



BrexitLawNI

Policy Report:

Brexit and The Peace Process

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BrexitLawNI

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

About BrexitLawNI:

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

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

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

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Executive Summary

Brexit and the Peace Process

The European Union has provided significant financial and political support for the peace process in Northern Ireland (NI) since the 1980s. UK and Irish membership of the European Union (EU), formerly the European Economic Community (EEC), has been crucial to improved Anglo-Irish relations since both joined the EEC in 1973. The EU has also featured prominently in the key agreements between the two governments from the Anglo-Irish Agreement (1985) onwards and it is embedded in the architecture of the Good Friday Agreement (1998). The decision by the UK government to exit the EU has quite profound potential consequences for the peace process in Northern Ireland.

The improvement in Anglo-Irish relations which has evolved as a by-product of both the UK and Irish governments being members of the EU has been crucial in embedding 'habits of cooperation' between the two governments as co-guarantors of the Good Friday Agreement and as stewards of the broader peace process.

Brexit has had significant consequences for political relations in NI. 56% of the overall electorate of the jurisdiction voted to remain in the EU. Almost 90% of nationalists voted to remain, whilst 66% of unionists voted to leave. Brexit contributed to the collapse of the power-sharing executive in (NI) and remains a formidable obstacle to it being re-established. As one unionist MLA told the BrexitLaw NI team, Brexit has provoked Irish nationalists in NI in particular, with a sense that *'English nationalists have come in over their heads and denied a part of their identity which was critical to them feeling comfortable about living here.'*

Brexit has had a political impact across the island of Ireland in 'mainstreaming' discussion on Irish reunification – an issue that appeared to have been 'settled' by the Good Friday Agreement. The Irish government successfully argued for the inclusion of provisions in the EU's negotiation guidelines to permit NI to re-join the EU as part of a united Ireland similar to the process deployed by unified Germany after the fall of the Berlin Wall. Former DUP First Minister Peter Robinson has cited the lack of planning associated with Brexit as an example to highlight the need for contingency planning on this issue – referring to debates on reunification as *'the elephant in the room that is positioning to squat on their [unionist] laps.'* Concerns have also been expressed by some unionist politicians and others that the increased focus upon Irish reunification may have an unsettling effect on loyalist paramilitaries.

To date in the Brexit related discussions, there has been very little detailed attention given over to the human rights, equality and political identity concerns of the unionist community in Northern Ireland as part of the renewed focus on Irish reunification.

A number of failed legal challenges to the out-workings of Brexit in NI have highlighted the limits of law as a means of redress for those opposed to Brexit. In addition, the removal of the human rights and equality protections associated with the EU Charter on Fundamental Rights and Freedoms, enforceable through the European Court of Justice, has been cited by some nationalist commentators as an additional factor in nationalist disillusionment with Westminster.

Brexit is widely regarded as having been (as one spokesperson described it) 'manna from heaven' for republican dissidents opposed to the peace process and the Good Friday Agreement. From their perspective, particularly if Brexit results in some form of 'hard border', Brexit will bring home 'the reality of partition' previously obscured by a largely invisible border and the constitutional settlement of the Good Friday Agreement. Concerns about a hard border as a result of Brexit are widely shared including by the Chief Constable of the Police Service of Northern Ireland because any such installations would be 'fair game for attack' in the minds of republican dissidents.

There are also significant concerns amongst the PSNI and other security officials that Brexit will have a deleterious effect on their capacity to counter organised crime and cyber-crime as well as dissident republican violence. Much of the information sharing and other practical cooperation between the PSNI and Garda Síochána is currently done through Europol and other EU regulatory structures.

Recommendations:

- Avoid a hard border on the island of Ireland at all costs. Any such border would further deteriorate political relations within NI, between NI and the ROI, and between the UK and Irish governments. It would also, inevitably, become a target for dissident republicans opposed to the peace process.
- As suggested by the Tánaiste, Simon Coveney, the UK and Irish governments should revisit and enhance existing bilateral cooperation mechanisms between the governments to safeguard 'habits of cooperation' linked to their responsibilities as co-guarantors of the Good Friday Agreement and stewards of the peace process.
- Agreements need to be reached between the UK government, the Irish government and the EU with regard to continued funding on peace process related work in NI and the border region beyond Brexit. In particular, the British government needs to be specific about how their commitments to such funding will be enacted.

- Ensure that future intergovernmental relationships within the UK fully respect the constitutional fundamentals of the NI peace process and the principles embedded in its founding Agreements.
- The UK, Irish government and EU negotiators should recognise that NI is already supposed to enjoy a special constitutional status within the UK and on the island of Ireland and work to ensure that this status is respected and protected in the EU-UK (and Ireland-UK) negotiations and in their legal and political outcomes.
- The UK government should make a reciprocal agreement with the EU to maintain all the existing rights of EU citizens in NI in return for all those born in the North, whether British or Irish citizens, having the rights of EU citizenship.
- The UK government should guarantee equality of rights of Irish and British citizens.
- The two governments and local political parties in NI and the Republic should ensure that any future discussion on Irish reunification, including the conduct of a border poll, is conducted in a way that foregrounds the human rights, equality and political identity concerns of all – in particular those in the unionist community.
- As part of the renewed focus on the importance of human rights and equality for all in the wake of Brexit, a Bill of Rights for NI should be enacted that will guarantee a rights-based society and regulate the fair operation of the devolved institutions as well as a Charter of Rights for the island of Ireland that would help to underline the fundamental importance of human rights and equality in both jurisdictions.
- The UK government should prioritise continued membership in Europol and should take steps to ensure the continuation of data sharing with the EU, including the European Investigation Order. In addition, the UK must continue to allow jurisdiction of the CJEU to maximise law enforcement and security cooperation with the EU and ensure effective oversight.

