

Brexit and Northern Ireland: A briefing on Threats to the Peace Agreement

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Introduction

The withdrawal of the UK from the EU will have a profound effect on the legal and constitutional underpinning of the present jurisdiction of Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations. The UK and Ireland's common membership of the EU was an assumption in the Belfast Good Friday Agreement (BGFA) and the UK's adherence to EU law regulates the powers and legislative operations of the devolved institutions. The equal rights of Irish and British citizens, a principle of the BGFA, in great part relies on the equal rights of both as having EU citizenship. The lack of significant border regulation is largely due to common membership of the EU, North and South, as well as the improved security situation. Many equality and anti-discrimination provisions in Northern Ireland, which have particular importance in a divided society, rely on EU law. For more detail on the human rights and equality implications of Brexit see CAJ's conference report "Brexit and Rights" <https://caj.org.uk/2016/09/30/brexit-and-rights-conference-papers/>

All of these impacts could have a destabilising effect on the constitutional, political and legal settlement that, in the main, ended the violent political conflict which devastated the people of Northern Ireland and gravely affected those in the rest of the UK and Ireland. While it is unlikely that any one particular effect of leaving the EU would destroy the peace settlement, the cumulative impact could begin to unravel it. In particular, any diminution in the protection of rights of the people living on the island could reduce trust in the BGFA institutions and any unravelling of the settlement would be disastrous for human rights. A continuing preoccupation of CAJ will therefore be the protection of the integrity of the peace settlement and the various agreements that make it up. Given that violent conflict always involves a bonfire of human rights, protecting the peace settlement is our top priority.

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Threats to the peace process and the Belfast Good Friday Agreement

The process was and is an all-island one

While there are three strands of the Agreement (BGFA), its all-island character is not restricted to Strand 3 (North-South). The Irish government was intimately involved in the negotiations, the BGFA was sealed with a British-Irish Treaty, all-island cross-border bodies were established, there is the concept of “equivalence” in human rights protections, the recognition of the “birthright” of people who live in Northern Ireland to Irish citizenship makes that concept an all-island one and many of the outworkings of the peace process involve both parts of the island.

The fact that both jurisdictions on the island were part of the EU supported progress towards harmonisation in many areas of economy and society, freedom of movement across an increasingly notional Border and made economic integration easier and apparently inevitable. All of that will be stopped in its tracks. How are cross-border bodies, for example, to operate in two different economic and social and well as political regimes? Any move towards a border that is controlled in any way, by fixed checkpoints, electronic surveillance or in-country spot checks, will not only cause economic and social inconvenience but also accentuate the distinction between jurisdictions which was becoming usefully blurred.

The process was founded on the exercise of self-determination

The BGFA recognised that “It is for the people of the island of Ireland alone...without external impediment, to exercise their right of self-determination.” The people of the whole island voted for or against the Agreement on the same day and on the same question. Depending on the point of view, this was an act of self-determination by all the people of Ireland or of the people of Northern Ireland with a supportive vote in the South. Either way, the principle of the people living on this island deciding their own future was a foundation stone of the Agreement. It is notable that the UK Government’s Position Paper on Northern Ireland and Ireland in Para 53 ignores the role of the will of the people of the South in accepting or not the choice of the people of the North in relation to the constitutional status of Northern Ireland.

The UK-wide Brexit vote involved a complete disregard for the principle of self-determination as regards both Northern Ireland and the island of Ireland. The North has been explicitly subordinated to the will of the UK as a whole.

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The vote to leave the EU was not a “national” matter with no particular impact on Northern Ireland. On the contrary, the effect of the Brexit vote will be, unless some kind of remedial action is taken, to change irrevocably the relationship between North and South. That the North’s clear wishes on that subject have been ignored puts a question mark over the whole recognition of self-determination painstakingly built up since the language of the Downing Street Declaration in 1992 opened up the route to the ceasefires of 1994. The hopes of some that constitutional law would have developed far enough to recognise the rights of the devolved regions were dashed by the Supreme Court in the *Agnew* case – there is currently no legal means of expressing this fundamental pre-condition of a successful peace process.

The “birthright” of the ability to be Irish or British or both by individual choice is a fundamental pillar of the Agreement

For most people, the passport of choice is not just an identity accessory like a Gaelic top or a Rangers shirt but a declaration of national aspiration and indeed allegiance. The BGFA proposes the disentangling of national identity from its expression by residence in a nation state. The promise of this process was to create conditions where people with different national allegiances could share the same political and geographical space. At the present time the nation state governing Northern Ireland is the UK but the BGFA expressly recognises the right of the people of NI to express their wish to join the Irish State by simple majority vote. Currently, Irish citizenship for Northerners is an extra-territorial claim of right; in the future British citizenship might have a similar character. That there be complete equality in the rights accruing to these citizenship choices is an indispensable implication of the whole concept.

