Courts turned to the ‘clear disregard’ test in determining whether these rights should be enforced, failing to act on the rights afforded in the Constitution. Similarly, in *Sinnott v. Minister for Education*⁹, the Supreme Court overturned the lower court judgement to the effect that the State failed in materialising give effect to the right to ‘free primary education’¹⁰ under the Constitution. This pattern of inaction was followed in *O’Reilly v. Minister for Justice*¹¹, in which members of the Traveller community claimed damages for the lack of halting sites provided by the Housing Authority, claiming this infringed upon the personal rights inferred upon them by the Constitution.¹²

Within the Northern Ireland, this pattern of Judicial inaction is not reflected, and the Courts of Northern Ireland have issued vitriolic declarations. In *Conradh na Gaeilge’s Application*¹³ the Courts asserted that the ‘Executive Committee has failed, in breach of its statutory duty’ of upholding to uphold the aforementioned Northern Ireland Act. Though this is no injunction, it is unequivocally a more pro-active response than that usually employed by the Irish courts, where there seems to be simply a difference than simply a desire to shift the blame as seen with the Irish Courts.

III. Academic Perspectives

It is in the perspective of several academics that both the North and Republic of Ireland have severe shortcomings in relation to socio-economic rights, which diminishes divergence between the two

⁹ *Sinnott v. Minister for Education* [2001] 2 I.R. 545

¹⁰ Article 42°, s. 4.

¹¹ *O’Reilly v Minister for Justice* [1989] I.L.R.M. 181

¹² Article 40, s. 1.

¹³ *Conradh na Gaeilge’s Application* [2017] N.I.Q.B. 27

States and may make unification a less turbulent ordeal. However, there are still key divergences in key areas. Firstly the aforementioned burden of housing faced by the Northern Irish government will most likely never extend to the South. The housing crisis and reluctance of the Courts to derive and vindicate rights as seen in *T.D.* being the main factors for such, as articulated by Rachel Walsh.¹⁴ *T.D.* continues to play a pivotal part in Dickson's observation¹⁵, that Irish courts, as seen in exemplified in *T.D.*, adopt a strict separation of powers, resisting enforceable socio-economic rights. In contrast, the Northern Irish judiciary operates within the confines of the U.K.'s legal framework, where proportionality and human rights considerations under the Human Rights Act, 1998 allow for greater judicial scrutiny of state actions impacting socio-economic rights. In a similar manner, Laura Cahillane critiques Ireland's judicial reluctance¹⁶, rooted in constitutional formalism, as limiting rights vindication. This contrasts with Northern Ireland's framework, which permits broader judicial intervention, emphasizing individual rights within a proportionality-based analysis. These differences reflect a significant divergence in the judicial philosophies of the two jurisdictions and pose challenges for judicial harmonisation in a United Ireland.

IV. Conclusion

As illustrated, divergence in judicial philosophies between the Republic of Ireland and Northern Ireland presents significant challenges for harmonising socio-economic rights in a United Ireland. While Ireland's courts emphasize strict separation of powers and limited judicial intervention, Northern Ireland's proportionality-based framework under the Human Rights Act facilitates

¹⁴ Rachel Walsh, 'Distributing Collective Burdens and Benefits: O'Reilly, TD and the Housing Crisis' (2022) 3 *I.J.S.J.* 63

¹⁵ Brice Dickson, 'Judicial Enforcement of Social Rights in a Comparative Perspective' (2022) 3 *I.J.S.J.* 82

¹⁶ Laura Cahillane, 'The TD Case and Approaches to the Separation of Powers in Ireland' (2022) 3 *I.J.S.J.* 10

broader judicial enforcement. Bridging these differences will require careful constitutional and judicial reforms, ensuring socio-economic rights are effectively integrated into a unified legal system.

V. Children's Rights

by Molly Doyle, Lisa Spanier, Daria Jedruch, Eve O'Callaghan, and Sarra Abdalla

A. I. Introduction

Children's rights are essential for the wellbeing and development of young individuals. In Northern Ireland and the Republic of Ireland, these rights cover areas such as child welfare, education, juvenile justice, mental health services, and family law. Across both jurisdictions legislative and policy frameworks reflect commitments to international human rights standards, such as the United Nations Convention on the Rights of the Child (UNCRC). Despite their proximity, each State has developed distinct policies influenced by unique historical, cultural, and legal contexts.

This section offers a comparative analysis of children's rights in Northern Ireland and the Republic of Ireland. By examining sectors like the right to play and leisure, school meal policies, juvenile justice systems, mental health services, and family law, we aim to identify similarities and differences in how children's rights are protected and promoted. It seeks to highlight best practices, identify areas for improvement, and provide recommendations to enhance children's rights across the island of Ireland. Our goal is to contribute to the ongoing discussion on child welfare and support efforts to ensure all children can fully enjoy their rights and reach their potential.

B. I. Child Welfare Protections: The Right to Play and Leisure

The right to play and leisure applies distinctly and indeed exclusively to children. In Northern Ireland and the Republic of Ireland, this right is protected domestically and under the UN Convention on the Rights of the Child (UNCRC). While at first, the right to play may appear somewhat inconsequential, it is essential in its own right and as a result of its impact upon other fundamental rights like health, freedom, and equality. In this section, I will analyse areas of divergence between Northern Ireland and the Republic of Ireland, paying particular attention to the role religion, immigration, and Traveller status play in accessing the right to play.

II. Religion

For decades, the sharp delineation of Catholic and Protestant communities has resulted in restrictions on children's movement and right to play. 61% of children in North Belfast felt that leisure facilities were inaccessible due to their location in a perceived 'Protestant' or 'Catholic' area, according to a 2005 study.¹ Among the activities interviewees noted as difficult were meeting friends, going to the leisure centre, and playing sports.² Suspicion of the perceived 'out-group' notably engendered barriers for children's right to play: only 31% participated in cross-community projects, with an overwhelming number responding that fighting between communities resulted in further restrictions on their ability to play.³

¹ Jonny Byrne, Mary Conway and Malcolm Osterneyer, 'Young People's Attitudes and Experiences of Policing, Violence, and Community Safety in North Belfast' (2005, Institute for Conflict Research)

² *id.*

³ *id.*

In the Republic of Ireland, however, barriers between Catholics and Protestants play a lesser role than barriers between, for example, Christians and Muslims. Sociological factors leave Muslim children particularly vulnerable to low engagement in play activities. Music and representation of living creatures is forbidden by some Muslim groups, thus acting as a barrier to Muslim children in engaging in creative activities like art in environments where diverse faiths may not be considered. Muslim girls who wear hijabs may face additional barriers, particularly with regard to sports.

Finally, and most worryingly, proliferation of prejudice and xenophobia in play environments can effectively forbid Muslim children from equal access to play. While overt nationalist sentiment has become increasingly common in communities across Ireland, particularly in the wake of the 2023 Dublin riots, implicit biases are often those which impact upon children's right to play. In the 2022 survey, a key issue raised was the poor treatment some children received from other children due to their religious clothing, for example.⁴ These factors fundamentally alter Muslim children's access to play in the Republic of Ireland, and as a result acts as a stumbling block when it comes to integration into a largely Catholic society.

III. Immigrant Status

Play restrictions faced by immigrant children have long been cited as detrimental to their mental and physical health, as well as integration into their peer group.⁵ The welfare discriminations experienced by these children are unmistakable contraventions of the UNCRC.⁶

⁴ Zahra Farahani, Ellis Hennessy, and Lilyana Mbeve, 'Inclusion and Engagement of Children of Muslim Background in Creative Activities in Ireland' (University College Dublin School of Psychology)

⁵ Shirley Martin, Deirdre Horgan, Jacqui O'Riordan, and Reana Maier, 'Refugee and Migrant Children's Views of Integration and Belonging in School in Ireland- and the Role of Micro- and Meso-Level Interactions' (2021) 28(13) *Int. J. Incl. Ed.* 1

⁶ Bryan Fanning and Angela Veale, 'Child Poverty as Public Policy: Direct Provision and Asylum Seeker Children in the Republic of Ireland' (2004) 10(3) *Child Care in Pract.* 241

Social exclusion caused by living in Direct Provision hinders asylum seeker children's ability to become accepted in their social groups, which in turn creates barriers when it comes to play.⁷ Additionally, according to a report by The Department of Children (DYCA) in 2019, lack of facilities for adults in Direct Provision centres obstructs space available to children, with adults often taking over children's play spaces.⁸ Play spaces were found to be substandard with 'few toys and broke swings'.⁹ It appears, then, that the right to play has been confined to non-immigrant children in the Republic of Ireland, seen as a luxury rather than a necessity.

In Northern Ireland, meanwhile, lack of integration precludes immigrant children from accessing play. A 2010 study found that challenges many newcomer pupils in Northern Ireland faced when it came to play and leisure included language barriers, difficulties making new friends, and community racism.¹⁰ Racism was frequently cited as furthering social isolation and lack of access to play, with an implicit bifurcated system of difference producing a heightened sense of exclusionary collective identity among non-immigrant children in play environments.

This is especially acute when immigrant children do not speak fluent English, which was noted as being essential in terms of making friends and joining in with activities. Equally, however, many surveyed noted that they had made several friends, which widened their access to play, with one boy noting 'I am happy and I have got new friends and there are no soldiers'.¹¹ It appears, then, for both immigrant children who had positive experiences and those who had negative experiences,

⁷ Bryan Fanning and Lucy Michael, *Immigrants as Outsiders in the Two Irelands* (1st ed., Manchester University Press 2019)

⁸ Department of Children, Equality, Disability, Integration and Youth, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People, 2014-2020* (Stationery Office 2020)

⁹ Roisin Dunbar, Lauren Burke, Neasa Candon, Meghan Reid, Sien Crivits, Stacy Wrenn, and Angelica Shilova, 'Direct Provision's Impact on Children: A Human Rights Analysis' (2020, Irish Centre for Human Rights)

¹⁰ John McMullen, Sharon Jones, Rachel Campbell, Judith McLaughlin, Barbara McDade, Patricia O'Lynn, and Catherine Glen, 'Sitting on a Wobbly Chair': Mental Health and Wellbeing Among Newcomer Pupils in Northern Irish Schools' (2020) 25(2) *Emotional and Behavioural Difficulties* 125

¹¹ Teresa Geraghty, Celine McStravick, and Stephanie Mitchell, 'New to Northern Ireland: A Study of the Issues Faced by Migrant, Asylum Seeking and Refugee Children in Northern Ireland' (2010, National Children's Bureau)

friendship was a key determinant in the achievement of their right to play, a trend mirrored in experiences of these children in the Republic of Ireland.

IV. Traveller Status

Traveller children have long suffered from a greater infringement on their rights than non-Traveller children in both jurisdictions. This can hinder community integration, and lead to feelings of alienation which can deprive Traveller children of the right to play. In the Republic of Ireland, economic deprivation and discrimination are two critical factors preventing Traveller children from accessing their right to play. Payment required for many out-of-school activities can act as barriers to economically vulnerable Traveller children seeking to access these activities. Participation in these activities can improve longer term cognitive, educational, and social development, and therefore support must be extended to these children.¹²

In Northern Ireland, meanwhile, Traveller children's right to play has been hindered primarily due to safety concerns in the immediate surrounding environment. Mortality rates among Traveller children are impacted by the paucity of safe areas for these children to play. Traveller sites are often located at the edge of busy roads, with children in danger of being knocked down. The Commissioner for Children notes that 'alarmingly, the mortality rate of Traveller children up to the age of 10 has been found to be 10 times that for the population as a whole'¹³. The conditions under which Traveller children attempt to exercise their right to play thus infringe upon other fundamental rights like safety and health.

¹² Dorothy Watson, Oona Kenny, Frances McGinnity, and Helen Russell, 'A Social Portrait of Travellers in Ireland' (2017, E.S.R.I.)

¹³ Q.U.B., 'Children's Rights in Northern Ireland' (2004, Northern Ireland Commissioner for Children and Young People)

V. Conclusion

Therefore, the systems of Ireland and Northern Ireland as they relate to the right to play are deficient in a number of ways. However, we see much divergence in the inadequacies and strengths peculiar to territories. Religious background, immigrant status, and Traveller status manifest themselves as barriers to this right in a variety of ways. It must be asked what the solution can be to these systems. It is essential to take a multifaceted approach to the right to play and leisure, taking into account interests of children from all backgrounds, and reminding ourselves of links between play and other essential rights. In this way, the right to play and leisure for all children in Ireland can move from an ideal to a reality.

C. I. Education Rights - Right to Food

Especially for children, the importance of the right to food must not be understated. The right to adequate food is a prerequisite for the enjoyment of other human rights.¹⁴ For children, the right to food is particularly important because the deprivation of food at a young age has lasting effects on the physical and mental health of the child.¹⁵

Different international provisions protect the right to food for children. Article 11 of the International Covenant on Economic, Social and Cultural Rights protects the right to an adequate standard of living and lists the right to 'adequate food'.

Furthermore, the right of food is protected by the Convention on the Rights of the Child in article 24 (2) (c) and article 27 (1).

¹⁴ United Nations Committee on Economic, Social and Cultural Rights, 'General Comment 12' E/C.12/1999/5

¹⁵ Katie Morris, 'Young and Hungry: School Meal Policies and Children's Right to Food in the UK and Ireland' (2024) 32 *Int. J. Child. Rights* 354, 357

According to the General Comment No.12 of the CESCR Committee:—

‘[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.’¹⁶

In the following section it will be examined how Northern Ireland and Ireland implement their obligations. Since children receive a significant portion of their daily nutrition during school hours,¹⁷ school meals are an important possibility for the State to support children from different backgrounds. It is also a great opportunity to teach children about food and healthy nutrition. The focus will therefore lay on the school meal policy of the respective countries.

II. School Meal Programmes available to pupils

The school meal programmes available in Ireland and Northern Ireland differ considerable concerning the structure and the meals provided. In Ireland, the question of whether children will be provided with school meals and what these meals will consist of depends largely on the initiative of the different schools. It is rare in Ireland that freshly cooked meals are provided for the children, it is more common that pre-packed lunches get delivered from external businesses.¹⁸ This is because the funding of the two traditional programmes (Urban School Meals Scheme and School Meals Project

¹⁶ UNCSER (*op. cit.*)

¹⁷ Emily A. Busey, 'National Policies to Limit Nutrients, Ingredients, or Categories of Concern in School Meals: A Global Scoping Review' (2024) 8 *Curr. Devp. Nutr.* 1

¹⁸ Michelle Darmody, 'A kitchen at the heart of a school – an investigation into school meals in the Republic of Ireland' (2023) 42 *Ir. Educ. Stud.* 165; Morris (*op. cit.*)

Local Scheme) covers only food whereas staff and infrastructure are not included.¹⁹ However, in 2019, the 'Hot Meals Programme' was introduced in 30 pilot primary schools.²⁰ As of April 2024, pupils of 2000 schools profit from the programme.²¹ As a replacement of the cold lunch served before, a hot meal prepared and delivered by a supplier will be served in primary schools that don't have canteen and kitchen facilities on site.²² The programme has not yet reached secondary schools.

a. The Urban School Meals Scheme

In Northern Ireland, children get free school meals in their school if eligible.²³ The eligible criteria are determined by the limit of the family income or received allowances (*e.g.*, Universal Credit not over 15,000 £ a year, receiving Guarantee element of State Pension credit).²⁴ Recently, the Department of Education has published a consultation on free meals for all school pupils in Northern Ireland.²⁵

b. Nutrition Standards

In both states efforts to guarantee a nutritious meal have been undertaken. Nutritional standards for children's food are crucial as the obesity among children and adolescents has grown in every country between 1990 and 2022.²⁶

¹⁹ [1] Michelle Darmody, 'A kitchen at the heart of a school – an investigation into school meals in the Republic of Ireland' (2023) 42 *Ir. Ed. Stud.* 165, 169

²⁰ GOV.ie, 'School Meals' (2019) <<https://www.gov.ie/en/press-release/4449a-taoiseach-simon-harris-and-minister-humphreys-announces-rollout-of-hot-school-meals-to-additional-900-primary-schools/>> (last accessed 16 December, 2024)

²¹ *id.*

²² *id.*

²³ Morris (*op. cit.*) 360

²⁴ NI Direct, 'Nutrition and School Lunches' (2023) <<https://www.nidirect.gov.uk/articles/nutrition-and-school-lunches>> (last accessed 14 December, 2024)

²⁵ Education NI, 'Free school meals and uniform grants' (2024) <<https://www.education-ni.gov.uk/consultations/review-free-school-meals-and-uniform-grant-eligibility-criteria>> (last accessed 16 December, 2024)

²⁶ WHO, 'One in eight people are now living with obesity' (2024) <<https://www.who.int/news/item/01-03-2024-one-in-eight-people-are-now-living-with-obesity>> (last accessed 16 December, 2024)

The Department of Social Protection (Department of Health) issued standards for the Hot School Meals in Ireland.²⁷ The standards have for aim to ensure that children are provided ‘healthy, nutritious and balanced lunch’.²⁸ However, no information on how schools will be assessed is provided.²⁹ In Northern Ireland, the ‘Healthy Food in Schools Policy’ contains mandatory elements as well as recommendations for schools (3.1 of the Healthy Food in Schools Policy).³⁰ The schools are encouraged to adopt a ‘whole-school’ approach to food and nutrition encompassing all aspects of nutrition in the school.³¹

c. Learning about nutrition

In Ireland, the Social, Personal and Health Education curriculum includes lessons on maintaining a balanced diet and making healthy food choices according to their age.³² In Northern Ireland, schools should establish strong connections between lessons on nutrition and health and physical education (3.5 of the Healthy Food in Schools Policy).³³

D. I. Juvenile Justice in Northern Ireland and Ireland: A Comparative Analysis

Juvenile justice systems are designed to address youth offending in a manner that balances accountability with the protection of children’s rights. While Northern Ireland and Ireland share many principles in their approaches, such as the prioritisation of rehabilitation and the use of restorative justice, there are significant differences in their legal frameworks, diversion practices, and detention

²⁷ GOV.ie, ‘Nutrition Standards for School Meals’ (2017) <<https://www.gov.ie/pdf/?file=https://assets.gov.ie/128268/d07bed24-dd1d-4055-8ced-5e381621ca65.pdf#page=null>> (last accessed 16 December, 2024)

²⁸ *id.*

²⁹ Morris (*loc. cit.*)

³⁰ Education NI (*op. cit.*)

³¹ *id.*

³² Social, Personal, and Health Education, ‘Curriculum’ (1999) <https://www.curriculumonline.ie/getmedia/462570f8-27cc-4f5b-a13e-d1e2de8c18d2/PSEC06_SPHE_curriculum.pdf> (last accessed 16 December, 2024)

³³ Education NI (*op. cit.*)

policies. This section explores these areas of divergence and highlights how each system responds to the needs of young offenders.

II. Minimum Age of Criminal Responsibility

One key divergence between the juvenile justice systems in Northern Ireland and Ireland is the minimum age of criminal responsibility (MACR). In Northern Ireland, the MACR is set at 10, one of the lowest in Europe. This means that children as young as 10 can be held criminally responsible and subject to formal judicial proceedings. This age has drawn criticism from human rights organisations and the UNCRC, which recommends a minimum age of at least 12 years.³⁴ A 2011 review suggested raising the age to 12, with consideration for 14, but these recommendations have yet to be implemented.³⁵

Ireland, by contrast, has a higher threshold. Under the Children Act 2001, the MACR is 12, except for serious offenses such as murder or manslaughter, where children aged 10 and 11 can also be prosecuted.³⁶ This higher age aligns more closely with international standards and reflects a broader emphasis on keeping younger children out of the formal justice system. The discrepancy between the two jurisdictions raises questions about the consistency of children's rights protections across the island.

³⁴ UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland* (UN Doc CRC/C/GBR/CO/5, 3 June, 2019) [79]

³⁵ Department of Justice, Equality and Law Reform, 'A Review of the Youth Justice System in Northern Ireland' (2011) [5.6.6.]

³⁶ Criminal Justice Act, s. 129

III. Diversion and Restorative Justice

Both jurisdictions emphasise diversion and restorative justice as alternatives to formal judicial proceedings, aiming to minimise the negative impacts of criminalisation on young people. However, the mechanisms and implementation of these practices vary.

In Northern Ireland, diversion is a cornerstone of the youth justice system, facilitated by the Youth Justice Agency (YJA).³⁷ Police-led measures, such as cautions and warnings, are common for minor offenses. More significantly, Youth Conferences play a central role in restorative justice. These conferences bring together young offenders, victims, family members, and other stakeholders to discuss the offense and agree on a reparative plan.³⁸ Youth Conferences are internationally recognised for their effectiveness in reducing reoffending rates and improving victim satisfaction.³⁹ However, while restorative in intent, concerns have been raised about their potential to feel punitive, particularly when young offenders perceive a lack of choice in the process.⁴⁰

Ireland's diversion efforts are led by the Garda Youth Diversion Programme (GYDP), established under the Children Act, 2001.⁴¹ The GYDP provides a more informal framework for addressing youth offending, allowing the Gardaí to caution young offenders and refer them to Youth Diversion Projects.⁴² These projects are tailored to support behavioural change and reintegration into the community. Prioritising early intervention, the GYDP addresses the root causes of offending through

³⁷ Criminal Justice Inspection Northern Ireland, 'The Effectiveness of Youth Conferencing' (2015) <<https://www.ccp-probation.org/wp-content/uploads/2018/10/Effectiveness-of-Youth-Conferencing-in-Northern-Ireland-23.03.15.pdf>> (last accessed 15 December, 2024)

³⁸ Deena Haydon and Siobhan McAlister, 'Young People, Crime and Justice in Northern Ireland', in Anne-Marie McAlinden and Clare Dwyer (eds.), *Criminal Justice in Transition: The Northern Ireland Context* (Hart 2015) 219

³⁹ *id.*

⁴⁰ *id.*

⁴¹ Children Act 2001, s. 20

⁴² John Reddy, 'The Youth Justice System in Ireland: A Review (Revised 2022)' (2022) <<https://hdl.handle.net/10344/11103>> (last accessed 15 December, 2024)

strong collaboration with community partnerships and support networks, fostering long-term positive outcomes for young people.

Although both systems share a commitment to restorative practices, their implementation differs. Ireland's programme places more emphasis on early intervention through collaborative community efforts, aiming to keep young people out of the justice system altogether. By contrast, Northern Ireland's Youth Conferences, offer a more formalised approach that prioritised victim involvement and accountability. Both approaches demonstrate a shared goal: reducing reliance on prosecution and detention while promoting rehabilitation.

The operation of youth courts in Northern Ireland and Ireland reflects a shared commitment to creating child-friendly judicial environments, but notable differences exist in their processes and handling of serious cases involving young offenders.

In Northern Ireland, most juvenile cases are handled by the Youth Court, which is designed to be less formal than adult courts. The court comprises a District Judge and two Lay Magistrates, one of whom must be female. To foster a less intimidating atmosphere, wigs and gowns are not worn, and young people typically sit at a table rather than in a dock. Despite these efforts key challenges remain including delays in case processing and the need for greater specialisation and training for legal professionals involved in youth cases.⁴³ Such delays undermine the rehabilitative intent of the system and risk exacerbating the harm to young people already in contact with the justice process.

In Ireland, the Children Court operates under similar principles, emphasising informality and privacy.⁴⁴ Judges receive specific training, and proceedings are closed to the public to protect the child's

⁴³ Department of Justice (*op. cit.*)

⁴⁴ Children Act 2001, Part 7

identity. While delays remain a challenge, the Children Act includes provisions to ensure cases are resolved expeditiously, minimising the disruptive impact on young offenders.⁴⁵

While both systems strive to create supportive and informal judicial processes, Ireland's approach reflects a more consistent commitment to child-centred justice, particularly in the handling of serious cases. Northern Ireland, despite its efforts, faces ongoing challenges related to delays, specialisation, and the transfer of cases to adult courts.

IV. Detention Practices

Detention is viewed as a last resort in both Northern Ireland and Ireland, but the policies and facilities differ. In Northern Ireland, custodial sentences are primarily served at Woodlands Juvenile Justice Centre, a facility that combines security with rehabilitative programmes. However, older juveniles (aged 16—17) may be detained at Hydebank Wood Young Offenders' Centre, where they are housed alongside adults. This practice has drawn criticism for undermining rehabilitation.⁴⁶ Additionally, the overuse of remand custody, particularly for non-threatening offenses, disproportionately affects vulnerable groups, such as 'looked-after' children.⁴⁷

In Ireland, the Oberstown Children Detention Campus serves as the primary facility for juvenile detention. Established under the Children Act 2001, Oberstown focuses on rehabilitation through education, therapeutic interventions, and individualised care plans. Ireland has largely eliminated the use of adult prisons for juveniles, aligning with best practices in children's rights. Detention

⁴⁵ Children Act 2001, Part 7

⁴⁶ Dr Linda Moore, 'The CRC Comes of Age: Assessing Progress in Meeting the Rights of Children in Custody in Northern Ireland' (2011) 62(2) *N.I.L.Q.* 217, 233

⁴⁷ Department of Justice (*op. cit.*)

orders in Ireland are subject to periodic review, ensuring that young offenders are not held longer than necessary.

While both jurisdictions prioritise rehabilitation, Ireland's stricter avoidance of adult facilities for juveniles is a notable strength. Reforming Northern Ireland's reliance on remand custody remains a pressing need.