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BrexitLawNI Policy Report:

Brexit and The Peace Process

A. CONTEXT

This paper focuses on the implications of Brexit for the peace process in Northern Ireland (NI). In a similar vein to all of the major peace process related agreements between the two governments from the Anglo-Irish Agreement (1985) onwards, the Good Friday Agreement (1998) was premised upon the continued membership of the European Union (EU) of both the UK and Ireland.¹ The International Treaty signed between the United Kingdom and the government of Ireland as part of the Good Friday Agreement refers to 'the unique relationship' between the two countries 'as partners in the EU.' Article 17 of the Agreement also requires that the North South Ministerial Council (set up to develop consultation, co-operation and action across six key areas within the island of Ireland) shall consider the EU dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Beyond the Agreement itself, membership of the EU has directly affected Anglo-Irish relations, relations within NI, and relations between NI and the Republic. The historic social and political tensions that characterised these complex relationships for decades have arguably been mediated by EU membership and a largely invisible border between the two jurisdictions.² As is detailed below, the decision by the UK government to exit the EU has therefore quite profound consequences for the peace process in NI. For the purposes of this report we group these consequences under a number of key themes. We then address the specific impact of Brexit on each. In the concluding section we consider ways in which the considerable challenges posed by Brexit might be mitigated, and offer some suggestions for potential ways forward.

B. THEMES

The consequences of Brexit on the peace process are grouped under the following key themes:

The EU and the NI Peace Process

The EU has provided significant financial and political support for the peace process in NI since the 1980s. References to the importance of EU membership is contained in all of the major peace process related documents produced by the two governments from the Anglo-Irish Agreement (1985) through to the Good Friday Agreement (1998). In addition, the EU has made very substantial financial contributions to support the peace process in (NI) and the border regions. Alongside several European Structural and Investment Programmes, there have

¹ Katy Hayward and Mary Murphy, 'The EU's Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit' (2018) 17:3 *Ethnopolitics* 276-291; Jonathan Tonge, 'The Impact of the Withdrawal from the EU Upon Northern Ireland' (2016) 87:3 *The Political Quarterly* 338-342.

² Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on 'the Border in the Mind' (2017) 19: 3 *British Journal of Politics and International Relations* 497-511; Jennifer Todd, 'From Identity Politics to Identity Change: Exogenous Shocks, Constitutional Moments and the Impact of Brexit on the Island of Ireland' (2017) 28 *Irish Studies in International Affairs* 57-72.

been three PEACE programmes involving a financial contribution of €1.3 billion, with a fourth ongoing since 2016. The border regions in NI and the Republic of Ireland have also benefitted to the tune of €1.13 from the EU INTERREG programme since 1991. The latter programme supports cross-border cooperation by addressing the economic and social problems resulting from the existence of borders.

Anglo-Irish Relations and the EU

Between partition and the early 1970s diplomatic relations between the UK and the Irish government have been broadly characterised as based on mistrust and mutual misunderstanding. At the outbreak of political violence in 1968 the Department of Foreign Affairs had no official exclusively and specifically assigned to Anglo-Irish relations. After Ireland and the UK joined the EU together in 1973 the EU framework created space for developing and improving diplomatic relationships as evidenced in particular from the Anglo-Irish Agreement (1985) onwards. Although that Agreement created its own mechanisms for intergovernmental relations, the EU continued to serve a crucial function in embedding 'habits of cooperation' between the two governments. While of course it did not magically resolve disputes and disagreements between the two governments on peace process and other related matters, being members of the EU provided a structure for resolving and working through such difficulties. Brexit will remove this important component of the Anglo-Irish relationship which has been so important to the two governments in their role as co-guarantors of the Good Friday Agreement and as stewards of the broader peace process.

Political Relationships in NI

Brexit has had quite profound political consequences upon political relations in NI. The majority of the overall electorate (56%) voted to remain in the EU. Almost 90% of nationalists voted to remain, whilst 66% of unionists voted to leave. For many people who voted remain, Brexit places front and centre the consequences of UK sovereignty being exercised in Northern Ireland despite the express wishes of those who live in the jurisdiction. Brexit contributed to the collapse of the power-sharing executive in NI and remains a formidable obstacle to it being re-established. As one unionist MLA told the BrexitLaw NI team, Brexit has provoked Irish nationalists in Northern Ireland in particular, with a sense that 'English nationalists have come in over their heads and denied a part of their identity which was critical to them feeling comfortable about living here.'³

The 'Mainstreaming' of Irish Reunification

Brexit has had a political impact across the island of Ireland in mainstreaming discussion on Irish reunification – an issue that appeared to have been 'settled' by the Good Friday Agreement. The Irish government successfully argued for the inclusion of provisions in the EU negotiations guidelines to permit NI to re-join the EU as part of a united Ireland, similar to the process deployed

³ BrexitLawNI, Interview with UUP MLA (Belfast, 9 January 2018).

by unified Germany after the fall of the Berlin Wall. Former DUP First Minister Peter Robinson has cited the lack of planning associated with Brexit as an example to highlight the need for contingency planning on this issue – referring to debates on reunification as *‘the elephant in the room that is positioning to squat on their [unionist] laps.’*⁴ Concerns have also been expressed by some unionist politicians and others that increased focus upon Irish reunification may have an unsettling effect on loyalist paramilitaries (see further below). To date in the Brexit-related discussions, there has been very little detailed attention given over to the human rights, equality and political identity concerns of the unionist community in Northern Ireland as part of the renewed focus on Irish reunification.

The Limitations of Law

A number of failed legal challenges to the out-workings of Brexit in (NI) have highlighted the limits of law as a means of redress for those opposed to Brexit. As is detailed below, those judgements (particularly that of the Supreme Court in *Miller*)⁵ has suggested a significant legal retreat from the special constitutional status expressed previously with regard to the Good Friday Agreement and the Northern Ireland Act which implemented it. In addition, the removal of the human rights and equality protections associated with the EU Charter on Fundamental Rights and Freedoms, enforceable through the European Court of Justice, has been cited by some nationalist commentators as an additional factor in fostering nationalist disillusionment with continuing to live in a part of the United Kingdom.

Dissident Republicanism and the Governance of Security

Brexit is widely regarded as having been (as one spokesperson described it) ‘*manna from heaven*’ for those republican dissidents opposed to the peace process and the Good Friday Agreement.⁶ From their perspective, particularly if Brexit results in some form of ‘hard border’, it will make clear ‘the reality of partition’ – a reality previously obscured by a largely invisible border and the constitutional settlement of the Good Friday Agreement. Concerns about a hard border as a result of Brexit are widely shared including by the Chief Constable of the Police Service of Northern Ireland because any such installations would be, in his words, *‘fair game for attack’* in the minds of republican dissidents.⁷ There are also significant concerns amongst the PSNI and other security officials that Brexit will have a deleterious effect on their capacity to counter organised and cyber-crime, as well as dissident republican violence. Much of the information sharing and other practical cooperation between the PSNI and Garda Síochána is currently done through Europol and other EU regulatory structures.