The formal situation in relation to nationality choice has not been changed by Brexit but the content of that choice has. Given that for many purposes the rights of all EU citizens in the EU were similar, before Brexit there was no practical impact whatever citizenship choice was made. The EU has already said that Northern Irish citizens will remain EU citizens, though what that will mean in practice needs to be examined. Northern British citizens will have no such status. So there is now a clear difference between the two citizenships on offer – that could have a significant impact on the basis of the peace agreement.

Equality in the broadest sense is a key element of the peace process

Equality between the two main communities is, of course, a basic principle of the BGFA and is explicitly recognised in the concepts of “equality of treatment” and “parity of esteem,” though the extent to which these concepts have been implemented in practice is another matter.

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However, Sec 75 of the Northern Ireland Act and associated measures cover a broad range of categories. To overcome the negative characteristics of a divided society, it is necessary not just to confront the headline prejudice (sectarianism) but also to attempt the creation of an equal society, accepting of diversity, at least as regards aspects of personal identity. Given the inter-sectionality of diverse forms of prejudice, confronting sectarianism requires a broad based equality agenda.

Significant elements of equality standards derive from EU law and regulation. These are not simply a static set of rules but a whole system of law with its associated jurisprudence, methods of enforcement and dynamic of progress. Moreover, these standards are external to Northern Ireland and currently bind the devolved institutions including the legislature. Their loss will represent a blow to the project of “de-sectarianising” Northern Ireland society through the development of high standards of equality enforcement across all relevant grounds. It will be necessary to envisage and propose how the equivalent effect of these directives and regulations can be achieved post-Brexit.

Human rights protections are a basic part of the Agreement but have only been implemented partially and may be threatened

All the weaknesses and failures identified in, for example CAJ’s report “Mapping the Rollback”(<https://caj.org.uk/2013/11/19/mapping-rollback-human-rights-provisions-belfastgood-friday-agreement-15-years/>) have reduced the robustness and resilience of the institutions and the peace process as a whole. There is a continuing need to fulfil and go beyond the protections envisaged in the BGFA and succeeding agreements. This is all the more important in view of the long term ambition of elements within the Conservative Party to repeal the Human Rights Act and perhaps also to denounce the European Convention on Human Rights.

The fragility of the peace settlement without the implementation of rights guarantees that could regulate the behaviour of elected politicians and public authorities has been demonstrated by the recent fall of the institutions. The collapse of the institutions was itself, no doubt, partly a result of the arbitrary abandonment of basic assumptions about the peace agreement and the rejection of the special constitutional status of Northern Ireland. It is important that a way of reintroducing the guarantees around citizenship, nationality and equality, as well as more general rights protections, is found. The fulfilment of the commitment to a Bill of Rights for Northern Ireland could meet some of these needs.

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A “hard” border and the Common Travel Area

The complex constitutional context of Northern Ireland and the mutual recognition rights regarding Irish or British citizenship, as well as the north-south and east-west arrangements under the Agreement, provide a compelling case that the right to freedom of movement should be considered as applying across the island of Ireland. Para 20 of the UK Government’s Position Paper on Northern Ireland and Ireland refers to “the principle of free movement between the UK and Ireland” which, of course, must include across the border between North and South. Moreover, while international human rights standards generally permit border controls at the boundaries of a state, human rights are engaged where there is racial discrimination or internal border controls impacting on freedom of movement within a state. In this sense, the re-creation of a “hard” border across the island of Ireland would disrupt the basis of the BGFA and potentially make it the site of racial discrimination thus violating international human rights standards.

It has been argued that the UK leaving the EU will have no impact on the border between the two jurisdictions on this island nor, indeed, on free movement between Ireland and the UK in general because of the existence of the Common Travel Area (CTA) between the two states. This pre-dates the two states’ membership of the EU and is not governed by EU law. However, if one of the motives of “Brexit” is to “take control” of the UK’s borders with the purpose of restricting immigration, including from EU countries, then there will be a clear threat to the CTA and therefore to free movement across the border. If the CTA remains for Irish and British citizens, anyone whose appearance or accent suggests they may not be one or the other are likely to be fair game for stop-checks. This would be clear racial profiling.

There is also the question as to what extent future arrangements between the UK and an Irish state within the EU will require customs controls. While this is a separate matter to immigration controls, in the UK both disciplines are now part of the same agency, having been put together within a unified UK Border Force. To deploy such an agency on the border with an immigration role, even whilst officially there for customs purposes, risks mission creep at the very least. CAJ is also concerned about ensuring that the ethos and accountability arrangements for the UK Border Force comply with the post-Patten policing accountability architecture in Northern Ireland.

Even if there are no or few controls on the border itself, relatively free movement across the island could see the territory of Northern Ireland targeted by UK authorities for particularly severe and intrusive immigration checks including raids on workplaces and increased detention of migrants. Concern about this is increased by the leak of an extremely hard line policy paper on immigration after Brexit being considered by the Government.

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Amongst other things, such a security clampdown outside the police accountability mechanisms painstakingly built up since 2001 would have a negative effect on public confidence in the rule of law.