V. Rehabilitation and Reintegration

Rehabilitation and reintegration are central goals of juvenile justice in both Northern Ireland and Ireland. However, challenges persist in ensuring that young offenders receive the support they need to avoid reoffending.

Northern Ireland's system emphasises education, vocational training, and community-based support programmes to prepare young offenders for reintegration. However, high reconviction rates suggest gaps in post-release support, particularly for accessing stable employment and housing.⁴⁸ Recommendations include reducing the stigma of criminal records and expanding support networks to prevent reoffending.⁴⁹

Ireland's rehabilitation framework is similarly focused on education and skill-building within detention facilities. The integration of community-based programmes, such as the GYDP provides continuity of support after release.⁵⁰ Ireland's holistic approach, which includes collaboration with

⁴⁸ Department of Justice (Northern Ireland), *Research and Statistics Bulletin: Adult and Youth Reoffending in Northern Ireland (2021/22 Cohort)* (17 October 2024) <<https://www.justice-ni.gov.uk/news/adult-and-youth-reoffending-northern-ireland-202122-cohort-published-today#:~:text=The%20cohort%20was%20made%20up,for%20young%20people%20was%2023.5%25.>> accessed 15 December 2024.

⁴⁹ Department of Justice, Equality and Law Reform, 'A Review of the Youth Justice System in Northern Ireland' (Belfast, 2011)

⁵⁰ John Reddy, 'The Youth Justice System in Ireland: A Review (Revised 2022)' (2022) <<https://hdl.handle.net/10344/11103>> accessed 15 December 2024.

families and local organisations, has been effective in addressing the root causes of offending and promoting long-term reintegration.

VI. Conclusion

The juvenile justice systems in Northern Ireland and Ireland share a commitment to protecting children's rights and prioritising rehabilitation over punishment. However, differences in the MACR, diversion practices, and detention policies highlight areas where one jurisdiction can learn from the other. Northern Ireland's restorative justice initiatives and Ireland's strong community-based interventions both demonstrate effective strategies for reducing youth crime. By addressing remaining systematic challenges, such as delays in case processing and the overuse of remand custody, both systems can better serve young offenders and their communities.

E. I. Healthcare and Children's Rights in Northern Ireland and the Republic of Ireland

Healthcare law is one of the most vital areas of law in any jurisdiction as it plays a critical role in deciding how healthcare should be delivered and regulated. In this essay, I will be analysing the current health care systems for children in the Republic of Ireland and Northern Ireland and contrasting the accessibility and differences of healthcare law in both jurisdictions particularly in relation to mental health law and the legality of involuntary care for the best interests of a child. Children's rights to proper health care are protected under article 3 of the United Nations Conventions of the Right to the Child which it was ratified into the legislation of the Republic of Ireland in 1992

and into the legislation of Northern Ireland in 1991 making it essential for both legal frameworks to protect the basic rights of children.⁵¹

Mental Health law is an imperative part of a country's health sector; however, it is often overlooked with long waiting lists. In children mental health is important most of all, at such an early age with brains still developing the law should make it a priority to protect children's mental health in an increasingly digitalised world where mental health disorders are becoming more common. The legal framework for dealing with mental health differs in both jurisdictions. A study was conducted in Northern Ireland in 2022 of young people between the ages of 11 and 21, with the primary category being 16 to 18, on their experiences with the mental health service in Northern Ireland. The study includes questions about the support provided and the accessibility of the services. The study found that only an average of 40% of young people were made to feel safe when receiving support. This study has highlighted that the children of Northern Ireland find the mental health services available to them an unsatisfactory with 49% agreeing that they were unable to receive help they required.⁵² A similar study was conducted in the Republic of Ireland in 2021 by the Ombudsman for Children's Office. The study received responses from approximately 2,616 children between the ages of 12 and 17 in which they rated their experiences with the mental health services. In this study it was found that only 12% of children were able to access CAMHS (Child and Adolescent Mental Health Services) due to the long waiting lists. Similarly to the results of the Northern Irish study, 42% of children in the Republic of Ireland claim that the support they received was unsatisfactory and they

⁵¹ United Nations Convention on the Rights of the Child, Article 3

⁵² Christine Irvine, 'Reviewing Mental Health Services and Support for Children and Young people in Northern Ireland: A Rights-Based Approach' (2022) 28(3) *Childcare in Pract.* 263

were not able to get the support that they required.⁵³ It is clear from these two studies that there must be improvements made to protect the mental health of children.

Social media has a detrimental effect on mental health with 48% of the children surveyed claiming that the pressures of social media and cyberbullying have worsened their mental health⁵⁴. Mental health law in both jurisdictions must adapt to respond to the technological advancements of today's society. Coimisiún na Meán have drafted an Online Safety code to be put into legislation to protect the mental health of the children in the Republic of Ireland, the code is based on three pieces of legislation 'The Online Safety and Media Regulation Act, 2022', the 'EU Digital Services Act' and the 'EU Terrorist Content Online Regulation'.⁵⁵ This Safety code will hold video sharing platforms accountable for the parental controls available on their platform to protect children's mental health.⁵⁶ The United Kingdom's Online Safety Act 2023 is binding on Northern Irish law and unlike the Online Safety Code in Ireland which has not yet been introduced into legislation it requires all social media services to mitigate the risks of harm for children.⁵⁷

A differing aspect of healthcare law between both jurisdictions is their approach to involuntary care. As per the Mental Health Act, 2001, a child may only be placed into involuntary care if they are suffering from a mental disorder and require treatment that cannot be given unless the child is placed into involuntary care which has been approved by the district court and accessed by a psychiatric professional. Under this Act, children can only be held in involuntary care for a period of 21

⁵³ Ombudsman for Children, 'A Piece of Mind May 2023 Children's Mental Health Survey: Stressors, Supports and Services' (2023) <<https://www.oco.ie/app/uploads/2023/05/A-Piece-of-My-Mind-Report.pdf>> (last accessed 02 February, 2025)

⁵⁴ *id.*

⁵⁵ Coimisiún na Meán, 'Online Safety' (2023) <<https://www.cnam.ie/online-safety/>> (last accessed 16 December, 2024)

⁵⁶ Coimisiún na Meán, 'Draft Online Safety Code' (2024) <https://www.cnam.ie/wp-content/uploads/2024/05/Online-Safety-Code_vFinal.pdf> [14] (last accessed 16 December, 2024)

⁵⁷ Online Safety Act 2023, ss. 61–62

days.⁵⁸ Similarly in Northern Ireland, for a child to be placed in involuntary care, the child must be accessed by a psychiatric professional. In Northern Ireland, the period for being under involuntary care changes based on the severity of the child's condition.⁵⁹ Under section 2 of the Mental Health Act 1983, a child can be held in involuntary care for up to 28 days, if it's in the best interest for the child to remain in involuntary care after the 28 day period,⁶⁰ the child may be re-accessed by a mental health professional under section 3 of this act and can extend the period of involuntary treatment up to six months. There is no limit to how many times a psychiatric professional may re-access a child under section 3 of this act.⁶¹

Health care is a basic right under Human Rights law however discrimination is still seen in the regulation of the health services and the providing of treatments. On the 10th of December 2024, The Northern Ireland Executive banned the prescribing of puberty blockers to children.⁶² This development in Northern Irish law will have a detrimental effect on the physical and mental health of transgender children in Northern Ireland. In contrast puberty blockers are still legal in the Republic of Ireland, while there has been calls to limit the prescribing of puberty blockers without expert medical advice and psychiatric assessment there has been no changes in the law.⁶³ This ban on puberty blockers for children in Northern Ireland goes against the Equality Act 2010 which makes discrimination illegal in Northern Irish law.⁶⁴

⁵⁸ Mental Health Act 2001, s. 25

⁵⁹ Young Minds 'Treatment in Hospital' (2022) <<https://www.youngminds.org.uk/parent/parents-a-z-mental-health-guide/treatment-in-hospital/#Howwillmychildgetadmittedtohospital>> (last accessed 16 December, 2024)

⁶⁰ Mental Health Act 1983, s. 2

⁶¹ Mental Health Act 1983, s. 3

⁶² Eoghan Dalton 'Parties in Northern Ireland executive agree to extend Britain's ban on puberty blockers' *The Journal* (11 December, 2024) <<https://www.thejournal.ie/puberty-blockers-northern-ireland-6568777-Dec2024/>> (last accessed 16 December, 2024)

⁶³ Fergal Bowers 'Calls for more cautious approach to prescribing puberty blockers in Ireland' *RTE* (14 March, 2024)

⁶⁴ Equality Act 2010

In conclusion, health care law is imperative for upholding the rights of children in both jurisdictions. Under the United Nation's Convention for the rights of the child, the children of both states are entitled to quality health care. Both legal frameworks allow children to be placed into involuntary care if it's in their best interests however the criteria and the period in which the children can be placed into involuntary healthcare differs. The children of both states have expressed that it is difficult to access mental health services due to long waiting lists. The legal frameworks in place for protection of children's mental health from social media is different as there is currently no online safety legislation for children in the Republic of Ireland, however there is in Northern Ireland. The availability of treatments for children in both frameworks differ as it is now illegal for transgender children in Northern Ireland to avail of puberty blockers.

F. I. Family law

The unification of Northern Ireland with the Republic of Ireland would have a substantial impact on human rights, particularly regarding children's rights. To guarantee that the rights of children and young people are protected during the transition to a united Ireland, several considerations would need to be considered. These would involve tackling problems like social cohesiveness, economic inequality, and safeguarding the emotional and physical well-being of children. To guarantee that children's rights are respected in a new political and social environment, safeguarding measures would be essential. The Ombudsman for Children, independent advocacy services, social workers, and child advocates would all play crucial roles in this process, especially when it comes to defending children's rights to mental health care, safety, and wellbeing. To protect and advance children's rights, these organisations would operate under a single set of laws.

The proposed safeguarding measures would combine the Republic of Ireland's and Northern Ireland's current frameworks. It is important to note that there may be both possibilities and challenges could arise because of the unification. The legal frameworks and procedures governing child welfare and safeguarding in Northern Ireland and the Republic of Ireland differ. Integrating these systems to provide uniform protection for every child on the island would be a significant challenge to overcome.

II. The role of the Ombudsman for Children and advocacy organisations in safeguarding children's mental health rights

In 2004, the Ombudsman for Children's Office (OCO) was founded under the principal law, the 2002 Ombudsman for Children Act. Promoting and defending the rights and welfare of children and young people is the responsibility of the Ombudsman for Children. The Ombudsman for Children's duties include investigating complaints about public bodies' acts, advocating for children's rights, and advising the government and other entities on research and policy. Only half of the suggested staffing levels are in place in community CAMHS, and most of the shortfalls in children's mental health services noted in *A Vision for Change* (2006) remain.⁶⁵ Additionally, there are serious shortcomings in primary care mental health services and mental health promotion, and inadequate interagency coordination and communication make it difficult for kids to get specialised mental health care. To raise the voices of children especially those from vulnerable groups such those impacted by socioeconomic hardship, mental health issues and those with disabilities the Ombudsman for Children could work with regional and national child advocacy groups. Advocacy groups can

⁶⁵ Norah Gibbons, 'Roscommon Child Care Case: Report of the Inquiry Team to the Health Service Executive' (2010, Health Service Executive)

help children get the resources they need, train professionals, and advocate for changes to policies. For a United Ireland, it is important that funding is increased for organisations like the ombudsman in order to provide adequate services for children.

III. The role of social workers, child advocates, and independent advocacy services in protecting children's rights

The Children First Act, 2015, which requires professionals to report suspicions of child abuse or neglect, is one of the strong child protection laws in the Republic of Ireland.⁶⁶ Similar policies are in place in Northern Ireland under the 1995 Children (Northern Ireland) Order. These mechanisms would have to work together in a united Ireland to guarantee smooth child protection throughout the nation. Nowadays, children and childhood are the focus of extensive interventions, with entire teams of social workers and health professionals trying to change childhood. The notion of children's needs—which is based on the ideas, presumptions, priorities, and objectives—justifies interventions like as health promotion, social work practice, and mother education.⁶⁷ However, even these novel approaches and ideas of infancy have primarily viewed kids as passive caretakers who belong in the private domain. Childhood role models still frequently started with adult ideas and parental attitudes.

Social workers naturally have a responsibility to encourage children's engagement and self-determination since they have a unique duty to advance marginalised groups in society. Maintaining a balance of power between the child and the social worker requires participation, which is a

⁶⁶ Children's First Act 2015

⁶⁷ Martin Woodhead, 'Psychology and the cultural construction of children's needs' in Martin Woodhead (ed.), *Constructing and Reconstructing Childhood* (3rd ed., Routledge 2015) 12

fundamental principle of social work practice. However, the idea of children's rights poses a serious obstacle to social work practice, which is founded on a welfare and care ethic. While working from the rights perspective, social workers are supposed to voice young people's wants and feelings without attempting to assess or act on what they perceive to be in a young person's best interests.⁶⁸ In contrast, the ethics of care approach calls for social workers to act in the best interests of young people.

IV. Safeguarding measures for a United Ireland

This project proposes a model for children's rights that combines a rights-based approach with an ethic of care. This particular model would acknowledge children's rights as unique persons while highlighting their ties to their families and communities and recognises the contradiction that exists between acting in a child's best interests and upholding their autonomy and rights, especially when such rights or desires may be at odds with the child's welfare. The repercussions of disregarding children's and youths' voices have been extensively documented in Ireland. Processes and protocols must be in place to protect children by giving them a voice, listening to that voice, empowering them to act, and, when necessary, intervening on their behalf to prevent the mistakes of the past from happening again.

To apply approaches that will work effectively for a United Ireland proposing the creation of official networks for advocacy and child welfare throughout the island may enhance service delivery. These networks might concentrate on addressing common issues including poverty, social isolation, and mental health as well as sharing resources and information. Child advocates and social workers

⁶⁸ Hanita Kosher, Asher Ben-Arieh, and Yael Hendelsman, *Children's Rights and Social Work* (Springer 2017) Ch. I

could collaborate on projects that deal with problems that impact vulnerable groups, such children from underprivileged neighbourhoods or those impacted by the conflict's aftermath in Northern Ireland. Introducing a children's Act applicable for both the republic and the north would harmonise the laws already in place in both countries. Social workers, child advocates, and independent advocacy groups should be trained using international standards and best practices from both the Republic of Ireland and Northern Ireland. By doing this, it would be easier to guarantee that all specialists are prepared to handle problems like neglect, and mental health issues.

V. Conclusion

In conclusion, there are a lot of potential and difficulties associated with a united Ireland's effects on human rights, especially when it comes to children's rights. From the above examples we can understand that for a united Ireland to be successful, we must put the welfare of children first, combining care-focused and rights-based strategies to establish a setting where all children are valued, their rights are upheld, and their wellbeing is preserved.

VI. Employment

by Gareth McCrystal, Leyla Cummins, Billy Dunne, and Ila Raso

A. I. Introduction

Employment law in both the Republic and North of Ireland possess a number of key similarities. Both jurisdictions, for example, share some common foundations in contract law and the implication of terms into employment contracts, and in tort law to deal with injury in the workplace.¹ Certain circumstances, however, have led to a level of divergence in the development of particular areas of employment law between the two sides of the island. This Chapter will outline some of these divergences, namely in the areas of employment equality and protections against workplace discrimination - with a particular focus on the protections, or lack thereof, against discrimination on the basis of political opinion - the rights of migrant workers, and family rights in the employment law context.

B. I. Employment Equality

As alluded to above, one of the key areas of divergence between employment law in the two jurisdictions arises in the context of employment equality, and employee protection against unjust discrimination.

a. The Current Legislative Framework in Northern Ireland

Northern Irish policy development on the issue of employment equality began in the early 1970s, after Direct Rule replaced the jurisdiction's devolved government.² The Fair Employment (Northern Ireland) Act 1976 marked the first real attempt to eliminate workplace discrimination on religious and political grounds in Northern Ireland,³ albeit with limited success.⁴ Later legal developments introduced more rigorous monitoring, as well as a limited level of affirmative action to

¹ Oran Doyle, David Kenny, Christopher McCrudden and Fionnuala Ni Aoláin, 'Legal Convergence and Divergence on the Island of Ireland: Report of the North-South Legal Mapping Project to the Shared Island Unit' (Irish Research Council, 2022) 14

² Carol Agocs and Bob Osborne, 'Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions' (2009) 35(2) *Can. Pub. Pol.* 241

³ Doyle, Kenny, McCrudden, and Ni Aoláin (*op. cit.*) 14

⁴ Raymond T Russell, *Fair Employment in Northern Ireland: the decades of change (1990 – 2010)* (Northern Ireland Assembly 2012) 1

address those imbalances still remaining.⁵ The Fair Employment (Northern Ireland) Act, 1989, for example, outlawed informal recruitment, introduced a duty on employers to monitor the religious composition of their workforce, and set up the Fair Employment Tribunal to adjudicate complaints of alleged discrimination in employment on the grounds of religious belief and/or political opinion.⁶ In 1998, the 1976 and 1989 Acts were repealed and re-enacted in consolidated form in the Fair Employment and Treatment (Northern Ireland) Order, 1998.⁷ At that time, there were no legal measures of an equivalent degree of intensity in Ireland.⁸

Notably, however, no one, single, harmonised piece of employment equality legislation exists in Northern Irish law today. In Northern Ireland, employment equality legislation remains a devolved matter.⁹ While the law relating to equality at work in the UK is found for the most part in the Equality Act 2010, this Act does form part of the law of Northern Ireland, which has no equivalent in terms of a comprehensive piece of legislation regulating discrimination.¹⁰ Rather, individual areas of equality are provided for in separate pieces of legislation, which have evolved since the 1970s.¹¹ This legislation includes:

- **The Equal Pay (Northern Ireland) Act, 1970:** which aims to prevent discrimination between men and women in terms and conditions of employment.
- **The Sex Discrimination (Northern Ireland) Order, 1976:** which likewise makes it unlawful to discriminate against an individual on the grounds of their sex in employment.
- **The Race Relations (Northern Ireland) Order, 1997:** which outlaws discrimination on racial grounds.
- **The Disability Discrimination Act, 1995:** which aims to end discrimination faced by disabled people.

⁵ Doyle, Kenny, McCrudden, and Ní Aoláin (*op. cit.*) 14

⁶ Russell (*op. cit.*) 3

⁷ *id.* 4

⁸ Doyle, Kenny, McCrudden, and Ní Aoláin (*op. cit.*) 14

⁹ Natasha Black and Glenda Doherty, *Comparative study of equality legislation in the United Kingdom and Ireland* (Northern Ireland Assembly 2024) 3

¹⁰ N/A, 'Equality at work' (2020) 3(1) *Inst. Empl. Rights J.* 73

¹¹ Black and Doherty (*op. cit.*) 3

- **The Fair Employment and Treatment (Northern Ireland) Order, 1998:** which makes discrimination on the grounds of religious belief and political opinion unlawful in areas of employment.
- **The Employment Equality (Sexual Orientation) Regulations (Northern Ireland), 2003:** which makes workplace discrimination on the grounds of sexual orientation unlawful.
- **The Equality Act (Sexual Orientation) Regulations (Northern Ireland), 2006**
- **The Employment Equality (Age) Regulations (Northern Ireland), 2006:** which makes workplace discrimination on the grounds of age unlawful.
- **Section 75 of the Northern Ireland Act, 1998:** which places a statutory obligation on public authorities in carrying out their various functions relating to Northern Ireland to have due regard to the need to promote both equality of opportunity and good relations between the groups listed above.

The existence of multiple, separate pieces of equality legislation in Northern Irish law means that discrimination cases can only be taken on individual equality grounds. This precludes the ability to take cases on intersectional or multiple grounds of discrimination.¹²

b. The Current Legislative Framework in the Republic of Ireland

The position in the Republic of Ireland differs in this regard. In the Republic, employers' obligations in relation to equality and human rights are set out in the Employment Equality Acts, 1998—2015, which harmonised and consolidated pre-existing Irish employment equality legislation. The Acts prohibit discrimination under any of the nine 'protected grounds' in employment (including work experience of vocational training), be it in hiring practices, training, promotion/re-grading, terms and conditions of employment, or dismissal. Harassment, (including sexual harassment, is specifically prohibited under the Acts. Discrimination under the Acts also applies to someone who is treated less favourably due to their association with someone protected under the nine grounds.

¹² Black and Doherty (*op. cit.*) 3; Equality Commission for Northern Ireland, 'The need for a Single NI Equality Act: Equality Commission Policy Position Paper' (2022)

The nine grounds protected under the Acts are: gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. Almost all of these grounds are likewise covered by Northern Irish equality legislation. Notably, however, there is no equivalent protection in Irish employment equality legislation to that of the Northern Irish safeguarding of one's political opinion.

II. The Implications of Brexit

While the increasing relevance of EU non-discrimination law had brought about a level of alignment between Irish and Northern Irish employment equality legislation, Brexit created a possibility of future divergence.¹³ Article 2 of the Windsor Framework, however, reflects the UK Government's commitment to safeguarding the equality (including equality in employment) and human rights protections in the Belfast (Good Friday) Agreement, which are underpinned by the 'supporting framework' of EU law.¹⁴ The Article commits the UK Government to ensuring that certain rights, safeguards and equality of opportunity protections, as set out in the Belfast (Good Friday) Agreement, will not be diminished as a result of the UK leaving the EU, and that certain equality laws in Northern Ireland will keep pace with any future changes by the EU to certain EU anti-discrimination laws.¹⁵ This effectively guarantees that certain Northern Irish employment equality laws will not fall below minimum EU standards of protection in equality and antidiscrimination law, thus limiting any potential further divergence between Irish and Northern Irish employment equality law.

III. Conclusion

The lack of one, harmonised piece of employment equality legislation in Northern Irish law represents perhaps its greatest element of divergence from the position in Ireland, and has accordingly drawn a level of criticism, most notably from the Equality Commission for Northern Ireland. The Commission, for their part, has argued that the lack of a single equality act for Northern Ireland has

¹³ Doyle, Kenny, McCrudden, and Ní Aoláin (*op. cit.*) 14

¹⁴ Black and Doherty (*op. cit.*) 5

¹⁵ *id.* 5

led to limited and inconsistent protections across different equality grounds, adds to complexity and cost, and impacts negatively on individuals, employers, service providers, and those providing advice.¹⁶

Were the two sides of the island to reunify, a single piece of employment equality legislation akin to the Employment Equality Acts would likely constitute the most preferable approach to constructing a unified Irish employment equality legislative framework. However, as already noted, the Employment Equality Acts' nine protected grounds do not contain provision for employee protection against discrimination on the grounds of their political opinion. This issue is explored in the next section of this chapter.

C. I. Political Opinion Comparison

The issue of political opinion as a ground for discrimination in employment has deep historical and socio-political roots in Northern Ireland and the Republic of Ireland. In Northern Ireland, political opinion discrimination has often overlapped with religious identity, reflecting the Protestant-Catholic divide. The Fair Employment (Northern Ireland) Act, 1976 tried to eliminate workplace discrimination on religious and political grounds in Northern Ireland, with later legal developments introducing more rigorous monitoring and limited affirmative action to address imbalances.¹⁷ Later legislative interventions in Northern Ireland included the Fair Employment and Treatment (Northern Ireland) Order, 1998 (FETO).¹⁸

Conversely, there were no legal measures in Ireland of an equivalent degree of intensity, political opinion is a lesser-emphasised ground within the broader Employment Equality Acts, 1998–2015 reflecting the different socio-political landscape in each jurisdiction.

¹⁶ Equality Commission for Northern Ireland, 'Submission to the Committee for the Executive Office Inquiry into Gaps in Equality Legislation' (2024) 1

¹⁷ Doyle, Kenny, McCrudden, and Ní Aoláin (*op. cit.*) 14

¹⁸ Raymond T. Russell, 'Fair Employment in Northern Ireland: the decades of change (1990-2010)' (Northern Ireland Assembly, 2012)

II. Current Legislative Landscape in Northern Ireland

Political opinion discrimination is explicitly prohibited under FETO 1998, one of the cornerstones of Northern Ireland's fair employment framework. FETO builds upon earlier legislation, including the Fair Employment Act, 1976 and the Fair Employment (Northern Ireland) Act, 1989, which were responses to widespread employment inequalities stemming from sectarian tensions.¹⁹ Unionists in Northern Ireland might worry that in a United Ireland they would suffer from discrimination based on their political opinion. That has been outlawed in Northern Ireland, to some extent at least, since 1921. Since 1976 it has been possible for an employer to be sued for disadvantaging someone because of their political opinion and from 1989 the same has been true for providers of service who discriminate. Ireland, as yet, does not grant this kind of protection.²⁰

Political opinion is one of the protected grounds, with significant attention given to employment practices that might disadvantage individuals based on perceived or actual political affiliations, especially in contexts where this intersects with religious divisions. FETO mandates that employers monitor and report the community background of their workforce. This monitoring extends to religious and political affiliation to ensure fair representation in hiring and retention. The Equality Commission for Northern Ireland enforces compliance, investigates complaints, and provides guidance to employers. The Equality Commission's reports indicate a narrowing of the historical disparity in employment participation between Protestant and Catholic communities.

Despite these measures, political opinion discrimination continues to manifest subtly, particularly in recruitment practices or workplace dynamics, where informal hiring and promotion processes can perpetuate historical bias.