4 Peter Robinson, ‘Some Refuse to Talk About the Elephant in the Room...but it is Positioning Itself to Squat on Their Laps’ *Belfast Telegraph* (3 August 2018).

5 *Miller & Anor, R (on the application of) v Secretary of State for Exiting the EU (Rev 3)* [2017] UKSC 5 (24 January 2017).

6 BrexitLawNI, Interview with Saoradh spokesperson (Dungannon, 24 May 2018).

7 ‘Police Chief says “Hard Brexit” Irish Border Would be Paramilitary Target’ *The Guardian* (7 February 2018) < <https://www.theguardian.com/uk-news/2018/feb/07/n-ireland-police-chief-says-hard-brexit-border-posts-would-be-paramilitary-target>>.

C. IMPACT OF BREXIT

The EU and the NI Peace Process

The origins of the EU’s contribution to the NI peace process can be traced at least to the 1980s. After being elected as an SDLP MEP in 1979 John Hume encouraged the European Parliament to produce a report by the then European Economic Community (EEC) on the NI conflict.⁸ Although this intervention was initially resisted by the UK government and treated with significant suspicion by unionists, this ‘studiously moderate’ document⁹ called for a co-ordinated British-Irish approach to the NI problem. Indeed the Anglo-Irish Agreement – which became the template for precisely such a joint approach from the British and Irish governments – referred to the EEC in its preamble and indeed drew significantly from the language, findings and recommendations of the Haagerup Report.¹⁰ Following the signing of the Anglo-Irish Agreement both the European Parliament and the Council of the EU formally congratulated the two governments on the achievement. In 1989 the EU provided 15 million ECUS (the forerunner to the Euro) into the International Fund for Ireland which was established as a result of the Agreement.

As Moxon Brown, Hayward and Murphy and others have argued, the European dimension internationalised and legitimised the joint British approach to the NI conflict as well as making it more difficult for either party to attempt to ‘go solo’ on peace process related matters.¹¹ The 1993 Downing Street Declaration signed by Prime Minister John Major and Taoiseach Albert Reynolds, which paved the way for the IRA and loyalist ceasefires in 1994, states that *‘...the development of Europe will, of itself, require new approaches to serve interests common to both parts of the island of Ireland, and to Ireland and the United Kingdom as partners in the EU.’*¹² Following the 1994 ceasefires, the 1995 Framework for Agreement produced by the two governments made even more significant reference to the importance of the European dimension as a template for ‘enabling’ the evolving peace process.¹³ In addition, as is discussed further below, the 1998 Good Friday Agreement made explicit reference to the EU both in terms of the cooperation between the British and Irish governments in the international treaty signed by both, but also in terms of the working of the North South Ministerial Council between NI and the Republic.

8 Nils Haagerup, ‘Report Drawn up on Behalf of the Political Affairs Committee on the Situation in Northern Ireland (European Parliament Working Document 1-1526/83, 9 March 1984).

9 Adrian Guelke, *Northern Ireland: The International Perspective* (Gill and Macmillan, 1988).

10 Katy Hayward, ‘Reiterating National Identities: The European Union Conception of Conflict Resolution in Northern Ireland’ (2006) 41:3 *Cooperation and Conflict* 261–284.

11 Edward Moxon-Browne, ‘The Impact of the European Community’ in Brigid Hadfield (ed), *Northern Ireland: Politics and the Constitution* (Open University Press, 1992); Katy Hayward and Mary Murphy ‘The (Soft) Power of Commitment: The European Union and Conflict Resolution in Northern Ireland’ (2012) 11:4 *Ethnopolitics* 439–452.

12 Downing Street Declaration (1993) para 3.

13 Paul Teague, ‘The European Union and the Irish Peace Process’ (1996) 34:4 *Journal of Common Market Studies* 549–570.

Ever mindful of the political sensitivities involved in being seen to 'interfere', the key thrust of EU policy has been focused on the belief that there was an inextricable link between improved social and economic conditions and the momentum towards peace. The original Peace funding programme – launched in 1994 by European Commission President Jacques Delors stated:

We should seize the new opportunities for action in Northern Ireland and address the additional needs arising out of the peace process. This must be done now, to convince those on the ground that the peace process can yield real dividends to their lives (EU 1994:1)

Since 1994 the financial contribution from the EU to Northern Ireland and the border counties has been substantial. In addition to several European Structural and Investment Programmes, there have been three PEACE programmes - a financial contribution of €1.3 billion from the EU, and €661 million from the British and Irish governments.¹⁴ In addition, a fourth programme (PEACE IV) was launched in January 2016 – with a total value of €270 million. These PEACE programmes are broadly aimed at ensuring '*cohesion between communities involved in the conflict in NI and the border counties of Ireland; and economic and social stability.*'¹⁵ They have funded infrastructure, business, political reconciliation and civil society projects and have sought to encourage collaboration between historically estranged communities.