Legislating and negotiating to defend the Agreement

A great many people have been pointing out the dangers and threats that Brexit poses to the peace process; fewer have been to the fore in proposing solutions. This is partly because of the complexity of the issues, partly because the UK Government seems to have no clear idea what it wants from the negotiations and partly because some of the potential solutions raise huge issues such as whether the UK should stay within the single market and/or the customs union. However, the fact that the “Irish” question is one of the three issues in the Brexit negotiations on which substantial movement needs to be made before the European Union is prepared to move on to discuss a Withdrawal Agreement, creates a level of urgency, as does the current passage of the Withdrawal Bill through Parliament.

CAJ has been working with colleagues to put forward suggestions (rather than firm policy positions) that might help in the short and long term. What follows is a brief summary of our thinking so far.

1) Amending the Withdrawal Bill to make the British-Irish Treaty legally enforceable

The Belfast Good Friday Agreement is made up of two parts: the text of the “Multi-Party Agreement” itself, made between some Northern Ireland parties (not including the Democratic Unionist Party, who opposed it) and the British and Irish Governments, and an Agreement between the Governments of the United Kingdom and Ireland, which has the status of an international treaty and is lodged at the United Nations. The treaty is attached as an Annex to the Agreement and, amongst other things, contains the “solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement” by both governments.

Unfortunately, neither the treaty nor the Agreement itself is directly enforceable in the courts. The UK Government’s Position Paper on Northern Ireland and Ireland accepts that “the British-Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law” (Para 13), but there is no mechanism for adjudicating when an act or law breaches the Agreement nor to enforce adherence to it.

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Legislation, including the “constitution-like” Northern Ireland Act 1998, implements many of the structural provisions of the Agreement but not all of the commitments made therein.

One way of the UK Government demonstrating its oft-repeated commitment to the Agreement would be to make the treaty provisions enforceable in UK domestic law and hence in the courts. A simple amendment of the Withdrawal Bill to the effect that all public authorities must act compatibly with the British-Irish Agreement could accomplish that.

2) Maintenance of EU human rights and equality protections

The Withdrawal Bill, as passed at its Second Reading, specifically removes the protection of the EU Charter of Fundamental Rights. Amendments have already been put in to reverse this and we would support those moves together with any other amendments designed to maintain human rights and equality protections.

3) Equality of citizenship – a reciprocal agreement

After Brexit, there will be large populations of both Irish and British citizens living in Northern Ireland. Irish citizens will continue to be EU citizens, with the right *inter alia* to move freely to and within the EU and to live and work there without discrimination; British citizens will not. This will mark a major distinction between the citizenships and thereby undermine the equality on which the BGFA was based.

One possibility to resolve the issue is that those British citizens whose eligibility for UK citizenship arises from being born in Northern Ireland could be regarded as EU citizens along with their Irish neighbours. It seems unlikely that the EU negotiators would consider any movement outside the established categories of citizenship except on the basis of reciprocity. In other words, if all those born in Northern Ireland with Irish or British citizenship were to retain EU citizen rights throughout the 27 member states, other EU citizens would have to have the same rights within Northern Ireland.

The reciprocal measure would therefore be to guarantee that the rights that EU citizens currently possess would, in Northern Ireland, continue undiminished, as far as practically possible. The proposal would therefore be ***that all EU citizens, not just current residents, would have the right to enter, live and work in Northern Ireland on a similar basis as at present.*** This is envisaged as ***the UK side of a reciprocal agreement with the EU that grants EU citizenship, or at least the rights thereof, to all those born in Northern Ireland with the right to be Irish or British, irrespective of which national citizenship they choose.***

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4) A duty on the UK Government to guarantee equality of rights of Irish and British citizens

Given that the citizenships are those of two sovereign states (plus at the moment citizenship of the EU) there must be both appropriate legislation relating to the North (which could be the Bill of Rights) and also some level of agreement or reciprocity with Ireland (and in the context of Brexit) with the EU.

5) Prohibition of immigration controls on the border

Various agreements have been made between Ireland and the UK around the Common Travel Area, most recently in 2014, but these are explicitly not legally binding. The only way the right to freedom of movement between Ireland and Northern Ireland can be legally enforceable in the UK is through legislation (which could be the Bill of Rights or some other legal instrument).

6) Guarantee of equivalence of rights across the island

The concept of equivalence has to work both ways to have any meaning. The aim can be expressed as ensuring that the rights of an individual are protected equally wherever they may be on the island, though the mechanisms will be different as they are those of the two sovereign states involved. This is essential to make free movement across the island a reality.

As noted, CAJ also believes that some of the unfulfilled human rights and equality commitments in the Agreement should be incorporated in a Bill of Rights for Northern Ireland and has made a separate submission on that here:

<https://caj.org.uk/2017/08/29/s467-cajs-submission-bill-rights-project-august-2017/> We will be working with colleagues to develop these and other proposals as the tortuous process of negotiation and legislation continues.