¹⁹ *id.* 9—16

²⁰ Brice Dickson, 'Implications for the Protection of Human Rights in a United Ireland' (Royal Irish Academy, 27 September, 2021) <<https://www.ria.ie/blog/human-rights-in-a-united-ireland/#:~:text=From%201976%20it%20has%20been,grant%20this%20kind%20of%20protection,>> (last accessed 27 December, 2024)

III. Current Legislative Landscape in the Republic of Ireland

In contrast, Ireland does of course have the Constitution which is superior to all other laws in the country.²¹ The Republic of Ireland's Employment Equality Acts provide a comprehensive anti-discrimination framework, covering nine grounds, including political opinion. However, political opinion discrimination receives less focus, largely due to the absence of the same historical sectarian conflict as Northern Ireland.

Political opinion is one of the recognised grounds, although with broad anti-discrimination protections, case law and enforcement measures have focused more on issues like gender, disability and race.

The Workplace Relations Commission (WRC) oversees complaints and disputes related to employment discrimination. Unlike Northern Ireland's Equality Commission, the WRC's mandate is broader and does not include mandatory workforce monitoring regarding political or religious composition, reflecting the absence of a historical necessity for such oversight.

Although the Republic of Ireland provides formal protections, the practical implementation and enforcement of political opinion protections appear less robust, and there is limited precedent in the courts addressing such claims.

IV. Potential Human Rights Implications Under Unification

Unification would require reconciling these divergent approaches to political opinion protections. Workers in the Republic of Ireland may find themselves with weaker protections against political opinion discrimination compared to their Northern Irish counterparts. Without mandatory monitoring, subtle or systemic forms of bias may go undetected in the Republic of Ireland.

A unified Ireland presents an opportunity to create a single standard for political opinion protections, drawing on Northern Ireland's robust monitoring practices and the Republic's broader anti-

²¹ Dickson (*op. cit.*) 596

discrimination framework. Harmonising institutional oversight, potentially through a new all-island equality body, could ensure consistent enforcement. This would require careful consideration of Northern Ireland's unique context, ensuring that protections for political opinion remain robust while fostering greater inclusivity across the island.

V. Conclusion

The comparison of political opinion protections in Northern Ireland and the Republic of Ireland reveals significant divergences in legislative scope, monitoring practices, and enforcement mechanisms. While Northern Ireland's framework is shaped by its historical divisions, the Republic's approach reflects a broader, but less targeted, anti-discrimination ethos.

To tackle the differences leading into a united Ireland, introduce workforce monitoring for political opinion and religious background across the island to ensure transparency and accountability. Develop a comprehensive legislative framework that balances Northern Ireland's robust protections with the Republic's broader anti-discrimination approach. Establish an all-island equality body to oversee the implementation of harmonised employment protections, with a focus on political opinion discrimination.

These measures would be a start to ensure that unification enhances, rather than diminishes, the protection of political opinion as a human right in employment.

D. I. Rights of Migrant and Minority Workers in a United Ireland

The rights of migrant and minority workers are central to human rights discourse in the context of Irish unification. Both Northern Ireland and the Republic of Ireland have distinct legal and institutional frameworks that protect migrant and minority workers, shaped by their historical, political, and constitutional contexts.

II. Current Protections in Northern Ireland

In Northern Ireland, the rights of migrant and minority workers are governed primarily by UK legislation, with some local provisions influenced by the region's unique socio-political context.

The Race Relations (Northern Ireland) Order, 1997,²² prohibits discrimination based on race, colour, nationality, or ethnic/national origin in employment. However, Northern Ireland's legal framework lacks the consolidation seen in Great Britain's Equality Act, 2010, leading to gaps in comprehensiveness.

Employers are required to monitor the community background of their workforce under the FETO 1998. While this is primarily aimed at addressing sectarian divisions, it has broader implications for fostering workplace equality. Migrant workers often face language barriers, social exclusion, and precarious employment. Post-Brexit immigration rules have further complicated access to the labour market for non-Irish EU nationals and third-country nationals.

III. Current Protections in the Republic of Ireland

The Republic of Ireland has a different legal and institutional approach to migrant and minority worker rights, rooted in its constitutional framework with Article 40 headed, 'Personal Rights' and it begins, in Article 40.1, by asserting that 'all citizens shall, as human persons, be held equal before the law'. Article 40.1 has been comprehensively supplemented by two sets of legislation, one dealing with equality in the sphere of employment (the Employment Equality Acts, 1998—2021) and the other with equality in society more generally (the Equal Status Acts, 2000—2018). These laws are roughly equivalent to Great Britain's Equality Act, 2010, which means in many respects they protect equality rights more strongly than do the discrete anti-discrimination laws applying in Northern Ireland. Northern Ireland is the only jurisdiction in these islands, for example, where it is still lawful to discriminate against older people when offering goods, facilities or services to the public.²³ These acts prohibit discrimination on multiple grounds, including race and ethnicity, in employment contexts. However, undocumented workers and asylum seekers often face limited protections, exacerbating their vulnerability.

²² The Race Relations (Northern Ireland) Order 1997.

²³ Dickson (*op. cit.*) 597

The Direct Provisions system has been a focal point of criticism, described as fostering conditions of poverty and exclusion for asylum seekers. Asylum seekers were previously barred entirely from accessing the labour market.

The landmark case of *NHV v. Minister for Justice and Equality*²⁴ addressed this issue, with the Irish Supreme Court ruling that an indefinite ban on employment for asylum seekers was unconstitutional under Article 40.3 of the Constitution, where ‘it is guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’, then adding that ‘in particular’ the state guarantees by its laws ‘to protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’.²⁵ Following this decision, reforms were introduced, allowing asylum seekers to work under specific conditions, marking a significant step forward and a positive look into the future. However, access remains limited compared to other EU jurisdictions.

Whilst there are government initiatives to support migrant workers, such as language and cultural integration programs, these are underfunded and inconsistent across sectors, leaving many workers without adequate support.

IV. Potential Impacts Under Unification

Unification presents opportunities to harmonise protections for migrant and minority workers but also risks creating disparities if existing weaknesses are not addressed. Migrants in Northern Ireland could lose protections tied to workforce monitoring and robust anti-discrimination oversight. There is a risk of policy conflicts with differing approaches to asylum and immigration creating disparities, particularly for vulnerable groups such as undocumented workers and asylum seekers.

With that said, a unified Ireland could draw on the strengths of both jurisdictions to create a comprehensive framework for migrant and minority worker protections, including the abolition of Direct Provision. Harmonising integration programs and introducing workforce monitoring across the island could foster greater inclusivity. Unification must ensure no diminishing of rights,

²⁴ [2017] IESC 35.

²⁵ Bunreacht na hEireann (the Irish Constitution), Article 40.3.2, Article 40.3.3, inserted in 2018, allows for laws to regulate the termination for pregnancies.

particularly for vulnerable populations such as migrant and minority workers. Transitional arrangements should prioritise harmonising protections to avoid regression.

V. Conclusion and Recommendations

The rights of migrant and minority workers are essential to the broader human rights implications of unification. Current divergences between Northern Ireland and the Republic of Ireland highlight the need for a harmonised approach that addresses systemic barriers and protects vulnerable groups.

Safeguarding human rights and promoting equity for migrant and minority workers in a unified Ireland will come about by implementing measures addressing the possible and already existing issues in both jurisdictions. To harmonise the legal frameworks, develop an all-island equality framework that incorporates the strengths of Northern Ireland's monitoring systems and the Republic's consolidated anti-discrimination laws. Replace Direct Provision with a rights-compliant model and ensure consistent access to employment for asylum seekers when addressing asylum system issues. Finally, establishing an equality body in a unified Ireland would ensure consistency in addressing discrimination and supporting migrant workers regarding employment rights.

E. I. Family- Related Rights

Divergences also exist in the employment law of both jurisdictions in the area of specifically protected rights relating to family life. This section will focus on the divergences between these family-related employment rights in the Republic of Ireland and Northern Ireland, namely in the areas of statutory bereavement and domestic violence leave from employment.

II. Parental Bereavement Leave: The Current Legislative Framework in Northern Ireland

There is no existing legislative framework which provides for general statutory bereavement leave in Northern Ireland. Statutory provision for parental bereavement leave, however, was made in 2022, by the Parental Leave (Leave and Pay) Act (Northern Ireland), 2022, which itself was supplemented and fleshed out by the Parental Bereavement Leave Regulations (Northern Ireland), 2022, and the Statutory Parental Bereavement Pay (General) Regulations (Northern Ireland), 2022. The legislation essentially provides that employees are entitled to at least two weeks of parental

bereavement leave following the loss of a child under the age of 18, or a stillbirth after 24 weeks of pregnancy, irrespective of their length of service. Employees who have been continuously employed with their employer for 26 weeks prior to the death of the child, and who earned at least the lower earnings limit for the past eight weeks, are entitled to statutory bereavement leave pay, paid at the lower of £156.66 per week or 90% of their normal weekly earnings.²⁶ Employees who do not meet this criteria are nonetheless entitled to parental bereavement leave, albeit unpaid. Apart from remuneration, an employee's terms and conditions of employment remain unchanged during a period of parental bereavement leave.²⁷

III. Parental Bereavement Leave: The Current Legislative Framework in the Republic of Ireland

Much like Northern Ireland, the law in the Republic makes no statutory provision for general bereavement leave from employment. However, unlike Northern Ireland, the law in Ireland makes no statutory provision for statutory bereavement leave at all. In the Republic, there is no statutory right to take leave from work following the death of a loved one, irrespective of the nature of the relationship between the employee and the deceased.²⁸ In practice, many employers will make allowances in these circumstances, usually providing between three to 5 days of bereavement or compassionate leave.²⁹ That said, they are under no legal obligation to do so.

Proposals were in place – in the form of a Private Members Bill – to amend the Parental Leave Acts 1998 and 2006, and make provision for statutory entitlement to bereavement leave for an bereaved employee who is a parent of a deceased child.³⁰ However, this Bill lapsed with the dissolution of the Dáil and the Seanad in November 2024, meaning that there is no equivalent provision to those of Northern Irish law in relation to statutory bereavement leave.

²⁶ The Statutory Parental Bereavement Pay (General) Regulations (Northern Ireland) 2022, s. 20 (1).

²⁷ The Parental Bereavement Leave Regulations (Northern Ireland) 2022, s. 9 (1).

²⁸ Eric Clarke, 'Understanding Bereavement Support for Staff in an Irish Higher Education Institute. How Are Staff Members Supported When They Experience Bereavement?' (Thesis, Royal College of Surgeons in Ireland 2021) 6

²⁹ *id.*

³⁰ Parental Bereavement Leave (Amendment) Bill 2021

IV. Domestic Violence Leave: The Current Legislative Framework in Northern Ireland

In 2022, the Northern Irish Assembly passed the Domestic Abuse (Safe Leave) Act (NI), 2022. While the Act was only recently subjected to consultation on the part of Northern Ireland's Department for the Economy (from 5 July to 27 September 2024) – meaning that neither its commencement date nor its specific regulations are, at this point, absolutely clear – the basics of the rights provided by the legislation are. The Act entitles employees who are victims of domestic abuse ten days of paid domestic abuse leave per year, from the first day of their employment, to deal with 'issues related to domestic abuse'.³¹ This will include matters such as finding alternative accommodation, receiving legal advice and/or pursuing legal proceedings, protecting family members, and receiving welfare and/or healthcare support. The Act also provides for the protection of the employee's employment rights while absent. Notably, Northern Ireland remains the only UK jurisdiction to have implemented statutory entitlement to paid leave for victims of domestic abuse.

V. Domestic Violence Leave: The Current Legislative Framework in the Republic of Ireland

There is little divergence between the position on domestic violence leave in Northern Ireland and the Republic. As of 27 November 2023, employees who have been the victims of domestic abuse are likewise entitled to avail of a paid leave under the Work Life Balance and Miscellaneous Provisions Act 2023. Employees are entitled to 100% of their regular pay during this period;³² a figure which has yet to be decided in Northern Ireland. However, unlike the position in Northern Ireland, employees in the Republic are only entitled to take five days of domestic violence leave per year, as opposed to the ten provided under Northern Irish law.

VI. Conclusion and Recommendations

The area of family-related employment leave rights highlights specific divergences between Irish and Northern Irish employment law. The absence of any bereavement leave rights in the Republic, for example, stands in stark contrast to employees' statutory entitlement to parental bereavement leave

³¹ Domestic Abuse (Safe Leave) Act (Northern Ireland) 2022, s. 1(1)

³² Parental Leave Act 1998 (Section 13Aa) (Prescribed Daily Rate of Domestic Violence Leave Pay) Regulations 2023 (SI 2023/574)

in Northern Ireland, and the length of domestic violence leave permitted in the latter jurisdiction doubles that of the former.

Should reunification occur, an approach incorporating the ‘best of both worlds’ would likely be most preferable, in order to ensure maximum rights protection across the island. Provisions mirroring those of Northern Irish law in relation to parental bereavement leave could be incorporated in the employment law of a unified Ireland, as could the entitlement to ten days of domestic violence leave. Furthermore, the entitlement to 100% of an employee’s regular pay during this period, as is the case in the Republic, could likewise be adopted in any potential legislation.

F. Conclusion

The divergences in employment law across Northern Ireland and the Republic of Ireland underscore the complexities inherent in any potential unification. Such unification presents an opportunity to harmonise these frameworks, drawing from the best practices of both jurisdictions to create a comprehensive, inclusive, and rights-focused employment law framework. Addressing gaps in the Republic’s protections; such as its lack of statutory bereavement leave and weaker political opinion safeguards, while integrating Northern Ireland’s targeted monitoring and oversight mechanisms would ensure a balanced approach to unification.

Recommendations for unification include introducing a single equality Act that consolidates protections, establishing an all-island equality body to oversee anti-discrimination measures, abolishing outdated systems like Direct Provisions, and standardising family related leave entitlements to prioritise employees’ rights and well-being. These measures would foster an inclusive, equitable, and forward-thinking employment landscape, ensuring that human rights and social equity remain at the forefront of a united Ireland’s legal and institutional framework.

VII. Political Opinion and Discrimination

by Hanna Keogh and Ryan Hickey

A. I. Divergences in Anti-Discrimination Law in Northern Ireland and the Republic of Ireland

II. Introduction

The anti-discrimination legal frameworks present in Northern Ireland and the Republic of Ireland share significant similarities due to the shared experience of historical alignment with Britain, membership of the EU and the 1998 Belfast (Good Friday) Agreement. Evident divergence in these frameworks was caused by each State having different drivers for legal change. As Collins and Crowley report, concerns for fair employment and a focus on the ground of religion were specific points of origin for Northern Ireland, whereas political momentum was key in driving the legislative framework for equality in the South.¹ This chapter explores the similarities and differences in the anti-discrimination laws in Northern Ireland and the Republic of Ireland, comparing legislative approaches, equality institutions, and the potential impact of Brexit.

III. Equality Commissions and Institutions

Northern Ireland and the Republic of Ireland have separate institutions carrying out enforcement and promotion of anti-discrimination law, with both institutions having converging functions of

¹ Evelyn Collins and Niall Crowley, 'Equality Frameworks on the Island of Ireland' (2023) 34 *Ir. Stud. Int. Aff.* 395

promotion and prevention. The Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) together oversee the commitment given by the UK Government in Article 2 of the Windsor Framework and are responsible for supervising the compliance with international conventions in Northern Ireland.² And, the Irish Human Rights Equality Commission (IHREC) is the Republic of Ireland's national human rights and equality institution and accounts directly to the Oireachtas. The key point of difference between the institutions is their efficiency. The IHREC is responsible for a human rights mandate and an equality mandate, whereas Northern Ireland shares these mandates across two institutions.³ The European Commission has noted that multiple mandates within one institution increase competition for resources, where the equality mandate loses priority and visibility.⁴ For this reason, the institutions in Northern Ireland are more effective in their duty to protect equality compared to the Republic of Ireland.

IV. Legislation

While the core provisions of equality legislation in both jurisdictions are broadly similar, key differences exist in the structure and scope of the laws.⁵ In Ireland, anti-discrimination and equality norms are protected under the Employment Equality Acts (1998—2015) and Equal Status Acts (2000—2018), which provide a unified framework covering multiple equality grounds. Whereas in

² Glenda Doherty and Natasha Black, 'Comparative Study of Equality Legislation in the United Kingdom and Ireland' (Northern Ireland Assembly 2024)

³ Collins and Crowley (*op. cit.*) 413

⁴ Commission Staff Working Document, 'Equality bodies and the implementation of the Commission' (Document 52021SC0063, 2021) [2.1.2.2] §6

⁵ Equality Commission for Northern Ireland, 'Submission to the Committee for the Executive Office Inquiry into Gaps in Equality Legislation' (2024)

Northern Ireland, equality law remains fragmented, with individual areas of equality provided for in separate pieces of legislation evolving since 1970.⁶

V. Key Divergences in Legislative Protections

A key divergence in equality law across the island of Ireland lies in the coherent and comprehensive approach to the legislative framework in Ireland, compared to the patchwork of laws in Northern Ireland. These various pieces of law covering equality rights in Northern Ireland are inconsistent and fragmented across a number of equality grounds, falling short of the standard set in Ireland.⁷ Separate equality legislation in Northern Ireland affects enforceability of the protections provided as discrimination cases can only be taken for individual equality grounds preventing the ability to claim for multiple discrimination grounds.⁸ In the Republic of Ireland, the EU Pay Transparency Directive⁹ implemented includes intersectional discrimination.

VI. Age Discrimination

In the Republic of Ireland, the Equal Status Acts cover discrimination on the grounds of age, in respect of the provision of goods, facilities and services, education and housing while employment is covered in the Employment Equality Acts. In Northern Ireland, the Employment Equality (Age) Regulations¹⁰ protects people against age discrimination in respect of employment and occupation,

⁶ The main pieces of equality legislation in Northern Ireland being: The Equal Pay Act Northern Ireland (1970) and Sex Discrimination Order (Northern Ireland) Order 1976, The Disability Discrimination Act 1995, The Race Relations (Northern Ireland) Order 1997, The Fair Employment and Treatment (Northern Ireland) Order, The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 and The Employment Equality (Age) Regulations (Northern Ireland) 2006, with grounds for specified groups under Section 75 of the Northern Ireland Act 1998.

⁷ Collins and Crowley (*op. cit.*)

⁸ ECNI (*op. cit.*) 8

⁹ Directive (EU) 2023/970 of the European Parliament and of the Council on pay transparency and repealing Council Directive (75/117/EEC)

¹⁰ Employment Equality (Age) Regulations (NI) 2006

further and higher education and vocational training but does not extend to accessing goods, services, and facilities.

VII. Equal Pay Provisions

The Gender Pay Gap Information Act, 2021 implemented gender pay gap reporting requirements in Ireland. Section 19 of the Employment Act (NI), 2016 should have introduced pay gap reporting requirements in Northern Ireland but was never enacted. Due to Northern Ireland's commitments under the Windsor Framework, the recent EU Pay Transparency Directive¹¹ requiring gender pay gap reporting must be transposed in the North by June 2026, though this has also yet to be implemented. This inaction has resulted in a large gap in legislation on the island of Ireland with respect to pay transparency.

VII. Racial Discrimination

There are a range of gaps with regards to race equality protection in Northern Ireland. Unlike Ireland, where the Employment Equality Act and Equal Status Acts provide harmonised protections on grounds of race, colour, nationality, ethnic or national origins, in Northern Ireland, there is less protection against discrimination and harassment on grounds of colour and nationality within the Race Relations Order, 1997 and less protection against direct discrimination, victimisation and harassment on grounds of race. Provisions to allow positive action for racial grounds are also less

¹¹ Directive (EU) 2023/970 of the European Parliament and of the Council on pay transparency and repealing Council Directive (75/117/EEC)

extensive than in Ireland. This means it is harder for employers and service providers in Northern Ireland to take positive action to promote racial equality than in the Republic.¹²

VIII. Third-Party Harassment

Equality legislation in Ireland holds employers liable for failing to take reasonable steps to prevent harassment of their employees by third parties.¹³ Northern Ireland lacks in this regard, where there is only limited protection for employees against third party harassment by customers or clients and no liability for employers if they fail to take reasonable steps to protect their employees from such harassment. This gap in protection significantly undermines workplace equality, particularly for vulnerable groups such as LGBTQ+ employees.

IX. Divergence of Rights after Brexit

Under Article 2 of the Windsor Framework, Northern Ireland must keep pace with certain EU equality laws post-Brexit, including any changes to the EU equality directives in Annex 1. However, there is the potential for divergence in relation to those EU laws for rights which do not fall within the Annex 1 equality directives.¹⁴ The EU's Work-life Balance Directive¹⁵, the European Accessibility Act¹⁶, and the EU Directive on Gender Balance on Boards¹⁷ are examples of areas where the ECNI,

¹² Equality Commission for Northern Ireland, Race Law Reform Policy Position - Priorities and Recommendations (Equality Commission for Northern Ireland, 2022) 10—18

¹³ Section 14A of the Employment Equality Act 1998

¹⁴ Directive (EU) 2023/970 of the European Parliament and of the Council on pay transparency and repealing Council Directive (75/117/EEC); Joint Statement by the European Commission and the Government of the United Kingdom on the Windsor Framework (27 February 2023)

¹⁵ Directive 2019/1158/EU 'Directive of the European Parliament and Council on work-life balance for parents and carers'

¹⁶ Directive 2019/882/EU, 'Directive of the European Parliament and Council on the accessibility requirements for products and services'

¹⁷ Directive (EU) 2022/2381 of the European Parliament and of the Council on improving the gender balance among directors of listed companies and related measures

NIHRC and IHREC have determined divergence could occur, potentially leaving Northern Ireland with weaker equality protections compared to Ireland.¹⁸

X. Conclusion

The divergences in anti-discrimination law between Northern Ireland and the Republic of Ireland highlight the need for greater coherence and alignment in the protection of equality rights across the island, an alignment that is required under the Good Friday Agreement but has not been implemented.¹⁹ While both jurisdictions have made similar progress in combating discrimination and promoting equality, there are clear gaps, in Ireland, where the IHREC's combination of mandates has caused less overall effectiveness, and particularly, in Northern Ireland, where its patchwork approach has caused clear challenges in the protection of discrimination.

B. The divergence between Northern Ireland and the Republic of Ireland in relation to *mens rea* of sexual offences: an obstacle to equality of law?

I. Introduction

There exists a great divergence between the Republic of Ireland ('ROI') and Northern Ireland ('NI') in the way in which both jurisdictions have developed their law concerning the *mens rea* for rape. Interestingly, one of the major consequences of this particular area of law is the implications that it has on gender discrimination and inequality. In short, the law of the ROI appears to continue to promote a very traditional approach that prioritises the male perspective – an approach that has

¹⁸ Equality Commission for NI and NI Human Rights Commission, 'Annual Report of the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission on the Implementation of Article 2 of the Windsor Framework' (2023)

¹⁹ Niall Crowley, *Empty Promises: Bringing the Equality Authority to Heel* (A. & A. Farmar 2010)

since been expelled from the law in NI. This research papers offers an analysis on the divergence between the ROI and NI with respect to the *mens rea* of rape and will conclude by offering some comments as to how the approach of the ROI may be problematic from the perspective of gender equality law.

II. The Law in the ROI

The law in the ROI concerning rape was placed on a statutory footing in Section 2 of the Criminal Law (Rape) Act, 1981 ('1981 Act').²⁰ For the purposes of this research paper, we are concerned with the *mens rea* element of the offence set out in section 2(1)(b) of the Act, which states that a man must know that the woman does not consent or be reckless to this fact in order to be convicted of rape.²¹ Furthermore, in deciding such a case, the jury must have regard to the presence or absence of any reasonable grounds for such a belief.²² In *D.P.P. v. C O'R*, Charleton J. defined 'recklessness' as the taking of a serious or unjustified risk.²³ Importantly, 'recklessness' does not mean that a reasonable man would be aware that a woman wasn't consenting but simply that the accused himself must have foreseen the risk of his conduct and decide to proceed regardless.²⁴

Furthermore, the courts have long endorsed the defence of 'honest mistake'. The origins of this defence can be found in *D.P.P. v. Morgan*, where the court stated if the accused had an honest, but mistaken belief as to the existence of consent, even if there was no reasonable basis for this belief, this provides a full defence to the conviction of rape.²⁵ In *DPP v. C O'R*, Charleton J. approved

²⁰ Criminal Law (Rape) Act 1981, s. 2

²¹ *id.* s. 2(1)(b)

²² *id.* s. 2(2)

²³ [2016] 3 I.R. 322.

²⁴ *id.*

²⁵ [1976] A.C 182.

Morgan and concluded that an honest, though unreasonable, mistake as to the existence of consent is a defence to rape.²⁶

III. The Law in NI

The law governing rape in Northern Ireland, is similar to that in England and Wales, and is laid down in Article 5 of the Sexual Offences (Northern Ireland) Order, 2008. Section 5(1)(c) states that a person commits the offence of rape if he does not “reasonably believe” that the woman has provided consent.²⁷ In deciding whether the offender’s belief is indeed reasonable, the jury must have regard to ‘all the circumstances, including any steps A has taken to ascertain whether B consents’.²⁸

IV. Key Divergence

The key divergence as between the two jurisdictions lies in the nature of the tests. The ROI has shown a preference toward subjectivism and in deciding whether the *mens rea* element of the offence is satisfied, the courts are concerned with the subjective belief of the offender. Charleton and McDermott, in discussing the law of the ROI, note that the existence or absence of consent is an objective fact, however, the accused’s view as to the existence or non-existence of that fact is subjective.²⁹ Indeed, in *D.P.P. v. O’C’OR*, the court affirmed the subjective test and stated that the *mens rea* of rape requires that the accused knew that the woman did not give consent.³⁰ Importantly, this does not mean that a reasonable man would be aware that a woman is not consenting, but simply requires

²⁶ *cf. fn.* (23)

²⁷ Article 5 of the Sexual Offences (Northern Ireland) Order 2008, s. 5(1)(c)

²⁸ *id.*, s. 5(2)

²⁹ Peter Charleton and Paul McDermott, *Criminal Law and Evidence* (2nd ed., Bloomsbury Professional 2020) [11.95].