In addition, the border regions in NI and the Republic of Ireland have benefitted from the EU INTERREG programme. The latter aims to support 'cross-border co-operation for a more prosperous and sustainable region', by addressing the economic and social problems resulting from the existence of borders. Since 1991 €1.13 has come into the Border region on the island of Ireland as a result of this programme and the INTERREG IVA Programme for 2014-2020 is worth €256 million.¹⁶

In the context of Brexit, the European Commission has pledged to continue funding 'cross border programmes supporting peace and reconciliation',¹⁷ and has proposed that it will contribute €120m between 2021-2027 towards peace and reconciliation within NI if mechanisms for appropriate matching monies can be agreed with the UK and Irish governments.¹⁸ While there has been a general commitment on the part of the UK to 'match' funding levels previously delivered across the UK by EU programmes, little detail has been provided with regard to NI-specific peace funding. In an article published in the mainly nationalist newspaper *The Irish News*, Prime Minister Theresa May stated that 'there may be specific and valuable EU programmes (including peace funding in NI) for which we want to agree continuation of funding' but the British government has not stated that it will cover the costs of all such projects directly. As such

14 European Commission, 'Cooperation Programmes under the European Territorial Cooperation Goal' COM (2016).

15 Special EU Programmes Peace IV Programme Overview <<https://www.seupb.eu/piv-overview>>

16 INTERREG IV A Programme Overview <<https://www.seupb.eu/iva-overview>>

17 BBC, 'Cross-border European funding to continue post-Brexit' *BBC News* (2 May 2018).

18 BBC, 'EU Proposes to Continue Northern Ireland Peace Funds' *BBC News NI* (29 May 2018).

they would have to compete for UK budget funds with key areas such as health and education.¹⁹ As former Irish Taoiseach Bertie Ahern said recently, Brexit will leave a 'gaping hole' in the Northern Ireland economy. He went on to suggest that the lack of clarity on British matching monies for peace and reconciliation work previously funded by the EU was 'a very serious issue indeed'.²⁰

In sum therefore, UK and Irish involvement in the EU (formerly EEC) has been a 'given' in the evolving peace process. That axiom - the 'European dimension' – was an important component in the language and context of all of the major peace process related papers from the Anglo-Irish Agreement (1985) until the Good Friday Agreement (1998). In addition, NI and the border regions of the Republic of Ireland have benefitted enormously from EU funding designed to underpin the peace process. Finally, as is discussed further in the next section, cooperation between the UK and Ireland has been greatly enhanced by joint membership of the EU.

The impact or potential impact of Brexit in this arena is that the removal of the 'European dimension' from the architecture of the peace has already had and will continue to affect key relationships between the UK and Ireland, within NI, and between NI and the Republic (discussed further below). Moreover, the very significant financial contribution by the EU to peace process in NI and the border regions will be removed and details on replacement funding have yet to be agreed between the key political actors.

Anglo-Irish Relations and the EU

A review of the relevant literature on Anglo-Irish relations in the decades following partition suggests that these were largely characterised by 'their failure of mutual comprehension and for their facility to generate mutual mistrust'.²¹ In 1969 Ireland had requested an urgent meeting of the UN Security Council in connection with events in NI, requesting the dispatch of UN troops and disputing the claim to domestic jurisdiction claimed by the UK – all of which were opposed by the UK government in some very barbed exchanges.²² At the outbreak of political violence in 1968 the Department of Foreign Affairs had no official exclusively and specifically assigned to Anglo-Irish relations.²³ Although that anomaly was rectified soon thereafter, and an 'Irish dimension' at efforts to secure peace first appeared in a British government discussion document in 1972,²⁴ relations between the British and Irish governments remained strained in the early days of the conflict.

19 'Platform: British Prime Minister Theresa May' *Irish News* (16 August 2017). See also Reuters, 'UK Says to Consider Replacing EU Peace Funds for NI' (16 August 2017).

20 'Clarity needed NI peace funding after Brexit, says Ahern' *Belfast Telegraph* (23 July 2018).

21 Paul Arthur, 'Anglo-Irish Relations and the Northern Ireland Problem' (1985) 2:1 *Irish Studies in International Affairs* 39.

22 As the then Minister of Foreign Affairs, later President Patrick Hillery, told the United Nations, 'Although we in Ireland have lived for some time with the reality of British control over the North of our country, we do not in any way concede to them the right to exercise jurisdiction there.' Address by Dr Patrick J. Hillery (20 August 1969) 24 UN SCOR (1503d mtg) Doc S/Agenda/1503.

23 Paul Arthur, 'Anglo-Irish relations since 1968: a "Fever Chart" Interpretation' (1983) 18:2 *Government and Opposition* 157-74.

24 That document was entitled 'The Future of Northern Ireland' (October 1972). Five months later a White Paper *NI: Constitutional Proposals* (Cmnd 5259) appeared, para 110 of which stated 'the United Kingdom favours and is prepared to facilitate the formation of a Council of Ireland.' This latter proposal became a key feature of the failed Sunningdale Agreement.

As has been discussed elsewhere, common membership of the EEC and then EU greatly improved relations between the two countries.²⁵ Ireland and the UK joined the 'Common Market' together in 1973. Former British Prime Ministers, Irish Taoisigh, foreign ministers and senior officials have all stressed the importance of the EU framework in the evolution and normalisation of British/Irish relations and the embedding of a notion of 'joint stewardship' of the NI peace process.²⁶ Meetings at EU summits and the like were often used for separate bilateral discussions on peace process related matters between the British Prime Minister, Irish Taoiseach and other senior politicians and officials. These relations became predicated upon what the current Irish Minister for Foreign Affairs has described as 'a habit of cooperation.'²⁷ As one former senior Irish Department of Foreign Affairs official told a member of the BrexitLawNI team:

Irish and British officials were dealing with X, Y and Z, as sort of equals, and they became too, they were using the same language, so they became quite close and they began to develop a mutual personal knowledge of one another, and intellectual respect. And I think it also gave people a sense of - look, here we are, all members of a EU, or community, as it then was, and yet, in part of these islands, there's this ongoing conflict which, I think, reflects on everyone in the two islands, and demeans everybody. And I think that kind of consciousness grew out of, or was helped to develop by our common participation in meetings in Brussels, on a daily basis.²⁸

Another Irish official recalled:

As we [Ireland and the UK] were transitioning into becoming full members together, of the then Common Market, naturally we had to liaise very closely on all sort of issues. I suppose there were five or six government departments on each side involved. But more importantly, ministers from the Irish Government met ministers from the British Government and that was a new development.²⁹

Essentially common membership of the EU meant that the Irish and British officials were assembled as equals around the table. One such official recalled:

25 See BrexitLawNI policy report: 'Brexit and North-South Relations' (BrexitLawNI, September 2018). See also Edward Burke, 'Who Will Speak for Northern Ireland?' (3 March 2016) 161 RUSI Journal 7.

26 *ibid* 'Brexit and North-South Relations'.

27 See speech by Simon Coveney, 'British-Irish Relations – Past, Present and Future,' (Tánaiste's Speech, Chatham House, London, 31 January 2018). <<https://www.dfa.ie/news-and-media/speeches/speeches-archive/2018/january/british-irish-relations-past-present-and-future/>>.

28 Interview with BrexitLawNI team member (Dublin, 7 December 2011). One member of the BrexitLaw NI team previously conducted extensive interviews on the evolution of the peace process including with regard to the importance of the EU on Anglo-Irish relations.

29 Interview with BrexitLawNI team member (Dublin, 6 December 2011).

I think that did have a change effect – it also, of course, broadened the agenda. In other words, it was no longer simply bilateral - whether dealing with economic matters or Northern Ireland. It was also multi-lateral and, of course, all large countries in the EU are conscious – most of the time – of their need for allies. One or even two large countries, on their own, can achieve very little.³⁰

It is not possible within the confines of this short paper to do justice to the complex history of Anglo-Irish relations in the post-EU membership era. Issues such as cross-border security, extradition and alleged collusion inevitably stoked historic enmities but, occasional crises notwithstanding, British and Irish officials worked increasingly closely together on a range of issues of mutual concern and co-operation. This enabled trust and mutual respect to grow to the extent that some have argued that the Anglo-Irish Agreement and subsequent accords were really the formal embodiment of a peace process that had been enacted by officials for some time previously.³¹

It is clear that the maturing and deepening of diplomatic relations between the two governments on a range of issues has been challenged by Brexit. While government politicians and officials in both Britain and Ireland have been mostly diplomatic in their language with regard to the state of relations between the two states, no-one we spoke to for this project (either on the Irish or British side) denied that relations had been placed under serious strain by Brexit.

Of course both governments continue to stress their ongoing commitment to the Good Friday Agreement and the peace process. The Irish government has made clear its profound concerns regarding the impact of Brexit on peace and its determination to maintain the commitments made in the Good Friday Agreement as the cornerstone of the peace process.³² For example, Irish Taoiseach, Leo Varadkar, noted in his December 2017 statement following the conclusion of Phase One of the Brexit negotiations that:

we want reconciliation and respect to grow. Our guiding light – and our only ambition throughout – has been to ensure that the provisions of the Good Friday Agreement continue to operate in full after Brexit, and that people can go about their normal lives and business as before.³³

More recently, approaching the 20th anniversary of the Good Friday Agreement, the Taoiseach expressed his concerns in even more stark terms:

30 Interview with BrexitLawNI team member (Dublin, 27 July 2011).

31 *Ibid*.

32 'Enda Kenny and Theresa May Hold Joint Press Conference in Dublin' *Irish Times* (30 January 2017) <<https://www.irishtimes.com/enda-kenny-and-theresa-may-hold-joint-press-conference-in-dublin-1.2957203>>; 'Why Ireland is so Fearful of our Closest Neighbour Leaving the EU' *The Guardian* (20 June 2016) <<https://www.theguardian.com/commentisfree/2016/jun/20/ireland-fearful-neighbour-leaving-eu-northern-ireland>>.

33 'Statement on Brexit Negotiations by Taoiseach Leo Varadkar' *Irish Government News Service* (8 December 2017) <https://merriestreet.ie/en/News-room/News/Statement_on_Brexit_negotiations_by_the_Taoiseach_Leo_Varadkar_T_D_.html>.

To me, Brexit is a threat to the Good Friday Agreement simply because it threatens to drive a wedge between Britain and Ireland, between Northern Ireland and the Republic of Ireland, and potentially between the two communities in Northern Ireland. And that's why we must do all that we can to make sure that those wedges, that that risk, does not become a reality.³⁴

Although they appear to disagree with the Irish government regarding the nature of the threat to the Good Friday Agreement and peace process posed by Brexit, senior British politicians and officials have repeatedly made similar statements about the importance of both. For example, in her 29 March letter triggering Article 50, British Prime Minister Theresa May said:

In particular we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland ... We also have a responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.³⁵

Such concerns are shared by senior figures within the EU. In a joint press conference with Taoiseach Leo Varadkar in March 2018, the President of the European Council, Donald Tusk, said that *'disrupting the peace process in Northern Ireland must be avoided at all costs'*.³⁶ He also stated that he had spoken with all 27 EU leaders and each had told him that their Brexit priorities are *'protecting the peace process and avoiding the hard border'*.³⁷ The chief Brexit negotiator for the EU, Michel Barnier, has also taken a strong stance on the need to protect the peace process and uphold The Good Friday Agreement since the referendum. In May 2017, he offered reassurances that *'nothing will put peace at risk in the upcoming negotiations with the UK'*.³⁸

34 'Brexit Threatens Good Friday Agreement, Irish PM warns' *The Guardian* (14 March 2018) <<https://www.theguardian.com/world/2018/mar/14/brexit-threatens-good-friday-agreement-irish-pm-warns>>.

35 Letter from His Excellency Mr Donald Tusk to Prime Minister Theresa May, 29 March 2017 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf>.

36 "Ireland First" Donald Tusk says Every EU Leader "Wants to Protect Peace Process and Avoid Hard Border" (Journal.ie blog, 8 March 2018) <<http://www.thejournal.ie/donald-tusk-brexit-ireland-3892678-Mar2018/>>.

37 *ibid.*

38 'Brexit Will Not Jeopardise Peace in Ireland, EU's Chief Negotiator Says' *The Guardian* (11 May 2017) <<https://www.theguardian.com/world/2017/may/11/michel-barnier-brexit-will-not-jeopardise-peace-in-ireland-eu-chief-negotiator-says>>.