³⁰ *cf. fn.* (23)

that the defendant himself knew.³¹ This approach permits an accused to rely on completely unreasonable beliefs as to the existence of consent.³²

In contrast, the *mens rea* in NI is concerned with a more objective analysis and requires that the offender's belief as to the existence or non-existence of consent to be a 'reasonable belief'. However, it is worth noting that the NI test contains a subjective element in that the jury is obliged to have regard to 'all the circumstances' in making their determination. The effect of this provision is to incorporate a *de facto* subjective component into the test which allows the court to consider any compelling subjective circumstance that arises in the case which may have influenced the offender's belief as to the existence or non-existence of consent.

V. Impact of Divergence on Gender Equality Law

As this chapter is concerned with 'discrimination,' it is important to put the above discussion into context. The NI approach promotes gender equality and anti-discrimination sentiment much more effectively. The law in the ROI is mainly concerned with the position of the accused man – what did he believe to be the case? As a consequence, this law continues to promote a traditional dynamic between men and women whereby women were seen as inferior, unequal and often subjected to male dominance.³³ This traditional view is the basis of much of the law in the UK and as a result, the law was rarely concerned with the female perspective. The current law in Ireland, having gained influence from the UK, now displays this very same tendency.

³¹ *id.*

³² Law Reform Commission Report, *Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019) 49

³³ Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *M.L.R.* 10; see what Naffine labels as the 'Western View of Erotic Love', whereby the woman surrenders herself to be possessed by the man, who acts as the dominant figure in the relationship: p. 11

Furthermore, the law in the ROI promotes gender inequality and discrimination by undermining the experience of the female victim. The defence of 'honest mistake' asks whether the accused man honestly believed consent to be present, and if so, he can be acquitted. This doesn't give enough consideration to the woman's experience – how she acted or even whether she gave indications that a reasonable man would consider to be non-consent. This sends a negative message to victims of rape that says their experience can be negated and undermined by an irrational and ridiculous honestly held belief.³⁴ Under the objective analysis in NI, the law is much less male-centric and considers the woman's experience imperative to deciding whether the accused 'reasonably' believed consent to be present.

VI. Conclusion

In the context of reunification, the divergence between the jurisdictions in this particular respect would require a considerable level of legal reconciliation. There is a concern that the differing approaches to the *mens rea* notes above has also resulted in each jurisdiction demonstrating a different level of concern to issues of gender inequality and discrimination. The ROI continues to promote an out-dated and traditional view of gender inequality that has since been expelled from the law of the UK and Northern Ireland.

³⁴ Susan Leahy, 'When Honest is Not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law' (2013) 23(1) *I.C.L.J.* 4

VIII. Disability Rights

by Graham Doran

I. Divergence in disability rights in Ireland and the UK

There are two primary points of concern regarding divergence in the law between the Northern Ireland and the Republic of Ireland regarding substantive disability rights. These being socio-economic limitations in the Irish constitution, and international commitments. I will briefly deal with each of these in turn.

II. Constitutional limitations

While the Ireland has seen positive constitutional jurisprudential developments in relation to providing access to enhanced care and education for people with severe learning disabilities¹, it has also managed to limit its ability to deal with disability rights drastically. This is because the courts in this jurisdiction have been incredibly hesitant to recognise socio-economic rights as being contained within the constitutional order. The cases of *TD*² and *Sinnott*³ have both infamously recognised that constitutional guarantees for the state to provide for primary education under Article 42 of the constitution, which served to benefit people with learning disabilities, are subject to strict age limitations⁴, and that the courts are excluded issuing mandatory orders which would impose a positive obligation on the state to provide for such rights.⁵ While these decisions have had some

¹ *O'Donoghue v. Minister for Justice* [1996] 2 I.R. 20

² *T.D. v. Minister for Education* [2001] IESC 101

³ *Sinnott v. Minister for Education* [2001] 2 I.R. 545

⁴ *id.* 669 (*per* Denham J.)

⁵ *id.* 685 (*per* Hardiman J.)

substantial academic critique⁶, they are firmly maintained in the Irish jurisprudence and serve to substantially limit the scope of litigation to provide relief for breaches of constitutionally protected disability rights. It could be argued that in more recent years the courts have adopted a more inadvertent approach to vindicating disability rights through the rubric of administrative law⁷, but such an improvement would arguably be more attributable to the greater development of domestic legislation and international treaties on disability rights to which Ireland has become party, meaning that the courts now have greater scope to vindicate disability rights without appealing to the constitution. However, with regards to the internal constitutional order there remains a clear limitation in this jurisdiction on the use of the constitution as a tool to vindicate the rights of those with disabilities.

By contrast, the UK (and by extension Northern Ireland) adopts a different approach. The UK courts have developed a more expansive interpretation of the legal protections for disabled individuals, particularly with respect to social care, education, and employment rights. There is no written constitution for the UK on which claimants can rely on for rights, but the courts in that jurisdiction have historically been forward with the use of other legislative schemes as a basis for disability rights. The UK Supreme Court has recognized a continuous entitlement to care and support for individuals with disabilities beyond the age of 18, thereby establishing a broader right to access services in adulthood.

⁶ see Gerry Whyte, *Social Inclusion and the Legal System* (2nd ed., Institute of Public Administration 2015); Shivaun Quinlivan, 'TD v Minister for Education: A Chilling Effect on Would-be Litigants?' (2022) 6(3) *Ir. Jud. Stud. J.* 305; De Wispelaere and James Walsh, 'Disability Rights in Ireland: Chronicle of a Missed Opportunity' (2007) 22(4) *Ir. Pol. Stud.* 517

⁷ see, e.g., *P(C) v. Chief Appeals Officer & Ors.* [2013] IEHC 512

In one notable case however, *R v. Gloucestershire County Council and Another*⁸ the UK House of Lords ruled that local councils maintained independent scope to determine whether financial commitments on disability schemes could be restricted on the basis of the financial needs of the local council. This would suggest that there is a similar hesitance in the UK on the part of the judiciary to serve as a bulwark for protecting disability rights.

III. Legislative distinctions

There is very little substantive legislative distinction in the protection of disability rights in either jurisdiction. Both Ireland and the UK are party to several key international agreements relating to the rights of people with disabilities including the ‘United Nations Convention on The Rights of People with Disabilities’ (UNCRPD), and the ‘European Convention of Human Rights’ (ECHR). As such citizens in both jurisdictions remain entitled to rely on these international frameworks to vindicate their rights.⁹ However, with recent political trends in the UK in recent years of gesturing towards withdrawing from the ECHR¹⁰, it could be argued that these rights are more secure in an Irish context due to its monist structure they are imbedded into domestic law. Similarly, both jurisdictions have enhanced disability protections domestically with the Disability Act 2005 in Ireland and the Disability Discrimination Act 1995 in Northern Ireland.

IV. Conclusion

In conclusion, the divergence between disability rights in Ireland and Northern Ireland is relatively slim by and is primarily marked by Ireland’s constitutional limitations, coupled with a more restrained approach to socio-economic rights, which place constraints on the ability of individuals

⁸ [1996] 4 All ER 421

⁹ *Gauer and Others v. France* (App. No. 61521/08) is an example of the ECHR being used as a tool to protect disability rights.

¹⁰ BBC, ‘ECHR exit ‘would breach Good Friday Agreement’ (24 May, 2024) <<https://www.bbc.co.uk/news/articles/cl55n29v2ppo>> (last accessed 10 January, 2025)

with disabilities to secure long-term care and support through litigation. Both jurisdictions adhere to the same international agreements in relation to disability rights and largely structure their domestic legislation on the issue identically. In a potential situation of a merged system going forward, there would be a large opportunity to ensure that future legal structures do not face the same weaknesses that undercut the guarantees found in the Irish constitution. Making a point of ensuring that future constitutional orders maintain a distinct and substantively applicable scheme for protecting disability rights should be paramount to any conversation about unification going forward.

IX. Natural & Inalienable Rights

by Gráinne Lambert, Ella Okah, Nehir Camkoy, and Rahime Ayda Ozbay

A. I. Influence of the Preamble on the Protection of Natural Rights

The interpretation of natural rights has been shaped by the dynamic influence of living constitutional and social values in Irish jurisprudence. The Preamble of the Irish Constitution is one of the most cited textual resources, demonstrating both conservative and democratic aspects of Irish society.¹ The Preamble manifests the divinity of law and the democratic structure of Ireland as two coexisting themes rather than competing values.

In Ireland, the Preamble was traditionally interpreted as a textual tool establishing God as the ultimate resource of all valid laws, requiring every human-made law to comply with the principles of divine law. This is attributed to the beginning of the Preamble: ‘All actions of men and State must be referred to the Holy Trinity’ and that the ‘People of Éire humbly acknowledging their obligations to their Divine Lord and Jesus Christ.’ These explicit Christian references in the Preamble, ‘Holy Trinity,’ ‘Divine Lord,’ and ‘Jesus Christ,’ were believed to be positioned as superior and made the People of Ireland liable to these religious figures. This essay aims to analyse the shifts in the Irish Preamble’s interpretation and explain how they diverge from Northern Ireland’s protection of natural rights.

¹ Aileen Kavanagh, ‘The Irish Constitution at 75 years: Natural Law, Christian Values and the Ideal of Justice’ (2012) 48 *Ir. Jur.* 71, 100

II. Shifts in the Interpretation of the Irish Preamble

There have been landmark cases which required judicial intervention to modernise the Preamble's interpretation. This objective is achieved in the light of progressive constitutional interpretations and changing social values. In *State (Ryan) v. Lennon*, Chief Justice Kennedy (dissenting) argued, that '[e]very act, whether legislative, executive or judicial in order to be lawful under the Constitution, must be [...] declared to be derived from God.'² This is because the 1922 Constitution declared that 'all lawful authority comes from God to the people.' Chief Justice Kennedy's interpretation of the Preamble suggested that if a law is repugnant to God-derived law, it is automatically unconstitutional since it does not meet the Preamble's criteria: compliance with divine law. Although the legislation in question was not struck down in *State (Ryan) v. Lennon*, Chief Justice Kennedy's dissenting judgment revealed the traditional interpretation of the Preamble and portrayed human-made law as an inferior concept to divine law.

However, throughout the development of natural rights and Constitutional jurisprudence, different notions of the Preamble have started to play critical roles in Supreme Court judgements. The characteristic elements of a democratic society which are stated in the Preamble, 'common good,' 'true social order,' and 'dignity and freedom of the individual,' became more distinguishable.

In *McGee v. Attorney General*, the Preamble's notion of dignity and freedom of the individual became a turning point in some Supreme Court judgements.³ In the 70s, the importation of contraception was criminalised in Ireland by the Criminal Law Amendment Act, 1935. However, Mrs McGee was

² [1935] I.R. 170, 204.

³ [1974] I.R. 284

in an emergency, and she had to obtain a contraceptive due to personal health and family planning reasons. She successfully argued that she had a right to marital privacy and freedom to conduct intercourse in her desired way in order to protect her health and maintain the number of her children. Thus, she claimed that the State could not interfere with her contraceptive use and that the 1935 Act violated her right to marital privacy.

The Court held in favour of Mrs. McGee regardless of the Catholic Church's moral opposition to contraceptives at that time. In his judgement, Henchy J. referred to the Preamble's commitment to protecting the dignity and freedom of the individual. Hench J.'s references to the democratic elements of the Preamble demonstrated a shift in the interpretation of the Preamble.⁴

Additionally, 'justice,' another notion protected in the Preamble, outweighed the popular Christian teaching in *McGee*. Walsh J emphasised the importance of providing justice and stated that it required upholding Mrs McGee's claim: 'According to the Preamble, the people gave themselves the Constitution to promote the common good and justice, thus judges must interpret the Constitution in light of changing ideas of prudence, justice and charity.'⁵ Consequently, the democratic elements contained in the Preamble outweighed the Christian values.

Overall, regardless of the criminalisation of contraception by the Act 1935, the Court found it fair to allow Mrs McGee to use contraception with respect to changing ideas and the interest of justice. The Irish Supreme Court endorsed the democratic and dignitary characteristics of the Preamble in

⁴ *id.* 326.

⁵ *id.* 319.

McGee to protect human rights and departed from its conservative approach in *State (Ryan) v. Lennon*.

Lastly, another important change in the interpretation of the Preamble is observed in *Norris v. Attorney General*.⁶ The Supreme Court rejected Mr Norris' interpretation of the Preamble to support his homosexual activities. Mr Norris claimed that the Christian teaching of 'charity' and 'freedom of the individual' were protected in the Preamble, making his homosexual conduct legal.⁷ However, the Supreme Court rejected Mr Norris' argument on the basis that 'common good, public order, and morality' overrode the 'freedom of the individual right' in *Norris* case: 'They [freedom of the individual and charity] are protected by the Constitution subject to public order and morality.'⁸ Since Mr Norris' case concerned a broader issue, a public order issue, it made the 'freedom of individual' notion of secondary importance. Unlike in *McGee*, in this case, the Court favoured endorsing a less democratic interpretation of the Preamble, similar to its approach in *Lennon*.

Overall, throughout the improvement of Irish Constitutional jurisprudence, the coexisting elements in the Preamble were balanced to achieve justice in light of changing ideas and the common good. The interpretation of the Irish Preamble is used to protect human rights through its references to Christian norms, natural law, and the democratic rights of the People of Ireland.

III. How did these shifts diverge from the Northern Irish protection of natural rights?

In Northern Ireland, traces of parliamentary sovereignty, or 'legislative supremacy', are observed in natural rights discussions. Unlike Ireland, Northern Ireland does not have a Constitution and a

⁶ [1984] I.R. 36.

⁷ *id.* 58

⁸ *id.* 64

Preamble to consult as key textual resources. Northern Irish courts follow the Human Rights Act 1998 and the European Convention on Human Rights as textual resources in human rights discussion.⁹

This is one of the most critical divergences in human rights discussions because one jurisdiction requires the analysis of natural rights in light of constitutional and national values, while the other does not. The Irish interpretation of natural rights requires analysing and drawing connections to what the People of Ireland gave themselves through the Preamble and dynamic societal changes. In contrast, the Northern Irish interpretation method requires more formalistic interpretation techniques. Thus, interpreting and protecting natural rights regarding ‘changing social values’ becomes a significant divergence.

B. I. Expressly Stated Rights

The Irish Constitution, unlike the UK’s constitution, is a codified one. This means that rights stated in the constitution are expressly protected by it. Therefore, much of constitutional law in Ireland revolves around protection and balance of the rights as breached or exercised by the Government. Certain acts of Oireachtas are governed by Articles 40, 41, 42, and 43. An Act can be found unconstitutional on the grounds that it is repugnant to one of these articles. The role of the legislature is constricted in a way it is not in the UK by the virtue of these articles.

Article 40 includes the basic rights of humans, the equality principle and ‘the due course of law’.

Article 41 concerns the rights of the constitutional Family, which is a unique characteristic of the

⁹ Equality and Human Rights Commission, ‘The Human Rights Act 1998’ (15 November, 2018) <<https://www.equalityhuman-rights.com/human-rights/human-rights-act#:~:text=The%20Human%20Rights%20Act%201998,the%20UK%20in%20October%202000>> (last accessed 10 January, 2025)

Irish Constitution absent from the rules of law in the UK. Article 42 lays out the right to education and as of recently rights of children. Article 43 expands upon the right to private property and its necessary restrictions. Therefore, the state's role in Northern Ireland and Ireland differ hugely in these instances. For example, per Article 42.4 the Irish state is obliged to support private educational initiatives, something which has not been established in Northern Ireland or per Article 43.2 the courts can be called upon to review statutes delimiting the right to property on whether it precludes a 'common good' and if that 'common good' was appropriate to the level of restriction. This difference in codification of rights, therefore, has considerable practical effect on any proposed reunification.

The constitution, as the 'power-granting' document of a state, organizes the state's governance on a fundamental level and the primacy of rights expressly granted in the Constitution creates a potential for divergence from Northern Ireland's government as a part of the UK. This protection of people's right to 'life, person, good name, and property' has the potential to clash with established governance structures under the UK constitution as the protection of rights would be more concrete and by this virtue paramount in most cases.

a. Property Rights

The Irish Constitution, while protecting the 'natural right [...] to the private ownership of external goods', restricts the exercise of this right in accordance with 'the exigencies of the common good'. This is the very basic principle that governs property rights in Ireland expressly. The courts, naturally, have great discretion over what constitutes 'the common good'. In *Buckley and Others (Sinn*

Fein) v. *Attorney General and Another*¹⁰ the courts established that the government simply cannot irrevocably determine the common good. Irish courts decide if and when a statute is not properly balanced with the exigencies of the common good. However, there is a delicate balance warranted by the protection of rights in the Irish Constitution. *Shirley v. AO Gorman*¹¹ saw the establishment of courts being weak in enforcing these rights in the clear existence of a common good goal being achieved by a moderate infringement on rights. Northern Ireland is fundamentally different in this line of questioning. The need to balance legislation with the courts' definition of the common good is a significant change in the established UK system.

The Irish Constitution, in its protection of natural rights, follows a pattern. The Constitution firstly engraves the rights on the very basis of the rule of law in the nation, then restricts them in the interest of a just and functioning society. This results in the courts being placed in a unique position where they are tasked with guarding the rights and reconciling an individual's right with the greater society's interests as envisioned in the Constitution. Naturally, the courts' duty to safeguard natural rights 'antecedent to positive law' of people are stronger in Ireland by this acknowledgment. In a way, such rights prompt the Irish courts to reach beyond positive law. The Constitution of Ireland in this case grants a special power to the courts in protecting natural rights.

b. Family Rights

Another way the Irish Constitution differs is by the special protection it grants to a constitutional Family. These rights are very narrow but also very strong when applied. The case *Gorry v. Minister*

¹⁰ [1950] I.R. 67

¹¹ [2006] IEHC 27

*for Justice & Equality*¹² is a prime example of this approach and also a strong indicator of the natural rights approach of the Irish Constitution. The Constitution recognizes Family rights as ‘antecedent and superior to all positive law’.¹³ In *Gorry*, the question of whether this implied that a right to cohabitation of families trumped immigration law, which is a prime example of positive law. There were two approaches. Hickey uses the metaphor of a shoebox to illustrate these approaches. The prevailing approach amounting to a narrow but strong implication is akin to a shoebox sitting on its side, where the area it covers is small, but high. The second approach is a normal shoebox, supporting a more modest height while covering a larger area.¹⁴ The case’s outcome would not change despite vastly different approaches on whether the rights under article 41 trumped immigration law in this case. The ratio was the minister’s failure to consider all the Family rights under article 41. He simply could not have disregarded such rights. This, however, did not mean such rights would direct the minister to revoke the deportation order for Mrs. Gorry. *Per* O’Donnell J.’s judgement Article 41 rights would only concern the Family’s constitution and authority.¹⁵ In other words, its internal decision-making was protected, so this did not mean that the Family was immune to positive law. This ruling is significant not only on Family rights in the Irish Constitution, but all rights ‘antecedent and superior’ to positive law.

The ruling saw the emergence of a conservative approach in interpretation of such rights. The existence of them would not imply that there is a large amount of rights to be recognized as natural rights. The existence of inalienable rights that are ‘antecedent and superior’ does not mean that no

¹² [2014] 2 I.L.R.M. 302

¹³ Art 41.1.1°

¹⁴ Tom Hickey, ‘Interpreting natural rights: Gorry and ‘the family’ under Article 41’ (2021) 43(3) *J. Soc. Welf. & Fam. L.* 331

¹⁵ *id.*

positive law applies if such right is breached, it merely means that there is a very limited area within such rights that are almost inviolable. One can apply this to property rights, for instance, where infringement of an individual's property rights is acceptable for the common good, yet the existence of private ownership is much more strictly protected.

In this issue of Family rights and *Gorry*, there is a little caveat specific to the topic of this paper. The consideration of ECHR 8 being broader in many instances will alleviate potential points of conflict between Northern Irish and Irish law, as the UK is still subject to ECHR.

c. Equality

Equality is a natural right recognized by Article 40.1 of the Irish Constitution. However, the article also notes that this promise of equality does not mean there are no distinctions within legal order. The courts in *Donnelly* ruled that so long as the distinction was not arbitrary or inherently discriminatory, it did not breach the Constitution.¹⁶ This despite seeming like a potential point of contention, is mostly included in statutes and laws inferior to the Constitution, so is unlikely to cause a practical problem.

II. Derived Rights

Perhaps the most important part of natural rights is the previous tendency of the Irish courts to expand these rights in the now abandoned unenumerated rights doctrine. However, that

¹⁶ *Donnelly v. Minister for Social Protection* [2023] 2 I.R. 415

interpretation is now replaced by a derived rights doctrine with a significantly tamer approach to expansion of rights, following the interpretation of Article 41 in *Gorry*.

C. I. *Ryan v. Attorney General* — A Case Study on Unenumerated Rights

This section of the paper will discuss unenumerated rights; what they are and where they stem from, as well as the article in the constitution which protects them. In parallel, we will be analysing case-law. We will also be looking into the democratic and Christian nature of the state and how they are relevant and lastly the natural law approach and human personality test.

Unenumerated rights are rights which are not specified in the constitution but are still fundamental and considered necessary despite not being outlined in the constitution. Unenumerated rights are embodied in article 40.3 of the constitution. Article 40.3 reads as follows:—

‘1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’.

The courts use this Article in order to infer unenumerated rights. This is the case because article 40.3 enumerates a number of specific personal rights of the citizen, and Article 40.3.2 contains the phrase ‘in particular’, which implies that there are other rights protected by article 40.3.1.

II. *Ryan v. Attorney General*

Ryan v. Attorney General.¹⁷ has significant relevance in relation to unenumerated rights as it was within this case the doctrine was created. Therein, Mrs. Ryan was objecting to the fluoridation of the public water supply and contended that the Health (Fluoridation of Water Supplies) Act, 1960 was unconstitutional. She argued, *inter alia*, that the fluoridation would affect her right to bodily integrity. She claimed this right was implicitly protected as an unenumerated right by Article 40.3.1. Though she lost the court case as the courts did not find the act to be harmful to the plaintiff's health, Kenny J. and the Supreme Court both still agreed with her proposition. Accordingly, the unenumerated rights doctrine was born.

In *Ryan*, Kenny J. identified reasons in support of the argument that the right of bodily integrity was protected by the constitution. These reasons involve the Christian and democratic nature of the State – preambular principles which must lead to the protection of rights which would fall under such principles. Indeed, Catholic social teaching has recognised a right to bodily integrity.

III. The Christian and Democratic Nature of the State

The Christian and democratic nature of the State forms a consideration within a test developed by Kenny J. in the *Ryan* case which recognises personal rights which stem from the Christian and democratic nature of the state.

The democratic nature of the state refers to how Ireland is a democracy, wherein people have the right to vote, free speech, travel, *etc.* This test is allegedly from a time before a fair voting system was

¹⁷ [1965] I.R. 294

in place. But despite this there are rights already guaranteed and protected in the constitution, article 16 directly mentions the right to vote. A right which fits the democratic nature of the state clearly is the right to travel as the right is not mentioned in the Constitution, but it is still considered a right, a personal right. In the case of *The State (M.) v. An Bord Uchtála*¹⁸, it is described how the right to travel freely is a personal right for every citizen – even though it isn't mentioned in the Constitution.

In the Irish Constitution, there are many references to Christianity for example the preamble mentions the Holy Trinity. Article 44.2.2 states that the state is not permitted to favour any religion – '[t]he State guarantees not to endow any religion'. This portrays the idea that the Irish constitution prioritises fairness over encouraging religion. Ireland is no longer defined as a Christian State; however if it still were, there would be certain rights that would remain protected such as education, marriage and freedom of religion. Anyhow, these rights are already protected in the constitution by articles 41, 42, and 44. Due to this it's unclear and not understandable as to what extra rights Ireland would avail of if identified as a Christian state. Kenny J. once used the *Pacem in Terris*¹⁹ decree to try to figure out what other 'unwritten' rights should be considered in the Constitution. This was said to be controversial as the *Pacem in Terris* decree is a document from the Catholic Church, and if people are going to use documents, should they be allowed to pick and choose which ones?

IV. Natural Law Approach

The natural law approach is a variation of the 'Christian and democratic nature of the State' test. The test was created by the Supreme Court, and it suggests how there are certain moral principles

¹⁸ [1977] I.R. 287

¹⁹ *cf. fn. (17)*

ingrained in humans that aren't just made by laws or governments. These moral principles are defined as 'natural' which means that they only exist due to human nature. According to natural law, there are certain rights (*e.g.*, the right to life) that should be respected by the government. Natural law was thus a mechanism used to interpret the Constitution. However, there are issues when it comes to the natural law approach such as the lack of precision or how it's difficult to apply.