In a similar vein, Jean-Claude Juncker, President of the European Commission, in a speech in December 2017 stated:

On Ireland, the EU has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement. The EU has made it a priority to protect the peace process on the island ... All of the EU27 stand firmly behind Ireland and behind the peace process.³⁹

Indeed the centrality of the Good Friday Agreement has been foregrounded in the guiding principles of the European Commission Brexit Negotiation Task Force which states:

In its resolution of 5 April 2017, the European Parliament also recognises the unique position of and special circumstances confronting the island of Ireland. Issues unique to Ireland include the protection of the gains of the peace process and of the Good Friday Agreement ('Belfast Agreement') in all its parts, the maintenance of existing agreements and arrangements between the United Kingdom and Ireland including the Common Travel area, and specific issues arising from Ireland's unique geographic situation, including the aim of avoiding a hard border between Ireland and Northern Ireland. The invisible border on the island of Ireland is one of the major achievements and societal benefits of the Peace Process. Border issues are broader than economic questions. The physical border was a symbol of division and conflict.⁴⁰

The impact of Brexit in this arena has been to place a considerable strain on carefully nurtured and critically important relationships between the British and Irish governments. It is the stated desire of all of the actors to protect the Good Friday Agreement and the peace process. A key challenge will be to either devise new mechanisms or improve or rejuvenate existing structures to ensure that the habits of cooperation and a shared sense of responsibility between the British and Irish governments are maintained and enhanced during and after Brexit. Practical Anglo-Irish diplomatic arrangements can undoubtedly be made post-Brexit towards this end.⁴¹ The real challenge will be when hard choices need to be made, particularly on the part of the UK government, between policies which will have a direct and deleterious effect on the peace

39 'Remarks by President Juncker at the Joint Press Conference with Theresa May, Prime Minister of the United Kingdom (European Commission Press Release Database, Brussels, 8 December 2017) http://europa.eu/rapid/press-release_SPEECH-17-5181_en.htm.

40 See 'Guiding Principles Transmitted to EU27 for the Dialogue on Ireland / Northern Ireland' (TF50 (2017) 15 – Commission to EU 27, 6 September 2017) <https://ec.europa.eu/commission/sites/beta-political/files/guiding-principles-dialogue-ei-ni_en.pdf>.

41 Coveney (n27). In this 2018 Chatham House Speech the Irish Tánaiste and Minister for Foreign Affairs and Trade, Simon Coveney, stated that, whereas the habits of cooperation around the EU table will be lost, the two governments will now have to 'use our existing bilateral mechanisms to great effect'. He said 'we don't want to lose the kind of cooperation that can be fostered from a simple conversation on a corridor, or a cup of coffee on the margins of a meeting'. He went on to call for an annual meeting between senior Irish and British ministers, greater use of the British Irish Council and the British and Irish Intergovernmental Conference, and more regular meetings of Assistant Secretaries and Permanent.

process and the type of Brexit arrangements they seek to implement. Such hard choices will have the most obvious impact within NI itself and it is that subject to which we now turn.

Political Relationships in NI

The UK referendum result in Britain in favour of Brexit has had quite profound implications for political relationships in NI given that 56% of the electorate in NI voted to remain in the EU. As analysis by Professor John Garry has highlighted, the voting pattern in NI in relation to the EU Referendum reveals a clear ethno-national divide.⁴² Catholics overwhelmingly voted to stay by a proportion of 85% to 15%, whilst Protestants voted to leave by a proportion of 60% to 40%. Similarly, two thirds of self-described 'unionists' voted to leave whilst almost 90 percent of self-described 'nationalists' voted to remain.⁴³ In such a context, as Gormley-Heenan and Aughey have argued, the referendum *'result was bound to be taken as a victory for one community at the expense of another.'*⁴⁴ There were other issues involved in the decision by Sinn Féin to collapse the NI Executive in January 2017. However, as Deputy First Minister Martin McGuinness made clear in his resignation letter which triggered the collapse of the Assembly and fresh elections, Brexit was a contributing factor.⁴⁵ Moreover, it is also undoubtedly a significant factor mitigating against the re-establishment of the power-sharing executive before the out-workings of Brexit have become clear.

At this juncture it would be useful to offer a brief synopsis of the attitudes of the key political parties in NI towards Brexit and their views as to whether or not it represents a threat to the Good Friday Agreement and the peace process.

The Democratic Unionist Party (DUP), the largest unionist party, supported Brexit. It has always been a strongly Eurosceptic party.⁴⁶ The DUP was not a signatory to the Good Friday Agreement. The DUP is currently engaged in a 'supply and demand' arrangement with the Conservative government in Westminster which ensured the survival of Theresa May's government after the snap general election of 2017 saw Mrs May's majority in the House of Commons reduced. The DUP has argued that Brexit does not represent a threat to the peace process. For example, DUP Deputy leader, Nigel Dodds, has argued:

To use the Belfast Agreement, or more despicably to use the peace process as an excuse to either thwart Brexit or to shape it in the way some people want is quite frankly outrageous and disgraceful.⁴⁷

The smaller Ulster Unionist Party (UUP) opposed Brexit in the referendum but has since shifted its position, saying that it accepts 'the will of the British people' and that it supports Theresa May in her efforts to 'get the best deal for Britain and Northern Ireland.'⁴⁸ Following their shift of position, the UUP produced a paper which focuses explicitly upon NI post-Brexit. However this document does not discuss any implications with regard to the peace process – other than a key 'ask' that a peace centre should be built at the site of the former Crumlin Road Courthouse site.⁴⁹ However, one UUP Member of the NI Assembly (MLA) interviewed by the BrexitLawNI did express Brexit related concerns about the peace process, particularly with regard to the risk of a hard border:

I do not see how... you can do your customs checks purely electronically by somebody sticking some sort of electronic label on the windscreen of their lorry. And if you have a physical presence even if it's a mobile one or even if you just have a number of customs cars with officials driving round enough, dissident republicans are likely to look on those people as targets. So I think it has a serious implication for the peace process and for stability in that regard.⁵⁰

Amongst the nationalist parties, their opposition to Brexit has remained undimmed. Sinn Féin, formerly the political wing of the IRA and now the largest of the nationalist parties, has historically viewed increased European integration as a threat to Irish sovereignty.⁵¹ However, in recent years its increasingly pragmatic approach to the EU was evidenced in its campaign against Brexit. Sinn Féin have been particularly strong in its warnings about the implications of Brexit for the peace process. National Chairperson Declan Kearney has suggested that *'the Good Friday Agreement is facing its most serious threat in the history of the peace process.'*⁵² One Sinn Féin political representative expressed peace process concerns in very similar terms to those outlined by the UUP interviewee.

42 John Garry 'The EU Referendum Vote in Northern Ireland: Implications for our Understanding of Citizens' Political Views and Behaviour' (KESS, October 2016) <<https://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,728121,en.pdf>>.

43 ibid.

44 Gormley-Heenan and Aughey (n 2) 502.

45 '[o]ver this period successive British Governments have undermined the process of change by refusing to honour agreements, refusing to resolve the issues of the past while imposing austerity and Brexit against the wishes and best interest of people here.' Martin McGuinness' Resignation Letter in Full *Belfast Telegraph* (9 January 2017).

46 Gladys Ganiel, "Battling in Brussels": The DUP and the EU' (2009) 24:4 *Irish Political Studies* 575-588.

47 'Using Peace Process to "Thwart" Brexit Outrageous, says Nigel Dodds' *Irish News*, (28 February 2018) <<https://www.irishnews.com/news/brexit/2018/02/28/news/using-peace-process-to-thwart-brexit-outrageous-says-nigel-dodds-1266918>>.

48 'UUP Ends Anti-Brexit Stance and Sides with DUP to Oppose Sinn Fein' *Belfast Telegraph* (11 May 2017).

49 'A Vision for Northern Ireland Outside the EU' (Ulster Unionist Party Paper, September 2016).

50 BrexitLawNI, Interview with UUP MLA (Belfast, 9 January 2018).

51 Agnès Maillot, 'Sinn Féin's approach to the EU: still more "critical" than "engaged"?' (2009) 24:4 *Irish Political Studies* 559-574.

52 'Sinn Féin say Good Friday Agreement Facing its Biggest Threat' *Irish News* (4 December 2017).

I have sat in rooms and I have listened to former Chief Constables and others say, and quite clearly, that if there is any kind of physical infrastructure, however soft and chewy people might try to describe it, that that will cause a reaction, somebody will fire a stone at it, and then a brick, and before you know it these things will have to be staffed and secured and we will be back where we started. That's the words of their assessment, not ours. We all have to stop that happening. That is not acceptable that we have any kind of physical infrastructure emerging in Ireland because it does challenge the Good Friday Agreement, it challenges our political peace processes.⁵³

The smaller of the nationalist parties is the Social and Democratic Labour Party (SDLP). The SDLP has always been a particularly strong supporter of the EU.⁵⁴ Like Sinn Féin, the SDLP have continuously expressed concerns about the impact of Brexit. For example, SDLP leader Colum Eastwood has called for 'protecting the legacy of the Good Friday Agreement' and warned that Brexit '*...could potentially dismantle the architecture of our peace process.*'⁵⁵ Mr Eastwood continued '*I, for one, will not have the Good Friday Agreement torn up just to facilitate a very awkward negotiation that's going on between the United Kingdom and the European Commission.*'⁵⁶ For one SDLP MLA, the concerns expressed were not only related to the risk of hard border and its potential as a target for dissident republicanism but rather that Brexit had hardened positions amongst the nationalist community more generally:

I think the impact on the peace process has been that it's just injected the constitutional question completely back into the centre of everything and it has destabilised. It has made being a part of the UK very uncomfortable for a lot of nationalists and I speak personally as somebody on the softest possible end of nationalism. I could absolutely tolerate being in the UK and was very content to prioritise making NI work you know, reconciliation, the economy, over any momentum towards a united Ireland. That comfort blanket has been removed so that has made nationalism restless and it has just put identity and the constitutional question right back into politics in a way that the Good Friday Agreement had tried to minimise for decades...it has agitated it in a very serious way.⁵⁷

Finally the centrist Alliance party has also expressed concern over the impact of Brexit on the peace process and has repeatedly stated that a special arrangement must be made for NI in order to protect the Good Friday Agreement. Alliance's concerns regarding the impact of Brexit

53 BrexitLawNI, Interview with Sinn Fein MEP (Derry, 16 February 2018).

54 Peter McLoughlin, 'The SDLP and the Europeanization of the Northern Ireland Problem' (2009) 24:4 *Irish Political Studies* 603-619.

55 'Don't Let Brexit Ruin Labour's Legacy' *The Times* (19 February 2018).

56 'Kate Hoey Accused of Putting Brexit Before NI Peace' *The Guardian* (21 February 2018). Ms Hoey, originally from NI, is a prominent Brexit supporting Labour MP.

57 BrexitLawNI, Interview with SDLP MLA (Belfast, 20 February 2018).

on political and intercommunal relations mirror very closely those expressed by the SDLP interviewee in terms of hardening positions amongst both nationalists and unionists.

Well I mean it [Brexit] has had a fairly catastrophic impact. We are quite comfortable saying that Northern Ireland has been the first political casualty of Brexit...What Brexit did was to throw the constitution question back more formally into political discourse in the way it hadn't been pre-2016. So we now have real pushes for constitutional change happening, so nationalism certainly feels much more emboldened. On the other side unionism to an extent is evermore circling the wagons around and pursuing in some ways a very self-destructive process. It is pursuing a hard Brexit, but in terms also undermining the concept of the shared Northern Ireland. It's hard to see how a restored Executive will have a comfier position around Brexit, once identity politics entered into the situation post-2016 that became very difficult.⁵⁸

In reviewing the published materials on Brexit to date, as well as the interviews carried out by BrexitLawNI, a number of key impacts emerged which are worth exploring in more detail. Two are closely related and have arguably already happened the re-energising of '*identity politics*' and the re-emergence of '*Irish unity*' as a live political debate – and these are considered in this section. Two other issues – which might be more accurately described as '*predicted impacts*' – the risk of a '*potential hard border as a catalyst for republican dissident violence*' – and the '*impact of Brexit on the governance of security more generally*' – are also discussed separately below.

Identity Politics

As noted above, a significant theme that came through our research was the ways in which the structures contained in the Good Friday Agreement dulled some of the traditional cleavages between nationalism and unionism. Certainly part of the architecture of the Agreement was designed precisely to accommodate those who regarded themselves as being either British or Irish (or both/neither or indeed European) as well as capture the complex sets of North South and East West relationships.⁵⁹

As Todd has argued, the combination of the Agreement, devolution, the opening of the border and increased North/South cooperation and the broader context of the EU all combined to render invisible the ways in which British sovereignty impacted upon the cultural identity or legitimacy of the constitutional views nationalists.⁶⁰ These factors managed to secure what Gormley-Heenan and Aughey described as '*the assent of pragmatists within northern nationalist communities*' – people who were willing to live in NI as part of the UK '*...so long as their rights are*

58 BrexitLawNI, Interview with Alliance MLA (Belfast, 21 March 2018).

59 Jörg Neuheiser and Stefan Wolff (eds) *Peace at Last?: The Impact of the Good Friday Agreement on Northern Ireland* (Berghan Books 2003).