V. Human Personality Test

Henchy J. in *Norris v. Attorney General*²⁰ established a new test, the 'Human Personality Test'. This test stands as a less precise interpretation of the Irish Constitution. He proposes the idea that certain rights (*e.g.*, the right to freedom) are vital for people to live as individuals in society. He argued that these rights should be protected as they are intrinsic to our human personality. However, though it makes sense, there are some flaws to it such as how difficult it is to apply when it comes to more complex rights such as the right to own property.

VI. Position in the United Kingdom

As one commentator on Bracton once opined, '[i]n England[,] less attention is paid to natural law than anywhere else in the world'.²¹ Bar certain fundamental judgments like *Somerset*²² and *Macferlan*²³, this statement holds as much truth today as it did two hundred years ago. Anyone ever slightly so versed in the history of natural, inalienable rights will be quick to understand the oddity behind such a statement: from Sir Francis Ashley to Edward Wayne, there was no author of natural law

²⁰ [1983] IESC 3

²¹ F.W. Maitland, 'Selected Passages from Bracton and Azo' in Maitland (*ed.*), *Publications of the Selden Society* (Selden Society 1894) 125

²² *Somerset v. Stewart* (1772) 98 E.R. 499, 510 (*per* Lord Mansfield)

²³ *Moses v. Macferlan* (1760) 2 Bur. 1005 (*per* Lord Mansfield)

more prevalent than the English jurist.²⁴ Instead, it would seem that most of the rights we once perceived or recognised as being natural in origin, or which our Constitution was labelled ‘inalienable’, were recognised through a much more positivist and formal mechanism in the United Kingdom: *e.g.*, the Human Rights Act, 1998, statute, and case-law which does not purport to derive such rights from ‘nature’ but rather from more laic sources.

VII. Conclusion

There is no easy way to go about reconciling such a stark contrast in hermeneutics. In so saying, it is recognised that the Irish doctrine on natural rights has seen a steep decline – which rendered its development stagnant for the better part of 25 years. However, recent case-law²⁵ might lead one to infer a change in tides. Fortunately, a large majority of the rights recognised by the Irish judiciary as being natural have now been enshrined in International Human Rights Law instruments. As such, the question becomes two-fold: (i) would it be worth it to expressly give up the doctrine of natural rights in a consolidated Constitution in favour of a more positivist approach, and; (ii) would such an approach force either State to accede to international instruments they have yet to accede to in order to ensure parity of obligations?

D. I. Dualism as a divergence to the protection of human rights in Ireland and the UK

This section will engage in a discussion of dualism in Ireland and the UK and compare how dualism in both countries respectively impacts the incorporation of human rights into domestic law. I will

²⁴ A good historical account of natural law writers was given to this effect by Richard H. Helmholz, ‘Natural Law and Human Rights in English Law: From Bracton to Blackstone’ (2005) 3 *Ave Maria L.R.* 1, 8–11.

²⁵ *i.e.*, *N.H.V. v. Minister for Justice & Equality* [2017] IESC 35; *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49.

examine the severity of dualism as a divergence to the protection of human rights, with a particular focus being placed on the recent implications in the UK in light of Brexit.

Dualism refers to a system in which international and domestic systems of law are treated as separate and independent of each other. Dualism is the legal system adopted by many countries such as Ireland, the UK, Canada and Australia. As per Article 29.6 of the Irish Constitution:—

‘[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, on or after the entry into force of the Treaty of Lisbon, necessitated by the obligations of membership of the European Union’.

Ireland adheres to fundamental international and European human rights treaties and the Irish Constitution recognises the importance of these treaties in Article 29.6. However, delays caused by respect for the sovereignty principle – given greater significance throughout Ireland’s adoption of the principle of dualism – may on occasion ensue. The nature of the dualist system in Ireland was best evidenced in the landmark case of *Norris v. Ireland*²⁶ where there was a delay between the recognition of the breach of Article 8 of the ECHR in 1988 and the time when the law was changed in Ireland in 1993. Despite the decision given by the ECtHR in 1988 which provided that change to Irish legislation was required, in 1990 this reform had not yet been enacted and Mr. Norris resubmitted his case to the ECtHR seeking punitive damages for the delay. Eventually in 1993, the Sexual Offences Bill, 1993 was passed. As protection of human rights is constantly being policed by the EU as seen in the *Norris* case, any failure by the Irish government to comply with human rights protection due to their dualist system is swiftly addressed and rectified.

²⁶ [1984] I.R. 36

In the UK, on the other hand, the ECHR was only incorporated into UK law with the Human Rights Act (HRA), 1998, with the HRA entering into force on October 2nd, 2000. Prior to this, the UK was only compelled by the ECHR under international law; yet, after October 2nd, the ECHR could only be directly invoked in the UK courts as part of domestic law.²⁷

Article 3 of the ECHR concerning the ‘Prohibition of torture’ influenced the decision of the Court of Appeal in the landmark case of *A.A.A. v. Secretary of State for Home Department*.²⁸ As per Article 3 of the European Convention on Human Rights:—

‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

This case posed a challenge to the UK–Rwanda Asylum Partnership. Under this partnership, asylum-seekers in the UK would first be transferred to Rwanda before their claim for asylum was heard. Responsibility then lay with the Rwandan government to decide on the requirements for international protection. Moreover, even if the need for international protection was successful, those seeking asylum would remain in Rwanda. The UK Supreme Court upheld the decision of the Court of Appeal that the Rwanda asylum plan was in fact unlawful. However, since this Supreme Court decision, the Rwanda Bill has since been updated to address the Supreme Court’s obligations and was adopted earlier this year. Yet, shortly after the Labour Party cancelled the Bill. While this Bill was not enforced it is a clear example of how dualism and more importantly Brexit can allow the UK to

²⁷ Equality and Human Rights Commission, ‘The Human Rights Act’ (2018) <<https://www.equalityhumanrights.com/human-rights/human-rights-act#:~:text=The%20Human%20Rights%20Act%201998,the%20UK%20in%20October%202000.>> (last accessed 17 December, 2024)

²⁸ [2023] UKSC 42

simply bypass and overlook fundamental human rights treaties. Indeed, the reformed Bill allowed the British government to ignore the orders of the ECHR.²⁹

Following Brexit in 2016 the Government may apply new European law in some instances, yet this will ultimately be incorporated into British law and decided by British courts. However, the decision by the UK to leave the EU does not impact cases being brought before the ECHR. As such it appears that the protection of human rights which the ECHR focuses on primarily will not be impacted. However, this is complicated by the Human Rights Act, 1998. If the repeal of the HRA is successful, this will result in ECHR decisions becoming less effective in the UK. The threat of repealing the HRA is a long established one which is still ongoing.³⁰

The Conservatives' 2019 manifesto proposed to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'³¹

Just earlier this year, former Prime Minister Rishi Sunak raised his concerns surrounding the possibility of leaving the ECHR and the Council of Europe. The undermining fact is that without the ECHR, UK citizens would no longer be able to take cases to the European Court of Human Rights. However, if the ECHR is no longer effective in the UK by consequence the Human Rights Act cannot continue to operate.³²

²⁹ Jean-Philippe Lefief 'Understanding the British government's plan to send migrants to Rwanda' *Le Monde* (24 April, 2024) <https://www.lemonde.fr/en/international/article/2024/04/24/understanding-the-british-government-s-plan-to-send-migrants-rwanda-6669425_4.html> (last accessed 17 December, 2024)

³⁰ Commons Library, 'How Brexit might affected human rights in the UK' (2019) <<https://commonslibrary.parliament.uk/how-might-brexite-affect-human-rights-in-the-uk/>> (last accessed 18 January, 2025)

³¹ Alice Donald, ' "The Bill of Rights Bill" The UK In A Changing Europe' (2022) <<https://ukandeu.ac.uk/explainers/the-bill-of-rights-bill/>> (last accessed 19 December, 2024)

³² Alice Donald and Joelle Grogan 'Leaving the European Convention on Human Rights: UK In A Changing Europe' (2022) <<https://ukandeu.ac.uk/explainers/leaving-the-european-convention-on-human-rights/>> (last accessed 19 December 2024)

Both the decision in *A.A.A.* and the rejection of the proposed Bill of Rights Bill indicate that the British Government is giving considerable thought into the possible implications of this change on the protection of human rights. While Brexit and its implications do act as a divergence to the protection of human rights, it is clear that the British Government is not content with simply severing ties with the ECHR, which protects human rights completely and entirely, until a solution is met which ensures that the protection of human rights is not compromised.

X. International Legal Perspective

by Ines de Meyer, Charlotte Wellington, and Melina Poulin

A. Introduction

The unification of the Republic of Ireland and Northern Ireland will not solely be governed by the domestic laws of both entities, as International Law will determine the successor State's international legal personality. Consequently, it is important to outline the potential dichotomies that a United-Ireland would encounter in relation to their international status, both from a domestic and international legal perspective. This chapter sets out the current legal framework of both the Irish Republic and Northern Ireland regarding International Relations. Furthermore, it clarifies how the predecessor State's membership in the United Nations ('UN') might be affected, and whether an accession to the North Atlantic Treaty Organization ('NATO') is possible or if this is against Ireland's long hold position of military neutrality. Lastly, this chapter clarifies the impact of unification on the current militia of the Irish State.

B. Competences to conduct International Relations

Under the Irish Constitution, International Relations are exercised by, or on authority of, the government.¹ It is an autonomous power granted to the government that is subjected to limited oversight by the Dáil Éireann, namely the Dáil has to authorize a declaration of war or the conclusion of an international agreement that will bring a charge on public funds.² Besides these explicit limitations imposed on the powers of the government, the Supreme Court determined in *Crotty v.*

¹ Art 29.4.

² Arts. 28.3 and 29.5; *Horgan v. An Taoiseach & Ors* [2003] IEHC 64.

*Taoiseach*³ that the government's powers were also subjected to justiciable limits imposed by General Constitutional Principles. The Supreme Court determined that a referendum was needed before Ireland could become party to the Single European Act, and as such, the powers granted to the government under the Constitution did not allow it to do so without authorization by a Constitutional Amendment.⁴ The Single European Act would introduce a 'joint-foreign policy platform' with other States, which, according to the Supreme Court, went against the sovereignty of the State and as such required a referendum.⁵ The determining factor in this case was that the international agreement would undermine the sovereignty of the State in the area of external relations because the discretion of the State would have been alienated. This reasoning was reinstated in *Pringle v. Government of Ireland*⁶, a case involving an international agreement concluded by the government that established the European Stability mechanism, in which the Supreme Court determined that the government was free to conclude such an agreement because it retained a veto right and therefore did not alienate the State's discretion and undermine State sovereignty.

Regarding the United Kingdom ('UK'), the government's royal prerogative is the primary means by which International Affairs are conducted, meaning they can be exercised by the Government and do not need parliamentary authority.⁷ This gives the executive considerable latitude in negotiating and approving treaties, with the Constitutional Reform and Governance Act of 2010 ('CRAG') limiting parliamentary review to this process.⁸ Although CRAG allows for legislative oversight—for

³ *Crotty v. An Taoiseach and Others* [1987] IESC 4; Eoin Daly, 'Neutrality and the Irish Constitution' (*Verfassungsblog*, 13 April 2022) <<https://verfassungsblog.de/neutrality-and-the-irish-constitution/>> (last accessed 22 December, 2024)

⁴ *Crotty* fn. (3) [778]

⁵ Art. 2; cf. fn. (3)

⁶ [2012] IESC 47

⁷ Constitutional Reform and Governance Act 2010 (UK), ss. 20—21; Claire Mills, 'Military Action: Parliament's Role' (2024, House of Commons Library Research Briefing) 8 <<https://researchbriefings.files.parliament.uk/documents/CBP-10001/CBP-10001.pdf>> (last accessed 9 January, 2025); Lisa James and Arabella Lang, 'International Agreements: What is Parliament's role, and why does this matter?' (2024, The Constitution Unit Briefing) 2 <https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/international_agreements.pdf> (last accessed 9 January, 2025)

⁸ Constitutional Reform and Governance Act 2010 (UK), ss. 20—21; James and Lang (*op. cit.*) 2—3

example, requiring treaties to be presented to Parliament for 21 days during which objections may be made—it does not give Parliament the ability to veto the ratification, leaving large discretion to the government.⁹ Besides the CRAG, parliament exercises power in two other ways regarding international agreements, firstly it considers implementing legislation when necessary to adopt international obligations, and secondly it can exercise scrutiny through selected committees.¹⁰ Furthermore, there is no legal requirement for prior parliamentary permission regarding military deployments as this is also a royal prerogative.¹¹ However, recent practices, such as the Commons vote prior to the 2003 Iraq War, suggest rising parliamentary engagement.¹²

Although the executive is given large discretionary powers in both Ireland and the UK, there is a stark contrast as Ireland's Constitutional framework requires more parliamentary oversight, as the executive is not free to alienate its powers without a Constitutional amendment.¹³ This shows the UK's flexible, government-led approach compared to Ireland's stricter constitutional controls. As such, if a United Ireland were to accede to any international organization in such a way that it may alienate certain powers of the State and, as such, limit the State's sovereignty, it would not be possible without a Constitutional amendment.

C. United-Ireland's membership in International Organizations

a. *The UN*

The Irish Republic is currently a full and active member of the United Nations ('UN'), but its participation may be significantly impacted by unification. As Northern Ireland would separate from

⁹ James and Lang (*loc. cit.*)

¹⁰ *id.*

¹¹ Mills (*op. cit.*)

¹² *id.* 24—26

¹³ Crotty fn. (3) [741]; Daly (*op. cit.*)

the UK, the international rights and obligations of the UK will remain intact but will no longer be applicable to the entity of Northern Ireland.¹⁴ The UK will proceed as a State and retain its membership in international organizations.¹⁵ Current treaties regarding territory will continue to apply; however, treaties of a political nature, such as treaties of alliances, friendship or neutrality, will no longer be applicable if they are intimately linked to the nature of the UK.¹⁶ However, this may be subjected to change if the entities decide otherwise.¹⁷ Detrimental for the membership of a United-Ireland, is whether a new State will be established out of the existing Irish Republic and Northern Ireland, or whether Northern Ireland will merge into the current Irish Republic.¹⁸ Consequently, it is crucial to determine whether a United-Ireland could retain and exercise its membership in the UN or needs to reapply for membership.¹⁹

If Northern Ireland were to merge into the current Irish Republic, the rights and obligations of the Irish Republic would then extend to the territory of Northern Ireland.²⁰ The Unification of the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) in 1990 may provide an important base.²¹ The signing of the Unification Treaty facilitated the GDR's accession to the FRG under Article 23 of the FRG's Basic Law, resulting in a unified Germany that continued its existing international memberships, including that in the United Nations.²² Moreover, a series of

¹⁴ Malcolm N. Shaw, *International Law* (9th ed., Cambridge University Press 2021) 848—850

¹⁵ Jan Wouters, Cedric Ryngaert, Tom Ruys, and Geert De Baere, *International Law: A European Perspective* (Hart 2019) 249—250.

¹⁶ *id.* 246—247; Shaw (*op. cit.*) 845—847

¹⁷ Wouters, Ryngaert, Ruys, De Baere (*op. cit.*) 246—247; Shaw (*op. cit.*) 845—847

¹⁸ Shaw (*op. cit.*) 840—841

¹⁹ Charter of the United Nations (adopted 26 June 1945) ('UN Charter') 1 UNTS XVI, Art. 3 and 4; Tobias Lock, 'What Would a United Ireland Look Like? Some Lessons from Germany' (2024, Maynooth University spotlight on research) <<https://www.maynoothuniversity.ie/research/spotlight-research/what-would-united-ireland-look-some-lessons-germany>> (last accessed 7 January, 2025)

²⁰ Shaw (*op. cit.*) 848—849

²¹ Shaw (*op. cit.*) 840—841; Wouters, Ryngaert, Ruys, and De Baere (*op. cit.*) 244, 246—247; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009) 145—148

²² James R. Crawford, *The Creation of States in International Law* (2nd ed., OUP 2006) 685—686

treaties dealing with NATO matters was excluded from the extension of treaties of the FRG to the former GDR.²³

If a new State were to be created, it is very likely that it would have to reply for membership of the United Nations in accordance with the UN Charter.²⁴ In this instance, any of the permanent members could block the membership of a newly created United-Ireland by use of its veto power.²⁵ As such, the most feasible decision is to include the entity of Northern Ireland in the Irish Republic through a merger, retaining the current legal personality and membership of the Irish Republic under International Law but with a significant growth in its population and territory.

On a policy level, Unification may alter Ireland's foreign policy in addition to overall representation. Ireland has been a strong supporter of equitable global development, human rights, and climate action. A larger, unified Ireland could strengthen its alliances within regional blocs and provide more robust support to other Member States, enhancing its leadership in multilateral forums.²⁶ In essence, a united Ireland must strike a balance between diplomatic realities, policy priorities, and legal continuity when dealing with international treaties and institutions like the UN. While Unification offers opportunities for increased global influence, navigating the complex intersections of historical neutrality, regional cooperation, and expanded territorial identity will require careful and strategic planning.²⁷

²³ Shaw (*op. cit.*) 846—847

²⁴ *cf. fn.* (19) Arts. 4(2), 18(2), and 27(3); The Succession of States in relation to Membership of the United Nations A/CN.4/149 (1962) *Yearbook of the International Law Commission Vol. II*; Shaw (*op. cit.*) 857—858

²⁵ *cf. fn.* (19) Art. 27(3)

²⁶ Thomas Giegerich 'The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?' (2024) 27(4) *Zeitschrift für Europarechtliche Studien* 590

²⁷ Oran Doyle, 'Irish Unification: Processes and Considerations' (2020, The Constitution Unit Blog) <<https://constitution-unit.com/2020/05/16/irish-unification-processes-and-considerations/>> (last accessed 19 January, 2025)

b. NATO

Since the Second World War, every Irish government, which exercises a large discretion in international relations, has upheld the policy of military neutrality.²⁸ This policy has been partially grounded in the will of Ireland, as a small State under the nation States, to emphasize its independence and sovereignty from larger States, especially in relation to Britain.²⁹ However, since 1960, after its accession to the UN, Ireland started to actively participate in UN Peacekeeping missions and the government's understanding of military neutrality changed drastically since its accession to the European Economic Community in 1973 (now known as the European Union ('EU')).³⁰ From then on, the government's policy has been that neutrality means 'military neutrality' which does not include actions in security and defence, meaning it remains free to engage in these areas, such as within the EU's framework.³¹ Article 29 sections 1-3 of the Irish Constitution provide a set of general principles in international relations; however, these do not create an explicit obligation of neutrality. Consequently, what neutrality entails is left to the discretion of the Irish Government, as it is given wide autonomy in this area.³² However, if the Irish Government decides to drastically change its approach to military neutrality, there will be Constitutional implications.³³

Accession to the North Atlantic Treaty (hereafter NATO treaty) by a United-Ireland, would mean subjecting itself to the collective defence provision under Article 5, as no reservation to this

²⁸ Steven Murphy, 'Ireland and NATO: Challenges and Opportunities' (2021, University of Iceland Small States and the New Security Environment Project) 2 <<https://ams.overcastcdn.com/documents/Nato-Ireland-paper.pdf>> (last accessed 3 January, 2025); Daly (*op. cit.*)

²⁹ Murphy (*op. cit.*)

³⁰ *id.*

³¹ *id.*

³² Art 29.4.

³³ Daly (*op. cit.*)

provision is permissible because it would go against the object and purpose of the Convention.³⁴

The Preamble of the NATO Treaty emphasizes the intent of the parties in their objective to ‘unite their efforts for collective defence and for the preservation of peace and security’.³⁵ Moreover, Article 5 determines that if an armed attack would happen, as defined under the Treaty, all parties will exercise their right to individual or collective self-defence under Article 51 of the UN Charter.³⁶ As such, NATO is a political and military alliance with a significant difference to the European Union’s Common Security and Defence Policy that takes its decisions by unanimity.³⁷ Therefore, a United-Ireland would not retain the discretion to decide to intervene in a military conflict and would consequently, in accordance with the reasoning in *Crotty*, undermine Article 2 of the Irish Constitution.

In Conclusion, as NATO is a political and military alliance, accession to the Treaty would therefore go against the neutrality upheld by the Irish Government since World War II and would advance further than the current partnership for peace between Ireland and NATO, which entails a bilateral cooperation agreement.³⁸ Moreover, if a United-Ireland would want to join NATO, a referendum would be needed to adopt the Constitutional amendment – that is assuming the Constitutional Structure of the Republic remains intact in this respect.³⁹

³⁴ There is no provision on reservations in the North Atlantic Treaty, as such the rules of the Vienna Convention on the Law of Treaties are applicable as a rule of Customary International Law. *See, e.g.*, Statute of the International Court of Justice (adopted 24 October 1945) I UNTS 3 art. 38(2); North Atlantic Treaty (entered into force 24 August 1949) 34 UNTS 243 (‘NATO Treaty’) preamble, Art.5; Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 Art. 19(c); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) (Advisory Opinion) ICJ Rep 15 24; International Law Commission, ‘Guide to Practice on Reservations to Treaties (2011) UN Doc A/66/10, [3.1.5].

³⁵ NATO treaty preamble

³⁶ NATO treaty, Art. 5

³⁷ Treaty on the Treaty on European Union (2012) OJ C326/13, Art. 22(1)

³⁸ ‘Partnership for Peace programme’ (NATO.int, 28 June 2024) <https://www.nato.int/cps/en/natohq/topics_50349.htm> (last accessed 4 January 2025); Murphy (*op. cit.*)

³⁹ *Crotty* fn, (3) [778]; *cf.* fn. (6); Daly (*op. cit.*)

D. How would Unification affect the militia of the entities involved?

Unification would require reorganising the military structure by joining the Republic of Ireland's defence forces with any existing arrangements in Northern Ireland. Currently, Ireland's defence force is modest, focusing on domestic security and UN peacekeeping missions, while Northern Ireland relies on British military forces under its accords with the UK. As UK's military decisions remain a prerogative power,⁴⁰ prerogative facilitating the opportunity for Ireland to unite. Post-unification, aligning these systems would require creating a single command structure, standardizing training, and reconciling differences in ethos and equipment.⁴¹ Integration poses challenges, including operational inefficiencies and cultural tensions. Practical issues, such as budget allocation and equipment modernization, also require attention.⁴² However, unification provides opportunities to expand the militia's capacity and strength and eventually propel Ireland's ability to participate in peacekeeping and domestic security while still enhancing its standing in international alliances. Furthermore, Ireland's neutrality has influenced its interactions with international defence organisations, such as its involvement in NATO's Partnership for Peace (PP). Without committing to full membership, this framework permits collaboration on non-combative matters like humanitarian efforts and peacekeeping. As a United-Ireland adjusts to new political and territorial realities following unification, this connection might be reassessed.⁴³ Additionally, pressure to reevaluate neutrality may increase with unification. For greater regional cooperation and collective security, a United-Ireland might be more interested in joining NATO. Alternatively, increasing present PP

⁴⁰ Mills (*loc. cit.*)

⁴¹ John Doyle and Eileen Connolly, 'Irish Foreign Policy in the United Nations and European Union: Influence and Participation' (2010, DCIDOB) <https://doras.dcu.ie/15215/1/Doyle_Connolly_irish_foreign_policy.pdf> (last accessed 19 January, 2025)

⁴² John O'Brennan, 'Stuck in the Middle with EU (and the UK)? How Ireland navigates its relationships with the EU and UK post-Brexit' (2021) 16 *J. Cross Border Stud. In Ireland* 45

⁴³ 'Partnership for Peace Framework Document' (NATO.int, 30 October, 2009) <https://www.nato.int/cps/en/natohq/official_texts_24469.htm> (last accessed 19 January, 2025)

involvement might balance old policy with new geopolitical circumstances, allowing a United-Ireland to remain neutral while strengthening its role in NATO-led activities.⁴⁴

E. Conclusion

This chapter concludes that the unification of Northern Ireland and the Irish Republic would have significant hurdles under both domestic and international law. Although unification provides for an opportunity to strengthen Irish interests in international organizations, the continuity of the legal personality of the Irish Republic as a newly formed unified Ireland may not be as forthcoming, as recognition by other States remains a relevant factor under International Law. Furthermore, the current Irish Constitution, if this framework will remain, would require a referendum to decide on a further expansion of membership in international military organizations such as NATO, as this would go against the sovereignty of the current state and potentially Ireland's long held position of military neutrality.

⁴⁴ Murphy (*op. cit.*)

XI. EU Law and the ECHR

by James de Barra, Ella Cunningham, Alex Miquel, and Hugh Dolan

A. I. The European Court of Human Rights

The European Court of Human Rights (ECtHR) serves as a critical arbiter in addressing alleged violations of the Convention for the Protection of Human Rights. By holding member states accountable to their obligations under the Convention, it provides a crucial recourse for individuals and states alike when domestic courts fall short in safeguarding fundamental rights.

While both Ireland and the United Kingdom have historically expressed apprehension about ceding control to the European Convention on Human Rights (ECHR), particularly regarding its potential impact on their sovereignty, they have largely adopted a dualist approach, allowing the ECtHR decisions to influence national law indirectly. However, The ECHR and its court decisions have had a momentous influence on Northern Ireland, particularly surrounding the Good Friday Agreement, resulting in a somewhat irreversible effect on human rights jurisprudence in the region. This makes Northern Ireland a particularly complex area of divergence when predicting the ramifications of a potential united Ireland

II. ECtHR in Ireland

The ECHR was drafted in 1950 and came into force in 1953. Ireland, having gained independence in 1922, was eager to establish itself on the international stage and the ECHR provided an opportunity for Ireland to do so.¹ While the ECHR was a valuable opportunity to gain international reputation, it was crucial for the Irish government to be mindful of the competing concerns of

¹ Courts.ie, 'Ireland and the European Convention on Human Rights' (2021) <https://services.courts.ie/docs/default-source/default-document-library/o'malley-j_ireland-and-the-european-convention-on-human-rights.pdf> (last accessed 6 January, 2025)

preserving their hard-earned independent sovereignty and managing their limited capacity and budget for international relations.

Upon drafting the Constitution, Ireland played a particularly active role in advocating for the inclusion of mechanisms within the ECHR that allowed individuals, rather than just states, to bring claims against their own governments.² Ireland was notably the first defendant in an individual complaint brought before the European Court of Human Rights in *Lawless v. Ireland (No. 3)*.³ This case marked the beginning of the Court's pivotal role in adjudicating individual complaints against state actions, setting a precedent for holding governments accountable under the Convention.

Another area of the ECtHR that Ireland pioneered was interstate cases when Ireland brought a claim against the United Kingdom in 1978, which resulted in the very first judgment of the ECtHR in an inter-State case.⁴

While Ireland has played an active role in the evolution of the ECHR and its courts, it is important to note that the decisions by the ECtHR are not binding on Irish courts. Under the ECHR Act 2003, section 4 explicitly states that ECtHR jurisprudence is not binding but must be considered when applying and interpreting Irish law.⁵ This distinction allows Irish courts to remain guided by the principles of the ECHR while maintaining the autonomy to diverge from Strasbourg's rulings, should they deem it necessary in certain cases.⁶

² William Schabas, 'Ireland, the European Convention on Human Rights, and the Personal Contribution of Seán MacBride' (2007) *Judges, Transition, and Human Rights* 251

³ No. 332/57, ECtHR (Chamber), 1 July 1961

⁴ Brexit Institute, 'Ireland v UK II and Inter-State Cases' (2024) <<https://dcubrexitinstitute.eu/2024/02/ireland-v-uk-inter-state-cases/#:~:text=Ireland%20has%20been%20a%20pioneer,v%20UK%20decision%20of%201978.>> (last accessed 6 January, 2025)

⁵ UCD, 'Using the ECHR in Irish courts: More whisper' (2022) <<https://www.ucd.ie/t4cms/pilaechrseminar130511fdelondras.pdf>> (last accessed 6 January, 2025)

⁶ DFA, 'Affairs D of F, European Court of Human Rights' (2023) <<https://www.dfa.ie/our-role-policies/international-priorities/international-law/courts-tribunals-dispute-mechanisms/european-court-of-human-rights/>> (last accessed 6 January, 2025)

III. The ECtHR In the United Kingdom

Similarly to Ireland, the United Kingdom has placed significant importance on its sovereignty, particularly in relation to political independence. This is evident prior to Brexit, in many cases such as *Hirst v. U.K.*⁷, where the UK resisted the decision of the ECtHR, with the government maintaining that it was a matter of national sovereignty and overruled the ECHR's ruling on prisoner voting rights.

The United Kingdom has historically been reluctant to fully embrace the Court's rulings. In 2015, Sir Brian Leveson, the President of the Queen's Bench Division and Head of Criminal Justice stated:—

'[w]hen the Convention became part of UK law, it allowed our citizens to cite the Convention directly. That doesn't mean we are bound by its decisions... The legislation only requires us to take them into account'.⁸

He further explained that in the early stages of the ECHR's influence. UK courts were more likely to defer to ECtHR rulings. However, as the UK legal system has matured, British judges no longer automatically defer to the ECtHR, signalling a shift in the country's approach to its international obligations.

Since Brexit, The UK has decided a number of cases surrounding the application of the ECHR, cementing the fact that despite Brexit, The UK will remain a party to the ECHR, as the ECHR in itself is a separate entity to the European Union.

A number of Acts have gone beyond Leveson's explanation and have directly disregarded the ECHR obligations, including the Legacy and Reconciliation Act 2023. Given Ireland's application to the

⁷ *Hirst The United Kingdom (No. 2)* (Application No. 74025/01) [2005] ECHR 681

⁸ Jessica Elgot, 'British Judges Not Bound by European Court of Human Rights, Says Leveson' *The Guardian* (24 May, 2015) <<https://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson>> (last accessed 6 January, 2025)

ECtHR in January 2024,^{9,10} it appears likely that the ECtHR would rule in favour of upholding ECHR principles. The Court has remained consistent in its approach to matters involving immunities, amnesties, and pardons, particularly in cases of serious human rights violations that are incompatible with state obligations under the ECHR.¹¹

IV. Divergences

The Irish and UK approach to the ECtHR can be seen as parallel to one another in that both jurisdictions are presumptively bound by ECtHR jurisprudence, but divergence from that jurisprudence might be permissible where the ECtHR jurisprudence is unclear or inconsistent, where giving effect to the jurisprudence would cause extreme difficulties from a practical perspective, or where the decision of the Court was not ‘carefully considered’.

While former Prime Minister Rishi Sunak indicated the possibility of withdrawal if the ECHR frustrates new policies such as immigration, we are yet to see a frontrunning candidate from the conservative party advocating for withdrawal from the ECHR a central part¹² of their political campaign.¹³ If the idea of withdrawal were to gain traction, it would be a complex and lengthy process, with all judgments issued before the UK's withdrawal date still remaining in effect post withdrawal.

⁹ ECHR, ‘New inter-state application brought by Ireland against the United Kingdom’ (2024) <<https://www.echr.coe.int/w/new-inter-state-application-brought-by-ireland-against-the-united-kingdom>> (last accessed 06 January, 2025)

¹⁰ Houses of the Oireachtas, ‘European Court of Human Rights’ (2024) <<https://www.oireachtas.ie/en/debates/question/2024-06-27/33/>> (last accessed 06 January, 2025)

¹¹ Robin van der Lugt and Gaia Zoboli, ‘The Northern Ireland Troubles Act 2023: A Line under the Violence or a Strike through Human Rights?’ *EJIL* (02 October, 2024) <<https://www.ejiltalk.org/the-northern-ireland-troubles-act-2023-a-line-under-the-violence-or-a-strike-through-human-rights-2/>> (last accessed 06 January, 2025)

¹² Alice Donald and Joelle Grogan, ‘Leaving the European Convention on Human Rights, UK in a changing Europe’ (2024) <<https://ukandeu.ac.uk/explainers/leaving-the-european-convention-on-human-rights/>> (last accessed 03 February, 2025)

¹³ Anuragdeb Deb, ‘The Good Friday Agreement and the European Convention on Human Rights’ *UK Human Rights Blog* (30 August, 2023) <<https://ukhumanrightsblog.com/2023/08/29/the-good-friday-agreement-and-the-european-convention-on-human-rights/>> (last accessed 06 January, 2025)

The somewhat irreversible effect of the ECHR on the Good Friday Agreement refers to how the agreement explicitly references the ECHR, making it unlikely that the United Kingdom could exit the Convention without triggering a review procedure outlined in the agreement.¹⁴ This procedure would involve an interstate review between the United Kingdom and Ireland, complicating the process and requiring careful consideration of both the political and legal consequences.

V. Conclusion

In light of legal and political precedents established during the Brexit process, it is unlikely that the UK government could use prerogative powers to withdraw from the ECHR without parliamentary approval.¹⁵

With a change in leadership from Conservative to Labour, and Prime Minister Sir Keir Starmer's background as a human rights barrister, it is probable that the government will focus on repealing and replacing the 2023 Act rather than seeking to exit the ECHR entirely.¹⁶ Prime Minister Starmer has previously stated that his government will 'never' leave the ECHR.¹⁷

Regarding the potential transition to a united Ireland, it is unlikely to significantly alter the jurisdiction of the ECtHR. Both Ireland and the United Kingdom remain parties to the ECHR and maintain their commitment to the Convention while safeguarding their respective autonomy and sovereignty. Therefore, unless there are substantial shifts in the UK's relationship with the ECHR,

¹⁴ BBC, 'Echr Exit "Would Breach Good Friday Agreement"' *BBC News* (24 May, 2024) <<https://www.bbc.com/news/articles/cl55n29v2ppo>> (last accessed 06 January, 2025)

¹⁵ Donald and Grogan (*op. cit.*)

¹⁶ Reuters, 'British government to scrap Northern Ireland amnesty scheme' (2024) <<https://www.reuters.com/world/uk/british-government-scrap-northern-ireland-amnesty-scheme-2024-07-17/>> (last accessed 06 January, 2025)

¹⁷ Aidan McDonald, 'Britain's Keir Starmer Vows: I'll Never Leave Echr' *POLITICO* (18 July, 2024) <<https://www.politico.eu/article/britain-keir-starmer-never-leave-european-convention-human-rights-political-community-summit/>> (last accessed 06 January, 2025)

the move toward a united Ireland is unlikely to cause significant divergences in the application of ECtHR decisions.

B. I. EU Law and the ECHR

a. ECHR

The European Convention on Human Rights (ECHR) is a fundamental statute for the Council of Europe, of which the UK is a founding member. The Convention sets out a list of the rights and guarantees that States have undertaken to respect, including the right to life, the right to a fair trial and the right to freedom of expression. The European Court of Human Rights hears cases related to the European Convention of Human Rights. However, unlike the European Court of Justice judgments, the European Court of Human Rights decisions are considered so important that they become part of EU law, which is binding on EU states. The ECHR is a treaty that all member states of the Council of Europe are required to sign. Thus, it is not directly associated with the European Union. Currently, the United Kingdom are still members of the ECHR and the Council of Europe.

b. Brexit

The United Kingdom left the European Union in January 2020. However the UK is still a member of the Council of Europe and the ECHR. This commitment to the ECHR was reinforced in the Trade, and Cooperation Agreement that was finalised at the end of 2020. Thus, Brexit has no direct effect on the application of the ECHR in the UK. However, during the debate surrounding Brexit, many arguments were raised that the ECHR was at the core of why many people felt that the UK should leave the EU. Withdrawal from the ECHR has not been ruled out as a potential policy to

allow for easier implementation of new immigration policies. The problem of ECHR withdrawal came up in relation to the UK's draft Illegal Migration Bill, the proposed Bill of Rights and the Northern Ireland Protocol deal which will have implications on the Good Friday Agreement. However, at this moment in time, the UK is still committed to adhering to the current commitments of its international treaties, including to the ECHR. While Brexit does not affect the ECHR, the ECHR is part of the Eurosceptic agenda and thus it is possible that it will return as an issue.¹⁸

c. Incorporation of the ECHR

United Kingdom

The ECHR was incorporated into UK law in the Human Rights Act 1998. Under this act, the courts can rule whether laws or government action are in contravention of the Convention. The courts cannot strike down laws that do not conform, however Parliament can use a procedure to bring them in line. The ECHR is entrenched in the devolution acts 'in a stronger way so that any court can disallow laws in devolved matters.'¹⁹

d. Protocol 7 ECHR

Area of divergence between the two jurisdictions

Protocol No. 7 was created to add more rights and safeguards to the Convention, in particular relating to immigration.²⁰ Not all states are bound by protocols. Each state must choose to sign and ratify each protocol in order for it to come into effect in each member state.²¹

¹⁸ Michael Keating, 'Between two unions: UK devolution, European integration and Brexit' (2022) 10(5) *Terr. Pol. & Gov.* 629

¹⁹ *id.*

²⁰ Council of Europe, 'Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (1984) 117 *European Treaty Series*

²¹ European Court of Human Rights, 'The ECHR in 50 Questions' (2021)

<https://www.echr.coe.int/documents/d/echr/50questions_eng#:~:text=Protocol%20which%20add%20rights%20to,be%20bound%20by%20its%20provisions.> (last accessed 2 December, 2024)

Ireland became a signatory of Protocol No. 7 on 11/12/1984, and further ratified it on 03/08/2001, with the Protocol entering into force in Ireland on 01/11/2001.²² On the other hand, the UK failed to sign or ratify the Protocol following substantial debates in the House of Lords.²³ The main reason for not signing Protocol was due to legislative discrepancies in domestic law - for example, regarding spousal rights which would present as inconsistent with Protocol No. 7. It appears that the UK may aim to ratify the Protocol in the future with the UK's Joint Committee on Human Rights appreciating that 'the decision to accede to Protocol 7 ECHR once some legislative amendments have been made'.²⁴

How does the application differ in the UK to the application in Ireland?

The UK has confirmed in separate treaties that it would adhere to the ECHR, thus in the case of the UK leaving the ECHR, it would be inconsistent with agreements made such as in the Good Friday Agreement whereby the ECHR was confirmed to be enforceable in Northern Ireland, acting as a safeguard.

The ECHR is implemented in Ireland through the European Convention on Human Rights Act 2003 and in the UK through the Human Rights Act 1998. Given that the UK has not signed or ratified Protocol 7, the additional rights added by the Protocol are not implemented through the UK's Human Rights Act 1998.

²² cf. fn. (20)

²³ UK Parliament, 'European Human Rights Convention, Protocol No. 7' (House of Lords, 17 May 1994) <<https://hansard.parliament.uk/Lords/1994-05-17/debates/26cea50b-9429-4993-ab9b-042e9aaf59a3/EuropeanHumanRightsConventionProtocolNo7>> (last accessed 02 December, 2024)

²⁴ Joint Committee on Human Rights, 'Review of International Human Rights Instruments' (Seventeenth Report of Session 2004–05) <<https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/99.pdf>> (last accessed 2 December, 2024)

How might this be impacted in the event of a United Ireland.

Given that the ECHR is currently in force in both Northern Ireland and the Republic of Ireland, it can be assumed that the ECHR would remain in force in the case of a United Ireland. The issue at hand is whether Protocol No. 7 would apply in a United Ireland. In the case of a United Ireland, should the current Republic of Ireland's law come into force in Northern Ireland, the Protocol would continue to apply.

In the case that new laws are formed in the creation of a United Ireland, a similar process to that of Brexit might apply such as continuation agreements to former agreements signed by the Republic of Ireland or by Northern Ireland under the United Kingdom respectively. These continuation agreements would have to see United Ireland as a single signatory rather than the Republic of Ireland and Northern Ireland under the United Kingdom separately. At this point, should the Republic of Ireland's Human Rights Act 2003 come into force or an updated version of this legislation, it seems that the Protocol would indeed apply in a United Ireland.

e. Immigration

The UK remains in the ECHR even post-Brexit but there have been calls for them to withdraw given their contravention of the ECHR, in particular in relation to the Illegal Migration Act.²⁵ This act constitutes a direct challenge to the ECHR's enforcement system. The Act includes a clause that permits the government of the UK to disregard 'interim measures' circulated by the ECtHR. These measures were designed to be used in cases where the victim faces an immediate threat to their rights

²⁵ Valsamis Mitsilegas and Elspeth Guild 'The UK and the ECHR After Brexit: The Challenge of Immigration Control' (2024) 5(1) *E.C.H.R. L.R.* 116

as a human. The UK's flippant approach to the ECHR has been condemned in a Report to the Parliamentary Assembly of the Council of Europe. In the report recent legislation is cited which indicated an unwillingness to legislate in accordance with the UK's international legal obligations. Non-compliance or withdrawal from the ECHR would be significant in relation to Ireland's relationship with the UK. Compliance with the ECHR is necessitated in order to maintain EU-UK co-operation under the Trade and Cooperation Agreement.

Whilst still a member of the EU, the UK took part in the Dublin Regulation. This was a process whereby certain categories of asylum seekers could be returned to the first EU state that they entered. This is no longer the case in the aftermath of Brexit as asylum and immigration policy do not feature in the Trade and Cooperation Agreement.

f. UK-Rwanda

The UK-Rwanda policy was passed by way of amendment to the Immigration Rules 2020. The policy allows the UK to send asylum seekers to Rwanda for the determination of their claim for asylum and if their claim is recognised they will remain in Rwanda. The amendment made it possible for the UK to say anyone who could seek asylum in a safe third-country could not seek asylum in the UK meaning that there is no obligation on authorities to give substantive consideration to these types of applications for asylum. This is inconsistent with EU law. Pursuant to EU law there needs to exist a link between the person seeking asylum and the destination State. While of course since Brexit this does not impact the UK. However, it does highlight a clear divergence between the policies in relation to asylum in the UK and Ireland because unlike the UK Ireland does have to comply with this requirement set out in EU law.

g. The Case of Ukraine

A clear divergence in the policy of immigration between the UK and Ireland is evident from the divergent approaches each country adopted in relation to the influx of Ukrainians fleeing their war torn country. In order to compare the two approaches it is necessary to outline the line of action taken by each country.

h. Ireland

Ireland responded with haste on the 25th of February 2022 following the invasion of Ukraine. They acted by removing visa restrictions for all Ukrainian citizens. Upon arrival in Ireland, Ukrainians were given 90 days from their arrival to regularise their position in the State. Ireland, as a member of the EU, implemented the Temporary Protection Directive. Contained in the Directive is procedures to deal with a 'mass influx' of those seeking protection. Furthermore, the decision of the European Council on the 4th of March 2022 introduced temporary protections measures. These applied to Ukrainian citizens, non-Ukrainian citizens who were residing in Ukrainian prior to the 24th of February, refugees who had been living in Ukraine and family members of these groups provided that they were domiciled in Ukraine. As part of these temporary measures people from the categories mentioned above had permission to reside in Ireland for a period of one year with the possibility of extension. This temporary protection also provided beneficiaries with a Personal Public Service Number, the ability to work or be self-employed, suitable accommodation as well as assistance in

obtaining such accommodation, income support in the form of social welfare as well as the same healthcare available to Irish citizens.²⁶

i. The United Kingdom

While asylum is a right under international law and the Universal Declaration of Human Rights says as follows: ‘Everyone has the right to seek and enjoy in other countries asylum from persecution’ the UK is treating it akin to the way in which they treat immigration. This is blatantly apparent in the treatment of Ukrainians who fled their own country. In order for Ukrainians to come to the UK they must apply for their visas prior to arrival. The requirement to apply for a visa is a condition of immigration and is inconsistent with the international universal right to seek asylum. The UK also put in place a scheme, The Ukraine Sponsorship Scheme, which permitted Ukrainian nationals to come to the UK but in order to do this they would first need to find a sponsor who can provide them with accommodation for at least 6 months.²⁷

j. Comparing the Different Approaches Taken

There is a clear divergence between the policies undertaken in Ireland and the UK. Where Ireland dispensed with the need to hold a visa, the UK upheld that requirement. In the UK it was necessary for Ukrainians to be part of a scheme in order to come to the UK whereas no such requirement was needed in Ireland. Ireland’s response received much praise internationally and was contrasted to the position in the UK. It must be noted that Ireland’s response was criticised by some British MPs who

²⁶ Brian Collins ‘The Temporary Protection Directive and Nasc’s Experience of Families Fleeing from Ukraine to Ireland’ (2022) 2 *I.J.F.L.* 21

²⁷ Devyani Prabhat ‘MacDermott Lecture 2023: Confounding the rule of law: conflating immigration, nationality and asylum in the UK’ (2023) 74(3) *N.I.L.Q.* 510

feared that by allowing Ukrainians into the country without visas a backdoor to the UK would be created.

G. Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union, ratified in December 2000, would not become a binding legal text until the 1st of December 2009, with the entry into force of the Treaty of Lisbon and concretely its Article 6. Despite this, the content of the CFR shares many similarities with the European Charter of Human Rights, a separate entity from the EU which still binds the United Kingdom, as will be further explored later in this section.

a. Brexit's impact of the UK's position to the Charter of Fundamental Rights

The United Kingdom's decision to abandon the European Union forcibly implied its withdrawal from the CFR. The Charter is no longer part of UK domestic law under Section 5(4) EUWA; furthermore, during the Brexit process, the British government explicitly opted for not incorporating the CFR in its national legislation, unlike other content of EU Law.²⁸ The reasoning for this was that the main rights of the Charter were already protected by other legislation, such as the 1998 Human Rights Act.

However, some aspects of the CFR did not mirror completely the contents of the ECHR, as the CFR contains more rights than the ECHR, mainly the protection of personal data (Article 8 CFR), many worker's rights (Chapter IV: Solidarity CFR), and the right to asylum (Article 18 CFR). Moreover,

²⁸ Marion Charret-Del Bove, 'What Future for Human Rights in the UK Post-Brexit?' (2022) 27(2) *Rev. Fr. Civ. Brit.* 1

the CFR has a greater scope of protection of the rights protected by both documents thanks to the interpretation of the European Court of Justice²⁹.

b. Ireland's position in relation to the Charter of Fundamental Rights

The Republic of Ireland, still a member of the EU, considers the CFR as a legally binding document. The rights protected by the Charter are to be respected by the State's institutions, and the document by itself can be directly invoked in its national courts. Although the Charter is not explicitly mentioned in the Irish constitution, Article 29 already refers to the primacy of EU Law.

c. The situation in a United Ireland

For many years, the CFR was considered a bridge between the Republic of Ireland and Northern Ireland regarding its equivalency in Human Rights Protection. With the UK's decision of withdrawing from this Charter, and of not incorporating its contents fully into its Domestic Law, the question of Irish unification will also need to tackle the coherence of rights frameworks with alternative means.

H. Brexit and the EU

The UK's withdrawal from the EU, in January of 2020, marked a large change in both the political and economic landscape of Europe. While Brexit was a defining moment, the full-scale impacts of it are yet to be seen. The clear divergence resulting from the UK no longer being a member of the EU, the effects of this departure on trade, the protection of human rights, and the potential consequences if Ireland were to amalgamate with Northern Ireland and seek EU membership are

²⁹ *id.*

discussed below.

One clear result of Brexit is the current state of affairs within Northern Ireland, a region that voted overwhelmingly to remain in the EU during the 2016 referendum. According to BBC referendum results, 55.8% of the Northern Irish electorate voted to remain within the EU. Following Brexit, the UK and the EU reached an agreement, known as the Northern Ireland Protocol, which in practical effect keeps Northern Ireland in the EU's single market for goods while the rest of the UK leaves it. This arrangement has created in effect a border in the Irish Sea, separating Northern Ireland from the rest of the UK, both in an economic sense and a regulatory sense.

The Northern Ireland Protocol has created practical challenges and political tensions. Trade and business in Northern Ireland, especially agricultural and manufacturing sectors, have been challenged by disruptions due to changes after Brexit surrounding customs checks, additional paperwork, and regulatory divergence from the UK. Take for example, Northern Irish food producers, like meat processing. These companies now must navigate new border checks when exporting to Great Britain, making goods more expensive to produce and move to the market. All of these factors affect the competitiveness of Northern Irish based companies. The Windsor Framework as a post Brexit legal agreement, attempts to facilitate businesses in Northern Ireland and make the Northern Ireland protocol more practically applicable. From a certain perspective, it could be argued that with these new legal differences, Northern Ireland has the best of both worlds. Being part of the UK means trading with Great Britain is easier but also being geographically attached to the Republic of Ireland means it can still in affect trade with the EU single market.

Both politically and socially, the Protocol has created significant unrest. Among unionists, there is a common feeling that the special status of Northern Ireland undermines their British identity and the integrity of the union with Great Britain. The unionist sentiment of wanting to remain part of the UK has been a strong power in Northern Irish politics for decades. In 2021, protests across the Northern Irish capital Belfast erupted in response to the new regulations surrounding trade. To add to the already politically unstable environment currently in Northern

Ireland after Brexit, the Northern Ireland Executive, which includes both unionist and nationalist parties, has struggled to find consensus on how to manage the new reality.

Brexit has displayed further profound effects on trade within Northern Ireland. As a result of leaving the EU, the UK no longer enjoys the benefits of the single market and customs union, leading to a significant shift in its trading relationships not just within Europe but on an international scale. These issues and problems have presented themselves in higher costs, increased bureaucratic challenges, and disruptions to established supply chains. Both companies based in and who had shipping connections through Northern Ireland now have added costs.

The UK farming sector has experienced significant disruption post-Brexit. Before leaving the EU, UK farmers had direct access to the European single market, where British produce could be sold without tariffs or customs checks. This meant that generally all companies within the UK were on a level playing field with other EU counterparts surrounding cost of production. It also meant the free movement of labour and services within the EU. Since Brexit though, new customs procedures,

border checks, and paperwork have led to delays and increased costs for UK based farmers. One very specific example is the export of live animals and fresh food products, such as seafood and meat, has faced substantial barriers. One prominent case was the disruption faced by Scottish shellfish exporters who, after Brexit, found their shipments of live shellfish to the EU delayed or rejected due to new health certification requirements.

Alongside this, the UK's withdrawal from the EU has led to worries over the protection of human rights, particularly regarding labour rights. The EU has strict regulations protecting workers' rights, including laws on working hours, minimum wages, and non-discrimination, most of which came in during the growing welfare state within the EU from the 1960s to the early 2000s. In a post-Brexit era, the UK government and companies wanting to increase their production and profit have signaled their intentions to diverge from some of these protections, raising concerns about a "race to the bottom" in terms of labour standards. For instance, the UK's decision to end free movement of labour from the EU has caused shortages of skilled workers in sectors like agriculture, where seasonal workers from Eastern Europe were previously crucial to harvest crops. The lack of access to this mobile labour force has led to shortages, higher costs, and a decline in the availability of produce. All of this greatly affecting both trade and human rights protections related to working conditions and fair wages. This race to the bottom idea is also seen in standards and regulations around environmental concerns and climate change laws and targets previously put in place by the EU for all member-states.

The possibility of Ireland amalgamating with Northern Ireland is a complex and highly sensitive political issue. The historical and religious context which caused these lasting divisions between

the two regions, shaped by centuries of conflict, have long prevented unity. However, Brexit has brought renewed attention to this debate, given Northern Ireland's pro-EU vote in 2016 and the ongoing tensions created by the UK's departure from the EU. The Good Friday Agreement of 1998 laid the groundwork for peace between Northern Ireland's nationalist and unionist communities. It was brought in under mounting pressure from international players like the United States. Through this peace, economic stability and growing sectors such as tourism and agriculture have flourished. Under the agreement, Northern Ireland was given autonomy over many domestic issues while remaining part of the UK. It is allowed to have its own government, and its own first minister and local domestic governing was allowed to be carried out. It is important to note though, a key condition of the Good Friday Agreement is that any change in Northern Ireland's constitutional status must be decided by a democratic referendum. Given the post-Brexit political climate, discussions about unification have resurfaced, especially with growing calls from nationalists and pro-EU advocates in Northern Ireland.

If Ireland and Northern Ireland were to amalgamate, the new entity would likely seek EU membership, as the Republic of Ireland is already a member. Whether this means Northern Ireland would have to go through the regular application process or would certain parts be bypassed is still up for speculation. The Republic of Ireland has long been pro-EU, and its membership has brought significant economic and political benefits, including access to EU funding, trade, and security cooperation. If Northern Ireland were to unite with the Republic, the combined entity would inherit the Republic's EU membership, as per EU law. However, unification would not be without challenges. The process would require a referendum in Northern Ireland, as

stipulated by the Good Friday Agreement. Additionally, issues such as the integration of two economies, the protection of unionist interests, and the preservation of peace and stability would need to be carefully managed. The potential unification would have profound implications for both Ireland and the EU, and the process would take time and negotiations, with many questions remaining about how Northern Ireland's distinct political and cultural identity would be reconciled with the broader Irish state.

C. WHAT HAPPENS THE DAY AFTER

“What happens now?”: A Transitional Government for a United Ireland

by Conor Flannery

Introduction

Imagine the day, as an island, we have just woken up, maybe you stayed up to watch the results come in. It is the day after concurrent referenda on a United Ireland both north and south of the Irish border. It is on the news, the people on the island of Ireland have voted for constitutional change. The people who voted for change rejoice, the people who voted against despair. However, it does not matter anymore if you voted for or against constitutional change (or if you even voted at all). This outcome affects everyone on the island. So, what happens now?

This section will explore the concept of shared sovereignty between the British and Irish governments during a transitional period after reunification for Northern Ireland.

A. What is Shared Sovereignty?

Shared sovereignty, also known as joint rule/authority,¹ is the engagement of external actors in domestic political structures for a definite or indefinite period.² Shared sovereignty is a plausible option in Northern Ireland in the event of reunification as it will allow for representation of nationalists and unionists in a transitional period. It has been argued that shared sovereignty involves the establishment of institutions for governing a State.³ Krasner has argued that shared sovereignty

¹ Brendan O'Leary, *Making Sense of a United Ireland. Should it happen? How it might happen?* (Penguin 2022) 161

² Stephen Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2003) 25 *Mich. J. Int. L.* 1075, 1091

³ Stephan D. Krasner, 'Building Democracy After Conflict: The Case For Shared Sovereignty' (2005) 16(1) *J. Dem.* 69, 76

institutions could only work if they have been perceived as 'win-win'.⁴ It has been argued that shared sovereignty represents a 'softer version' of transitional governments which have been practiced in Bosnia and East Timor.⁵ West Germany during the Cold War provides us with a successful example of shared sovereignty.⁶ Agreements which were signed in Bonn agreed that the government of the German Federal Republic was responsible over all policies except that of security.⁷

B. Previous Considerations for Shared Sovereignty in Ireland?

The concept for shared sovereignty over Northern Ireland is not a new idea. This was a concept advanced by the SDLP in 1972 where it was set out that 'Britain and the Republic of Ireland agree on the treaty accepting joint responsibility for an interim system of Government for Northern Ireland to be known as the Joint Sovereignty of Northern Ireland'.⁸ This document proposed that two commissioners would be selected from the Sovereign states who will jointly sign all legislation by a Northern Ireland Assembly.⁹ This policy was adopted in 1984 by the Taoiseach Garrett Fitzgerald within the New Ireland Forum 1984.¹⁰ In this arrangement, the London and Dublin governments would have equal responsibility for all aspects of governance in Northern Ireland.¹¹ It was argued that shared sovereignty would provide 'political, symbolic and administrative expression of their identity to Northern nationalists without infringing the parallel wish of unionists to maintain and

⁴ *id.*

⁵ Oliver Richmond, 'Shared sovereignty and the politics of peace: evaluating the EU's 'catalytic' framework in the eastern Mediterranean' (2006) 82(1) *Int. Aff.* 149, 150

⁶ Krasner (*op. cit.*) 1092

⁷ *id.*

⁸ SDLP 'Towards a New Ireland: Proposals by the Social Democratic and Labour Party' (1972)

⁹ *id.*

¹⁰ O'Leary (*op. cit.*) 161

¹¹ New Ireland Forum Report (1984) [8.1]

to have full operational expression of their identity'.¹² This policy was carried into negotiations with Margaret Thatcher by Fitzgerald.¹³

C. Transitional Government for a United Ireland

It is submitted that shared sovereignty be used for Northern Ireland while the political institutions of a United Ireland are being established. This arrangement could foster trust and cooperation between both communities, providing a stable framework during the transition. Should the fledgling state be set with a federalist or unitary style government, it is submitted elections will be required to take place to elect representatives to office. Furthermore, the creation of a federalist state would need either amendments to the 1937 *Bunreacht na hÉireann* or a new constitution. Either of these options would need time to establish, showing the need for shared sovereignty. This model of government will allow for unionists and nationalists to feel represented during this transitional period while representatives are elected to whatever legislatures and while the new government is established with the cabinet being selected. Additionally, mechanisms for power-sharing and proportional representation could ensure that all voices are heard, helping to maintain peace and social cohesion.

This section submits that in the event of a United Ireland, shared sovereignty as set out in the 1972 document 'Towards a New Ireland' in which the governments of Britain and Ireland share sovereignty in Northern Ireland should be adopted with some tweaks. This section submits that alongside the two representatives from the British and Irish governments, there should be a delegation

¹² *id.* [8.2]

¹³ *id.*

comprised of representatives from the Northern Ireland Assembly. This delegation should consist of representatives across the political spectrum in Northern Ireland. It could be argued this delegation should be the Northern Ireland Executive, which at the time of writing, consists of Emma Little-Pengelly, Michelle O'Neill, Aisling Reilly, Caoimhe Archibald, Conor Murphy, John O'Dowd, Minister Andrew Muir, Naomi Long, Mike Nesbitt, Gordon Lyons, Paul Givan, and Pam Cameron. These are party members of Sinn Féin, the Democratic Unionist Party, the Ulster Unionist Party, and the Alliance Party. The only other major party which should be included is the SDLP, which forms the current opposition in the Northern Ireland Assembly. As the leader of this party is an MP, therefore, it is submitted that the party leader in Stormont, Matthew O'Toole, could make up the representative of the party within the delegation. To ensure equitable representation and foster inclusivity, mechanisms for proportional representation and gender balance should also be incorporated into the delegation's composition, reflecting modern governance standards.

Historical Barriers to Truth and Truth Recovery in Northern Ireland

by Lisa Costine

A. Barriers to Truth

During Northern Ireland's Troubles, conflict and societal divisions shaped how propaganda¹ operated within the media landscape. Biased and selective perspectives amplified UK government ideologies.² The Thatcher government,³ (1979—1990) portrayed "The Merits of British Policy in NI" while the views of paramilitary groups risked prosecution under Section 11 of The UK Prevention of Terrorism Act (1974,1976). Media were briefed by the RUC, state, and army⁴ while Section 31 of the Irish Broadcasting Authority Act, 1960 restricted Irish Media. Those who identified with Republican viewpoints were marginalized. In addition to disinformation and media restrictions, collusion was a recurring feature of Northern Ireland's historically corrupt system⁵ which permitted torture and internment without trial.⁶ The Bloody Sunday inquiry is a compelling example of NI Truth Recovery, yet, no prosecutions have been made.⁷ Likewise, Police Ombudswoman Nuala O'Loan (1999-2007) uncovered systemic levels of collusion between police and loyalist paramilitaries, mishandling of investigations, and instances of misconduct.⁸

¹ Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon 1988)

² Roseanna Jane Doughty, 'Representations of the NI "Troubles" within the British Media, 1973–1997' (PhD thesis, University of Cambridge 2020); Simon Cottle, 'Reporting the Troubles in Northern Ireland: Paradigms and Media Propaganda' (1997) 14(3) *Crit. Stud. Mass. Comm.* 282.; Ed Moloney, *A Secret History of the IRA* (W W Norton & Company 2002)

³ Doughty (*op. cit.*)

⁴ Cottle (*op. cit.*)

⁵ James W. McAuley and Jonathan Tonge, 'State Violence and the Colonial Roots of Collusion in Northern Ireland' (2010) 51(1) *Race & Class* 62

⁶ Michael J. Kelly, 'The Emergency: Northern Ireland, Internment, and the Law, 1971–75' (2015) 36(2) *J. Brit. Stud.* 336

⁷ Cottle (*op. cit.*); The Bloody Sunday Inquiry, *Report of the Bloody Sunday Inquiry* (The Stationery Office 2010)

⁸ CAIN Web Service, 'Police Ombudsman Reports' <<https://cain.ulster.ac.uk/issues/police/ombudsman/>> (last accessed 8 January 2025)

B. Barriers to Truth Recovery

Priorities at the time of signing the Good Friday Agreement (release of political prisoners, establishment of a governing assembly, reform of the police service) took precedence over legacy⁹ despite Truth Recovery's pillar in the Transitional Justice framework.¹⁰ This led to a 'piecemeal' approach as secret dealings, cover ups, collusion, and evidence withheld by the State added complexity to the Truth Recovery process.¹¹ The criminal justice system of forensic facts and truths proved ill-equipped to deal with conflict, truth and Human Rights abuses.¹² The focus on prosecution and punishment as the only means of justice and accountability leaves no provision for restorative justice measures.¹³ Attempts, such as the Historical Enquiries Team (HET) achieved little success as within its ranks, it was found that members of the RUC where investigating former colleagues and the army were being interviewed to less rigorous standards.¹⁴ Then, the Stormont House Agreement (2014) had an advantageous Truth Recovery design. The Fresh Start Agreement then fell apart in 2015, a strategic move by the UK conservative government amid concerns about protecting army veterans.¹⁵ The Truth and Reconciliation Bill, 2023 attempts to bypass Human Rights obligations, the Transitional Justice Framework and terms of the Good Friday Agreement. It's liberal amnesty laws prevent victims from pursuing legal action and creates a two tier system that violates Domestic and International Human Rights obligations.¹⁶

⁹ Bill Roston, *Political Imprisonment and the Irish Conflict: Parades, Remembrance and Memory* (Routledge 2006)

¹⁰ United Nations, 'The United Nations Approach to Transitional Justice' (2010)

¹¹ Cheryl Lawther, *Justice, Reconciliation and the Politics of Post-Conflict NI* (Palgrave Macmillan 2015)

¹² Bell (*op. cit.*)

¹³ Lawther (*op. cit.*)

¹⁴ Patricia Lundy, 'Policing the Past: The Historical Enquiries Team and the Legacy of the Conflict in NI' (2011) 38(3) *Ir. Pol. Stud.* 307; Committee on the Administration of Justice (CAJ), *Legacy of the Past: Report on the Historical Enquiries Team* (CAJ 2015).

¹⁵ Government of the UK, 'A Fresh Start for Northern Ireland' (17 November 2015)

¹⁶ Amnesty International UK, 'NI Troubles Bill' (2023) <<https://www.amnesty.org.uk/ni-troubles>> (last accessed 21 December 2024); Oireachtas, 'United Kingdom NI Troubles (Legacy and Reconciliation) Act 2023: Discussion' (2023)

a. Truth Recovery in a United Ireland

The Irish Government has challenged the Bill at the ECHR,¹⁷ so a ruling in their favour could champion a victim-centred approach to legacy and reconciliation with Justice for Troubles Victims as a key component in a United Ireland. Truth Recovery in a United Ireland could provide a single, cohesive legal and institutional framework. An impartial, consistent approach that honours commitments to International Human Rights Law, but is free from the political deadlock that has hindered the NI system.¹⁸ A victim-centred hybrid model could combine truth commissions, education initiatives, and legal accountability to foster a unified inclusive national identity.¹⁹ NI Human Rights are governed through the UK's Human Rights Act, 1998, which incorporates the ECHR into domestic legislation. The Irish Republic also safeguards Human Rights under the ECHR in addition to the Irish Constitution. A new Bill of Rights for United Ireland could harmonise both jurisdictions, use public consultation to represent diverging perspectives of all communities, safeguarded more effectively and be more closely aligned with international obligations.²⁰

¹⁷ Madden and Finucane 2023, 'The Northern Ireland Troubles (Legacy & Reconciliation) Act 2023 <<https://madden-finucane.com/2023/09/15/the-northern-ireland-troubles-legacy-reconciliation-act-2023/#:~:text=Madden%20%26%20Finucane%20Solicitors%20can%20confirm,which%20we%20are%20challenging%20the>> (last accessed 1 February, 2025)

¹⁸ McEvoy (*op. cit.*)

¹⁹ Healing Through Remembering, *Making Peace with the Past: Options for Truth Recovery in Northern Ireland* (HTR 2006)

²⁰ Brice Dickson, 'Implications for the Protection of Human Rights in a United Ireland' (2021) 32(2) *Ir. Stud. Int. Aff.* 89

Preserving Social and Economic Rights in a United Ireland

by Éanna Carr

The Belfast Agreement (1998),¹ widely known as the Good Friday Agreement (GFA), marked a historic breakthrough in fostering peace in Northern Ireland. By emphasizing socio-economic rights, equality, and non-discrimination, the Agreement created a foundation for reconciliation between the nationalist and unionist communities. This essay explores how the principles of the GFA can guide the drafting of a new Irish Constitution, ensuring that a united Ireland becomes a model of inclusivity, stability, and shared prosperity.

The Belfast Agreement enshrines a commitment to human rights, and broader socio-economic rights through article 1,² the Belfast Agreement guarantees equality of treatment, and freedom from discrimination across social, economic, and cultural dimensions. The parties sought to address these inequalities through equitable access to healthcare, and employment, with the ultimate goal of addressing the historical inequalities, that fuelled sectarian hatred and violence between the nationalist and unionist communities. The agreement emphasises the principle of ‘targeting social needs’,³ prioritizing funding for economically disadvantaged areas to reduce disparities in both wealth and opportunity. The Northern Ireland Human Rights Commission was also

¹ Belfast Agreement 1998

² *id.* Article 1

³ Rory O’Connel, Fiona Ní Aoláin, Lina Malagón, ‘The Belfast Agreement and Transformative Change: Promise, Power, and Solidarity’, (2023), <<https://www.niassembly.gov.uk/globalassets/documents/raise/gfaseminars/seminar2-bgfatransformativechange-briefing-paper.pdf>> 3, accessed 12th December 2024

established,⁴ which functions as an independent body tasked with safeguarding and promoting Human Rights across the region.

A. Social Rights

Article 1(vi) of the Good Friday Agreement recognises ‘The Birthright of all people in Northern Ireland to identify themselves and be accepted as Irish, or British, or both’.⁵ *De Souza V Secretary of State for the Home Department*,⁶ highlights the shortcomings of the Identity affirming rights that the Agreement seeks to safeguard. Emma De Souza, who identified solely as Irish, challenged the UK government’s insistence that she was automatically British under UK law. The case revealed a gap between the Good Friday Agreement’s commitments and its implementation in domestic law, as courts upheld the UK’s position despite the Agreement’s provisions.

To safeguard the identity of British identifying people in a united Ireland, the Irish constitution must ensure parity of esteem. Fruhstorfer, et al. (2021),⁷ emphasises the importance of creating an inclusive constitution to protect minority rights effectively. Explicit constitutional provisions should guarantee the right of all individuals to identify as Irish, British, or both, ensuring that no group feels marginalized or excluded. These protections would uphold the principles of equality and parity of esteem central to the Good Friday Agreement.

⁴ Northern Ireland Human Rights Commission, ‘Who We Are’ (2021) <<https://nihrc.org/about-us/who-we-are>> (last accessed 14 December, 2024)

⁵ Belfast Agreement 1998, Article 1(vi)

⁶ *De Souza v. The Minister for Justice and Equality* [2019] IEHC 440

⁷ Anna Fruhstorfer, Alexander Hudson, ‘Majorities for Minorities: Participatory Constitution making and the Protection of Rights’ (2022) 75(1) *P.R.Q.* 103

Additional Practical steps must be taken; this could include the establishing of an independent oversight body to monitor and enforce these protections, and provide access to legal remedies for those whose rights have been violated.⁸ By embedding these measures within the legal framework, the state can uphold the principles of the Good Friday Agreement and ensure that British-identifying individuals feel secure, respected, and valued.

B. Language

The Good Friday Agreement emphasised, ‘the importance of respect, understanding and tolerance in relation to linguistic diversity’.⁹ Despite this, political instability must be addressed. Since its establishment, the Northern Irish Assembly has faced multiple suspensions, totalling nearly a decade during its’ twenty five year existence.¹⁰ In order to facilitate the maintenance of human rights in a unified Ireland, steps must be taken to avoid an impasse akin to the DUP and Sin Fein’s dispute which lasted from 2017-2020. Language Rights ‘The New Decade, New Approach Deal’ represents a positive vehicle by which minority rights can be recognised and realised. The deal included an amendment to the Northern Ireland Act (1998),¹¹ which granted official status to both the Irish Language, and Ulster Scots.

To build on this progress, the introduction of comprehensive language acts across the island of Ireland should be prioritized. These acts should include measures to promote bilingual public services, enhance language education in schools, and ensure equal access to government resources in both

⁸ Joanne McEvoy, ‘Managing Culture in Post Conflict Societies’ (2011) 6 *C.S.S.* 55

⁹ Belfast Agreement 1998

¹⁰ Agenda NI ‘25 Years of the Northern Irish Assembly’ (2025), < <https://www.agendani.com/25-years-of-the-northern-ireland-assembly/>> (last accessed 03 February, 2025)

¹¹ Northern Ireland Act 1998.

Irish and Ulster Scots. For example, creating an independent language commission could monitor the implementation of these rights and provide support for communities seeking to preserve their linguistic heritage. Such initiatives would not only protect minority languages but also foster cultural understanding and mutual respect, strengthening the foundations of a unified and inclusive Ireland.

C. Economic Rights

Inequality between Northern Ireland and the Republic of Ireland is a significant challenge that must be addressed in a United and Inclusive Ireland. Northern Ireland remains one of the most economically disadvantaged regions of the United Kingdom,¹² facing persistent challenges such as higher levels of unemployment, lower wages, and limited access to quality public services. In contrast, the Republic of Ireland has experienced robust economic growth, emerging as one of the fastest-growing economies in the European Union. The Republic's economy has benefited from high levels of foreign direct investment (FDI), a competitive corporate tax regime, and its membership in the EU (prior to Brexit), which has provided access to a large market and substantial EU funding.¹³

The Good Friday Agreement established a broad economic reform agenda; this was embodied by the Strategic Planning (Northern Ireland) Order (1999),¹⁴ which established the 'Regional Development Strategy'.¹⁵ This focussed on long term planning of infrastructure, environmental

¹² David Jordan and John Turner, 'Northern Ireland's Productivity Challenge: Exploring the Issues' (2021, Productivity Insights Papers)

¹³ Patrick Honohan, 'How did Ireland Recover so Strongly From the Global Financial Crisis?', Economic Observatory (2024), <[\(https://www.economicobservatory.com/how-did-ireland-recover-so-strongly-from-the-global-financial-crisis#:~:text=The%20global%20financial%20crisis%20of,globalisation%20and%20foreign%20direct%20investment\)](https://www.economicobservatory.com/how-did-ireland-recover-so-strongly-from-the-global-financial-crisis#:~:text=The%20global%20financial%20crisis%20of,globalisation%20and%20foreign%20direct%20investment)> (last accessed 01 February, 2025)

¹⁴ Strategic Planning (Northern Ireland) Order (1999)

¹⁵ *id.*

sustainability measures, and social equity. In order to bridge the gap between the North and South, this framework could be expanded, to focus on cross border cooperation through increased trade, and sharing infrastructure. Ultimately, this united Ireland will allow Northern Ireland to reap the benefits of FDI, and access to European Union funding.

Conclusion

In conclusion, enshrining the Good Friday Agreement (GFA) in the Irish Constitution is essential for ensuring a united Ireland that upholds the principles of peace, equality, and inclusivity. The GFA's commitment to parity of esteem, human rights, and socio-economic justice must be fully integrated into the constitution to guarantee the protection of all identities, including British-identifying individuals, and address issues like language rights and economic disparities. By embedding these protections, Ireland can foster a society based on mutual respect, shared prosperity, and long-term stability, ultimately strengthening the peace process and creating a unified nation that values all its communities.

Through the Looking Glass of Unionist Identity: Reconciling Diverse Political Identities in a United Ireland Governance Structure

by Yasmin Emerson

This section problematises Unionist identity and subsequently evaluates different governance options for a United Ireland through this lens. Building upon the work of Todd, it is asked whether a Unionist identity can and more importantly *should* be ‘accommodated’ within such structures.¹ The right to ‘internal self-determination’ acts as a benchmark throughout for evaluating how appropriate each option is, having regard to Unionists as a minority group in a united Ireland. Firstly, two options for a governance structure- the ‘unitary state’ and federalisation are outlined. The following section analyses the long term sustainability of each. Finally, the need to move beyond the Unionist/Nationalist binary in this discussion is acknowledged. Ultimately, it is concluded that a unitary state strikes the best balance between Unionist self-determination and a united Ireland which reflects a more diverse cultural backdrop.

A. Assessing the Available Options

A myriad of options for governing a United Ireland have been proposed by scholars,² however, this section focuses on two- a ‘unitary state’ and federalisation.³ The former would comprise a new

¹ Jennifer Todd, ‘Unionism, Identity and Irish Unity: Paradigms, Problems and Paradoxes’ [2021] *Irish Studies in Intl. Aff.* 53

² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press 2009)

³ John Garry, Brendan O’Leary, Kevin McNicholl, and James Pow, ‘The future of Northern Ireland: border anxieties and support for Irish reunification under varieties of UKexit’(2020) *Reg. Stud.* 23

constitution, while the latter would maintain existing NI power-sharing institutions created under the Good Friday Agreement (GFA).⁴

The concept of 'internal self-determination' referred to is that defined by Hilpold as 'systematic involvement of all groups' in democratic governance, facilitating 'preservation of their cultural identity'.⁵ While self-determination has typically been confined to oppressed peoples within colonial settings,⁶ it has expanded into a broader concept.⁷ This shall inform the discussion of how far the Unionist voice should feature in united Ireland governance.

B. Striking a Balance: Short-Term Solutions Versus Long-Term Viability

This subsection evaluates the extent to which each governance structure can give effect to Unionists' right to self-determination, having regard to the resulting political trade-offs which may occur.

At first instance, one can readily see the appeal of retaining existing devolved institutions within a federal united Ireland. Arguably, the core Unionist fear of a united Ireland is erasure of Unionist identity.⁸ This is not a hypothetical fear, but one already agitated by Brexit and perceived distance between mainland UK and NI.⁹ Kelly and Tannam have advanced the argument for continuation of devolved institutions as a method of neutralising these fears.¹⁰ Enshrining recognition of Unionist identity through continuation of existing devolved structures may create a feeling of stability and

⁴ Patrick Diamond and Barry Colfer, 'Irish Unification After Brexit: Old and New Political Identities?' [2023] *The Pol. Q.* 104, 109

⁵ Peter Hilpold, 'Self-determination and Autonomy: Between Secession and Self-determination' [2017] *Intl. J. on Minority and Group Rights* 302, 326

⁶ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960).

⁷ Hilpold (*op. cit.*) 332, 334

⁸ Mark Daly, 'Unionist Fears & Concerns of a United Ireland, The Need to Protect the Peace Process & Build a Vision for a Shared Island & A United People' (2019)

⁹ Conor J Kelly and Etain Tannam, 'The Future of Northern Ireland: the Role of the Belfast/Good Friday Agreement Institutions' (2023) *Pol. Q.* 85, 86

¹⁰ *id.* 88—93

security, in addition to promoting self-determination by preserving Unionist voice in government. However, one must question whether this approach is short-sighted. Indeed, it may provide a transitional solution which is politically expedient, but it could ultimately deepen existing schisms. The critique of the GFA institutions as outdated and a perpetrator of party politics is particularly relevant here.¹¹

Instead, it is contended that a unitary state better addresses concerns of identity loss. Crucially, a unitary state has been envisioned as having ‘built in’ constitutional protections for the ‘unionist minority’, and continuing British citizenship for those who possess it.¹² Additionally, within a new constitution, there would be more room for discussion and negotiation with Unionists regarding protection for their identity. This more than satisfies the need to implement measures to account for minority interests which the internal right to self-determination necessitates.¹³

C. Beyond the Unionist/Nationalist Binary

Finally, application of the self-determination lens provides perspective regarding the best united Ireland governance option for *all*. It is important to note the changing demographic landscape of NI which has transcended the Unionist/Nationalist binary, with a ‘neither/nor’ political identity,¹⁴ being increasingly common. This prompts consideration of the extent to which Unionist identity should inform governance structure. Hilpold has cautioned that self-determination should not mutate into ‘new forms of nationalism’, and consequently, it is argued that while important to address

¹¹ Diamond and Colfer (*op. cit.*) 106-7

¹² Humphreys (*op. cit.*) 52

¹³ Hilpold (*op. cit.*) 327

¹⁴ Katy Hayward and Cathal McManus, ‘Neither/Nor: The rejection of Unionist and Nationalist identities in post-Agreement Northern Ireland’ (2018) *Capital and Class* 139, 140

the Unionist voice, it should not drown out the diversity of other voices within a united Ireland. Having drawn these conclusions, it is contended that the best view is that put forward by Todd that the Unionist voice should be one strand of a broader cultural approach to a united Ireland.¹⁵

To summarise, by applying the lens of Unionist identity and right to internal self-determination, it was concluded that a unitary state approach to united Ireland governance achieves the correct balance of protection for both Unionist and Nationalist identities, in addition to those falling outside this binary. Upon evaluating the unitary state option against federalisation, it was argued that both options have the capacity to accommodate the Unionist identity, yet the former is superior in terms of building a sustainable structure which looks beyond current political polarisation in NI. Ultimately, the Unionist voice *can* and *should* be accommodated within a united Ireland governance structure, but is not the only factor which should inform this decision, nor is it a political trump card.

¹⁵ Todd (*op. cit.*) 67

Balancing Identities and Protecting Human Rights in a United Ireland: The Case for Federalism

by Rosie Lyons

The prospect of a united Ireland raises concerns around integration, with human rights as one strand of a few. This article explores how a federal system of governance in a united Ireland may balance and nurture differing local traditions, cultural identities, and human rights concerns in the provinces. This might be a system where the North, in particular, may benefit from a smoother transition into a united Ireland compared to the current, highly centralised system in the South. Whilst local governments do operate, a federal layer might smooth human rights concerns, particularly for Unionists in the North. For clarity, federalism ‘divides political authority between a nation-state and sub-national polities within its territory so that both the national and sub-national polities directly govern individuals within their jurisdiction, and that confers both national and sub-national citizenships’.¹ Bednar et al. outline the benefits of a federal system for states with various local histories, differing economies, and diverse cultural backgrounds such as the US, Rwanda, Australia and South Africa, highlighting the potential for this system to give human rights guarantees to citizens.² Nevertheless, federalism would represent an immense constitutional shift for all provinces, lending more power to local governments. So far, that the Irish Constitution would have to

¹ Peter Schuck, ‘Federalism’ (2006) 38 Case 2 *Res J Intl L* 5, 5

² Jenna Bednar, William Eskridge, and John Ferejohn, ‘A Political Theory of Federalism’ in John Ferejohn, Jack Rakove, and Jonathan Riley (eds.), *Constitutional Culture and Democratic Rule* (CUP 2001) 223

be adjusted, since there is no current provision allowing for the creation of a subordinate executive.³

Federalism would therefore not be without its challenges, and would require both public and government support, balances of power, and clear lines of communication.

A. The Shape of Federalism

Within the devolved government in Northern Ireland, there is potential to lend some of this power to the federal provinces. The central government (Westminster) currently manages ‘reserved matters’ such as foreign policy, immigration, overall economic policy, and human rights guarantees, to name a few. In a united Ireland, this might be logical given the practicalities, whilst a readjustment period for the North might reduce if a somewhat similar system is retained on a procedural level in a period of otherwise huge adjustment.

This potential system of decentralised governance tends to ‘end up with fewer dissatisfied citizens’ due to the more accessible and representative nature of a sub-system of governance.⁴ In a post-conflict society, cultural identity and human rights remain concerns in Northern Ireland’s constitutional framework and amongst citizens. The Irish Times found that Protestants were remarkably more supportive of a system of governance in a united Ireland that more closely resembled a devolution model as opposed to an ‘integrated’ or centralised model of governance, which they strongly

³ Oran Doyle, David Kenny, and Christopher McCrudden, ‘The Constitutional Politics of a United Ireland’ in Oran Doyle, Aileen McHarg, and Jo Murkens (eds.), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge University Press 2021) 129, 138

⁴ Bednar et al. (*op. cit.*) 228

opposed.⁵ This affirms the importance of continuing to find a compromised solution for almost half of Northern Ireland's population.

B. Human Right Guarantees

Both Ireland and Northern Ireland are ECHR signatories. The Good Friday agreement explicitly commits to protection of human rights.⁶ Underscoring a fundamental constitutional commitment of both governments, a system of governance which nurtures and guarantees respect for human rights is crucial to the success of a united Ireland. Interviewing members of the public in Northern Ireland, the Irish Times found that citizens across the country were concerned about consent to a united Ireland, especially if violence might emerge if the process was completed in a way that did not embrace the cultural and religious diversity of Northern Ireland.⁷ Federalism ensures a way to maintain a 'voice' for the provinces, particularly Ulster where identity is an incredibly relevant issue which relates to human rights guarantees and recognition for all citizens. This constitutional change would have huge implications for cultural identity and for protecting the right of political opinion and religious expression for all. Thus, federalism gives a smoother opportunity for local governments to embrace and reassure citizens that these rights will continue to be guaranteed and protected. Issues around local tradition and language could be more effectively discussed by citizens and their local governments who will more closely understand their concerns than perhaps a

⁵ Brendan O'Leary and John Garry, 'Integrated vs devolved: two possible forms for united Ireland that divide opinion North and South' (*The Irish Times*, 10 December 2022) , < <https://www.irishtimes.com/ireland/2022/12/10/integrated-vs-devolved-two-possible-forms-for-a-united-ireland-that-divide-opinion-north-and-south/>> (last accessed 03 January, 2025)

⁶ Northern Ireland Office, 'The Belfast Agreement: An Agreement Reached at the Multi-Party talks on Northern Ireland' (10 April 1998) [1]§5

⁷ O'Leary and Garry (*op. cit.*)

centralised government initiative will. Federalism presents a good starting point for localised concerns to be discussed in a way that citizens feel heard, before potentially being brought to a national level.

C. Potential Challenges

Whilst federalism does allow uniquely local issues to be discussed effectively and would be underpinned by human rights guarantees, there are an array of challenges presented here. Firstly, it potentially prevents the nation, as a whole, from maintaining unity.⁸ With different policy initiatives in delegated areas and by embracing local traditions, cohesion nationally is reduced. Nevertheless, given Northern Ireland's unique past compared to the rest of Ireland, it seems a necessary step to opt into a system of governance which not only ensures human rights are protected but also allows for voices to be heard on a closer level, giving local governments more autonomy to initiate policy which reflects their public's particular concerns.

Any federal system also has the potential to cause conflict between local and state governments. Given Northern Ireland's unique history and differing government policies, a line of communication and mutual trust within government branches would be vital to maintaining legitimacy in using this system. In the case of the South, the Constitution would require a national referendum to create a federal system, and the timing of this would matter greatly, alongside effective communication to the public in what federalism looks like, for it to gain both legitimacy and support.

⁸ Schuck (*op. cit.*) 8

Overall, federalism may suit a united Ireland, ensuring human rights protections throughout the country and allocating some autonomy to local governments to ensure their public's voices are heard. Whilst this does decrease national coherence, allowing room for diversity amongst the provinces and potential human rights concerns in the North ensures that communication is open and would ultimately increase the legitimacy of governance in a united Ireland.

Looking Towards a Human Rights Act for a United Ireland

by Cathy McGee

This section will aim to look at the current human rights legislation in place within the UK and Ireland, with a particular focus on the legislation in the United Kingdom (UK) and the Republic of Ireland (ROI) which relates to the European Convention on Human Rights.¹ It will start by focusing on the context in which the respective acts were passed taking a comparative law lens and then move on to look at the changes that may have to be made to existing Irish human rights legislation in the event of reunification. The question of Constitutional human rights will also be briefly considered.

As this entire research project has been emphasising, in the event of reunification, it is very likely that adaptation on the part of the ROI, the UK and of course, Northern Ireland (NI) itself will be very necessary, and human rights legislation is no different. The most obvious human rights protections which currently exist in the UK and the ROI are: Ireland's European Convention on Human Rights Act 2003 (ECHR Act); and the UK's Human Rights Act 1998 (HRA). Both of these Acts were necessary given that both the ROI and the UK are dualist states and therefore must pass legislation domestically to enact international treaties that they have signed up for in order to allow citizens to invoke their rights. Although both jurisdictions passed legislation to domestically implement the

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

ECHR, for the ROI, the new legislation was less significant, given that the Irish Constitution already included a Bill of Rights for the ROI. In contrast the 1998 HRA was a human rights milestone for the UK, since the UK (unlike the ROI) does not have a codified constitution and therefore it could be argued that before the HRA 1998, there was a lack of clarity over where exactly citizens should look to, to find their human rights.

Many would argue that Irish human rights have been very influenced by the 1998 HRA, although some are concerned by the fact that Irish Courts do not go as far as UK courts.² This is exemplified by the fact that the ECHR Act 2003 does not classify Courts as ‘organs of the state’, which means that the ECHR Act 2003 does not have horizontal effect (non-state entities cannot invoke this act against other non-state entities), unlike the HRA 1998.³ However, the Constitution of Ireland does have horizontal effect, and this is particularly significant given the overlap in rights between the ECHR Act 2003 and the Irish Constitution.⁴ Both the HRA 1998 and the ECHR Act 2003 allow court rulings of ‘incompatibility’, although in the UK this power is limited by parliamentary sovereignty, and in the ROI greater weight is given to conflicts with the Constitution.⁵

The passing of the Good Friday (Belfast Agreement/ GFA), emphasised the importance of incorporating the ECHR into Irish law and meant that the human rights protections would be the same both north and south of the border (a core tenet of the GFA), although some would now argue that the ROI has greater human rights protections, given that it has both the ECHR Act 2003, as well as

² Donal O'Donnell ‘The ECHR Act 2003: Ireland and the Post War Human Rights Project’ [2022] 6(2) *Irish Judicial Studies Journal* 1; Ronagh McQuigg ‘The European Convention on Human Rights Act 2003 – Ten Years On’ (2014) 3(1) *Intl. Human Rights L. R.* 61.

³ McQuigg (*op. cit.*)

⁴ *id.*

⁵ O'Donnell (*op cit.*)

the Constitution, whereas NI does not have its own bill of rights, despite numerous efforts over the years.⁶ An interesting area of divergence is that the HRA 1998 accounts for free speech and freedom of religion, whereas the ECHR Act 2003 does not, although freedom of religion and freedom of expression already form sections of the Irish Constitution.⁷

There is the possibility that the current Irish Constitution could be slightly amended to further implement some of the human rights provisions of the GFA in the case of reunification. The pre-existence of human rights protection within the constitution means that areas in which the ECHR Act 2003 diverges from the HRA 1998 could be incorporated into the Irish Constitution, in order to give the rights greater legal power. It appears that the main change required to the ROI's ECHR Act 2003 would be to decide whether it would be necessary to extend its reach to allow horizontal usage, although as many academics have noted, this could conflict with the supremacy of the Irish Constitution and would therefore require careful consideration.⁸ Overall, it appears that from the human rights perspective, the transition to reunification would be relatively seamless with only legal technicalities to consider and this is largely due to the fact that both human rights acts come directly from the ECHR of which both the ROI and the UK are signatories. As well as this the fact that the UK and the ROI have previously come together for the GFA in which human rights protections were agreed upon, also means that there is a certain level of consensus between the UK and the ROI over the area of human rights.

⁶ O'Donnell (*op. cit.*) & Colin Harvey and Anne Smith, 'Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience' (2020) 44 *Fordham Intl. L. J.* 357

⁷ O'Donnell (*op. cit.*)

⁸ O'Donnell & McQuigg (*op. cit.*)

Yemen, Lessons Learned: Survival of Northern Ireland's Right to Self Determination in a United Ireland

by Mariella Vildoso

Introduction

To ensure that the right to self-determination for Northern Irish citizens is respected within a United Ireland, a governance model that combines central authority with meaningful regional autonomy would be highly effective.¹ The experience of Yemen's unification demonstrates how neglecting regional autonomy and centralized governance can lead to instability and discontent. To avoid similar pitfalls, a United Ireland should prioritize protections and fair representation for both Nationalist and Unionist communities, drawing on frameworks that emphasize inclusivity, decentralized power, and respect for local autonomy.²

A. Yemen's Unification: Key-Lessons

The unification of the Yemen Arab Republic (North Yemen) and the People's Democratic Republic of Yemen (South Yemen) was rooted in their common language, traditions, geographical proximity and historic interaction. All of which appeared to provide the perfect ingredients for a successful

¹ Brice Dickson, 'Implications for the Protection of Human Rights in a United Ireland' (2021) 32 (2) *Royal Irish Academy* 589, 602—603

² Jennifer Todd, 'Unionism, Identity and Irish Unity: Paradigms, Problems and Paradoxes' (2021) 32 (2) *Royal Irish Academy* 53, 71—73

unification. However, as time has showed, having/sharing similar interest does not guarantee a successful unification.³

Yemen's government failed to fundamentally involve leaders to be part of the political initiatives and dialogues. Additionally, Yemen's government was highly dysfunctional; failing to establish clear regions, setting unachievable goals which ultimately contributed to a sense of disappointment and untrust amongst its citizens, fuelling further divisions and leading to the growth of armed groups.⁴

B. NI-Autonomy and Governance: Avoiding Centralization Pitfalls

The political situation in Northern Ireland prior to the unification of Ireland consisted in a power shared between the two biggest Northern Irish political parties; Sinn Féin (SF) and the Democratic Unionist Party (DUP).

Following the United Kingdom of Great Britain and Northern Ireland's exit from the European Union, several members of the DUP began a campaign of 'boycott' Northern Ireland's power sharing. Therefore, a major challenge to the United Ireland's success of a transitional government relates to the deep divisions within Northern Ireland's society. It is therefore very likely that as a result of a widespread Unionist dissatisfaction in regards to a United Ireland could potentially lead to a resurgence of civil unrest.

³ Helen Lackner, *Yemen Poverty and Conflict* (Routledge 2022) 26—28

⁴ George Anderson and Sujit Choudhry, *Territory and Power in Constitutional Transitions* (OUP 2019) 312—316

C. Cultural and Identity Protections: Ensuring Minority Rights

The Unionist Community, have often seen themselves as part of the United Kingdom whereby, their community outnumbered the Nationalist Community.

The United Ireland's new dynamic in relation to representation *vis a vis* turning the protestant community into a minority is likely to see an increment in opposition groups, perceived prejudice, historic nationality and peoplehood from the Unionist minority.⁵

The Belfast Agreement was without any doubt a pivotal moment in Northern Ireland's history; after 30 years of conflict, the Good Friday Agreement provided hope to Northern Irish citizens.⁶ The ceasefire, decommissioning of weapons by armed groups and recognition of self – determination by allowing Northern Irish citizens to gain dual citizenship are some examples.

The recurrent dissolution of Northern Ireland's Assembly since devolution began, clearly illustrates the fragile nature of Northern Ireland's politics.⁷ Yemen's Unification has demonstrated, *inter alia*, that whilst international support/intervention plays an important role in transitional societies, such interventions do not ensure a successful unification.

Conclusion

The findings in this document strongly suggest that a federal government could assist the United Ireland's process of transition, however, it is crucial to learn from the failures of Yemen's unification.

⁵ Todd (*op. cit.*) 61-70

⁶ Dickson (*op. cit.*) 13

⁷ *id.* 17

Ensuring that regions are clearly defined and understand that a transitional process is unlikely to succeed in the midst of insecurity are key to a successful transition and an achievable unification.

Furthermore, acknowledging that both Northern Irish communities have created their own identity, whereby, becoming part of a United Ireland cannot fully satisfy Unionist and Nationalist's sense of belonging, self-determination and reconciliation.⁸ Therefore, the United Ireland central government requires to accept that political operation on the basis of consensus is unlikely to be achieved, thus, an adaptable and tolerant political regime that focuses on integrated political structure fairly addressing religious, economic and cultural differences amongst its citizens is more likely to succeed, avoiding Yemen's "whole government approach"⁹ and forced political integration by coercive means.¹⁰

33 years after Yemen's unification began this nation continues to struggle with becoming a one cohesive state, leading to further fragmentation of Yemen's society.¹¹

⁸ The Belfast (Good Friday) Agreement 1998, Art. 16

⁹ Anderson and Choudhry (*op. cit.*) 328

¹⁰ Ismail Sharif, 'Unification in Yemen Dynamics of Political Integration, 1978-2000' (MPhil thesis, University of Oxford) 33

¹¹ Tom Sparks, *Self-Determination in the International Legal System : whose claim, to what right?* (Hart 2023) 10

D. RECOMMENDATIONS

I. Recommendations from FLAC[†]

[1] Legal recognition of parentage should not be solely based on biological ties. Both Ireland and Northern Ireland should grant automatic recognition to non-biological parents in same-sex relationships from birth, removing the need for lengthy court applications. This would create parity between same-sex and opposite-sex couples in determining legal parenthood, ensuring greater security for children in LGBTQ+ families.

[2] A clear and comprehensive legal framework for surrogacy should be implemented in both jurisdictions, ensuring intended parents are legally recognized from birth. Ireland's Health (Assisted Human Reproduction) Act, 2024 should be expanded to include international surrogacy arrangements, while Northern Ireland must formalise protections through legislation. These reforms should prevent legal uncertainty and safeguard the rights of all parties, including surrogates and children.

[3] Adoption laws should be reformed to eliminate practical and legal barriers faced by LGBTQ+ couples. Ireland's process remains bureaucratically complex, particularly for international adoptions, while Northern Ireland, despite early legal progress, has seen low adoption rates for same-sex couples. Greater transparency, reduced delays, and targeted policies ensuring equal treatment in assessments would make adoption more accessible for diverse family structures.

[†] note that these summaries are not exactly all-encompassing and exhaustive. For a more concrete view of what should be performed pre-reform, the reader should review every individual section and chapter conclusion. Further, these summarised recommendations do not take into account the proposals made in Section C.

[4] Both jurisdictions should ensure full equality in marriage and civil partnerships by addressing residual restrictions. Ireland has largely phased out civil partnerships, while they remain an option in Northern Ireland. Legal alignment would provide same-sex couples with equal rights and choice across both systems, ensuring consistency in family law and relationship recognition.

[5] Both jurisdictions could enact a hybrid Bill of Rights, as proposed in the Good Friday Agreement, which would strengthen rights protections in areas such as family law, reproductive rights, and perhaps even socio-economic entitlements. This would enhance legal alignment between both jurisdictions, particularly given Ireland's constitutional framework for rights protection. Further, ensuring socio-economic rights are integrated into the law would prevent disparities in housing, healthcare, and education access. Of course, this final recommendation remains contingent on future potential constitutional restrictions, much like those evidenced in Article 45 of the Irish Constitution.

[6] Irish language protections in Northern Ireland should be strengthened to reflect the status it holds in the Republic. While recent reforms acknowledge the language's importance, a more robust framework is needed to actively promote and support Irish speakers. This should include enforceable rights to use Irish in legal and public settings, mirroring constitutional protections in Ireland.

[7] Ireland should remove the mandatory three-day waiting period for abortion, which creates unnecessary obstacles to healthcare access. Northern Ireland, despite legal reforms, continues to face gaps in service provision that must be addressed to ensure safe and timely access to abortion services.

Both jurisdictions must prioritise reproductive rights, aligning their frameworks to protect individual autonomy and access to essential healthcare.

[8] Ireland's Courts traditionally uphold strict separation of powers, limiting judicial intervention in socio-economic rights, whereas Northern Ireland's framework, influenced by the Human Rights Act 1998, allows for a broader enforcement of such rights. Bridging this divide would require careful constitutional and judicial reforms to ensure consistent protection of fundamental rights in a potential unified system, particularly in housing, healthcare, and social welfare.

[9] While both jurisdictions emphasise diversion and restorative justice, Northern Ireland relies on Youth Conferences, incorporating victim participation; whereas Ireland's Garda Youth Diversion Programme prioritizes early intervention through community support. Reform should enhance cross-jurisdictional best practices, ensuring young offenders receive rehabilitative rather than punitive responses, while addressing delays and inconsistencies in juvenile court processes.

[10] A unified Ireland should establish official networks for child welfare advocacy, improving service delivery on issues such as poverty, social isolation, and mental health. Harmonisation of child protection laws should include a novel Children's Act, incorporating best practices in child advocacy and welfare services to ensure all children receive equal protections, regardless of location.

[11] Northern Ireland lacks a single, consolidated piece of equality legislation, unlike Ireland's Employment Equality Acts, leading to inconsistencies in legal protections. A unified approach should

adopt a comprehensive anti-discrimination framework, ensuring consistency in employment rights, including protections against political opinion discrimination – which despite reform on both sides remains a key divergence. An all-island equality body should be established to oversee implementation and enforcement.

[12] Migrant and minority workers face systemic barriers in both jurisdictions, but a harmonised approach is needed to address disparities in employment rights and asylum systems. Replacing Ireland's Direct Provision system with a rights-compliant model and ensuring consistent access to employment for asylum seekers would be an essential reform in a unified Ireland. Additionally, an all-island equality framework should incorporate best practices from both systems to enhance protections for vulnerable workers.

[13] Northern Ireland provides statutory parental bereavement leave and offers longer domestic violence leave than Ireland, where such rights are more limited. A unified system should incorporate the strongest provisions from both jurisdictions, ensuring employees receive maximum protections, including paid leave entitlements that support work-life balance and family well-being.

[14] Ireland's legal approach to consent in sexual offences prioritizes the accused's belief, allowing the 'honest mistake' defence, whereas Northern Ireland applies a more objective standard, requiring reasonableness in assessing consent. Reform should align Ireland's laws with Northern Ireland's approach to strengthen protections for victims and remove outdated, male-centric legal standards that undermine gender equality in sexual offence cases.

[15] Both jurisdictions follow similar international disability rights frameworks, but Ireland's constitutional limitations restrict the enforceability of socio-economic rights, affecting access to long-term disability care. A unified legal system should ensure that disability rights are explicitly protected within constitutional or legislative frameworks, providing enforceable guarantees for access to services and support systems.

[16] Ireland's doctrine of natural rights has seen a decline, while Northern Ireland follows a more positivist legal tradition. In unification discussions, consideration must be given to whether a consolidated constitution should retain a natural rights approach or fully align with international human rights instruments. This would ensure parity in rights obligations across both jurisdictions.

[17] Unification would require careful navigation of international legal commitments, including treaty obligations held by Ireland and the UK separately. Continuation agreements, similar to those used post-Brexit, would be necessary to ensure seamless legal transitions. Additionally, Ireland's Human Rights Act, 2003 may need revision or expansion to accommodate a new legal framework.

[18] While both Ireland and the UK are parties to the ECHR, divergence in legislative approaches remains. With Labour leadership in the UK ruling out ECHR withdrawal, unification would likely retain existing protections under the Convention, but legal structures would need to be harmonized to ensure consistent application of ECtHR decisions across the island.

[19] Ireland's response to the Ukrainian refugee crisis was more open than the UK's, which imposed visa and scheme requirements. A unified Ireland must develop an immigration policy that balances humanitarian obligations with border control considerations, preventing policy clashes similar to those seen between Ireland and the UK during the crisis.

[20] UK police forces, including those in Northern Ireland, have a lower threshold for using lethal force compared to An Garda Síochána. In unification discussions, careful consideration must be given to aligning policing standards, ensuring human rights-compliant practices while maintaining public trust in law enforcement.

[21] Any unification process must address the presence and influence of paramilitary and militia groups in Northern Ireland. While the Good Friday Agreement significantly reduced paramilitary activity, dissident groups still exist, posing security and legal challenges. A unified Ireland must develop a comprehensive disarmament and reintegration strategy, ensuring compliance with international security norms while reinforcing rule of law. A dedicated transitional justice mechanism may be required to address legacy issues related to past militia activity, ensuring accountability and reconciliation.

[22] Ireland's long-standing policy of military neutrality contrasts with the UK's membership in NATO and broader defence alliances. In the event of unification, Ireland must determine whether to maintain its current stance or integrate Northern Ireland into a broader defence policy. This

would require careful negotiation with international allies and compliance with existing treaties. Any shift in defence policy, such as potential NATO membership, may necessitate a constitutional referendum in Ireland, given its established position on military neutrality.

[23] The new state would likely seek EU membership, given the Republic of Ireland's existing EU Member State status. Whether Northern Ireland would need to undergo the full application process remains uncertain. Ireland has long benefited economically and politically from EU membership, including trade and security cooperation. As such, under EU law, a unified Ireland would likely inherit the Republic's membership. However, challenges would arise, including the need for a referendum in Northern Ireland, as per stipulated under the Good Friday Agreement. Economic integration, unionist concerns, and maintaining peace would also require careful negotiation. The unification process would be complex and lengthy, with significant implications for Ireland and the EU.

[24] Finally, questions remain on how Northern Ireland's distinct political and cultural identity would be incorporated into the broader Irish State.