60 Jennifer Todd, 'The Vulnerability of the Northern Ireland Settlement: British Irish Relations, Political Crisis and Brexit' (2015) 40:2 *Études Irlandaises* 61-73.

respected and they have a secure sense of identity, but with no emotional or sentimental attachment to either Britishness or to the political institutions of the United Kingdom.’⁶¹

For unionists on the other hand, the initial shock of seeing Sinn Féin in government ultimately subsided once the IRA had decommissioned its weapons and (mostly) left the stage. The return (albeit intermittent at times) of power to Stormont was also welcomed by unionists and the fact that initial fears of the North South Ministerial Council as a ‘trojan horse’ to reunification proved unfounded combined to broadly reassure most that the Union, while requiring constant vigilance, was safe.⁶²

Across both communities, the electoral rise of Sinn Féin and the DUP - and their usurping of the ostensibly more moderate counterparts of the SDLP and UUP as the largest parties in nationalism and unionism- suggested that the electorate wished for their interests to be represented by the strongest political voices from within their two communities. Identity politics certainly had not gone away before Brexit. Indeed, Martin McGuinness’ decision to resign was also motivated by what he and other republicans and nationalists saw as the DUP’s inability to come to terms with expressions of Irish identity and culture including the Irish language.⁶³ That said, it is indisputable that Brexit has placed the intersection between British sovereignty in NI and nationalist identity in particular at the front and centre of local politics.

Many of the broader issues associated with identity politics were well summarised in an interview conducted with a UUP MLA. They are worth reproducing in some detail:

I think when it all plays out the most important thing about Brexit for the people of Northern Ireland is the implications for identity, because we have struggled for time immemorial with the tension between the individual sense of who they are and the territorial sovereignty of where they are. The Belfast Agreement tried its best to resolve that tension by saying ‘first of all in terms of your personal identity you self-define and there is no hierarchy so being British is not better than being Irish’, and secondly in terms of territorial sovereignty we are part of the United Kingdom unless and until we decide otherwise. And I think that left a lot of nationalists feeling content... But Brexit has changed everything for them because their identity was not a binary British or Irish, it was more like the John Hewitt, ‘I’m an Ulsterman but I’m also British Irish and European, and if you deny any part you diminish who I am’. Their perception post the Brexit referendum of this was that English nationalists had come in over their heads and denied a part of their identity which was critical to them feeling comfortable about living here.⁶⁴

61 Gormley-Heenan and Aughey (n 2) 503.

62 Jonathan Tonge et al, *The Democratic Unionist Party: From Protest to Power* (OUP, 2014).

63 Brendan O’Leary, ‘The Twilight of the United Kingdom & Tíocfaidh ár lá: Twenty Years after the Good Friday Agreement’ (2018) 17:3 *Ethnopolitics* 223-242.

64 BrexitLawNI, Interview with UUP MLA (Belfast, 9 January 2018).

In addition, for some interviewees, the loss of a sense of ‘Europeanness’ was acutely felt. This issue, of Brexit leading to a loss of a sense of European identity, was commented on frequently by interviewees and in our public meetings. In our first public meetings with young people, one respondent stated that she felt a sense of loss due to no longer being able to identify as European.⁶⁵ In the same meeting, a number of younger participants stated that they used a European identity as a way of avoiding having to identify themselves as British or Irish.⁶⁶ It was clear that these young people viewed a European identity as a more neutral option – providing an important way for them to avoid the unionist/nationalist dichotomy.

The ‘Mainstreaming’ of Irish Reunification

The other closely related impact of Brexit has been the enlivening of the political debate concerning the possible reunification of Ireland. Since the Brexit referendum, there has been quite a remarkable shift in the prominence of this issue as part of the national conversation in both NI and the Republic. Prior to the Brexit referendum, while reunification remained the formal position of all of the nationalist parties on the island (with Sinn Féin giving it most prominence), it was certainly not an issue given much attention by the major parties in the Republic of Ireland. However, since Brexit, there has been a discernible sea-change in attitudes towards a united Ireland amongst the political parties in the Irish Republic. At the McGill Summer School in July 2016 the then Taoiseach Enda Kenny said that in relation to the upcoming Brexit negotiations ‘*the EU needs to prepare for a United Ireland.*’ He went on to say ‘*The discussion and negotiations that take place over the next period should take into account the possibility, however far out it might be, that the clause in the Good Friday Agreement (that a border poll on reunification) might be triggered.*’⁶⁷ The Fine Gael-led government in the Republic successfully argued for the inclusion of provisions in the EU negotiation guidelines to permit NI to re-join the EU as part of a united Ireland.⁶⁸ In August 2017, a cross party parliamentary committee in the Dail endorsed a 450 page report detailing how a united Ireland by consent could be achieved in light of Brexit.⁶⁹

Amongst unionists in NI, there appears to be a reluctant acceptance that a united Ireland is part of the political conversation in ways that it has not been since the partition of the island in 1921. In a recent speech former First Minister and DUP Leader, Peter Robinson, suggested that, in light of the Brexit Referendum and its aftermath, ‘generational Border Polls’ would be ‘the least divisive and disruptive’ means to address the question of a united Ireland.⁷⁰

65 Brexit Café (Belfast, 8 December 2017).

66 Brexit Café (Belfast, 8 December 2017).

67 ‘Kenny Says Border Poll Should be Considered in Brexit Talks’ *Irish Times* (18 July 2018).

68 ‘Brexit Summit: EU Accepts United Ireland Declaration’ *Irish Times* (29 April 2017).

69 ‘Brexit and the Future of Ireland Uniting Ireland & Its People in Peace & Prosperity’ 32/JCIGFA/02 (Joint Committee on the Implementation of the Good Friday Agreement, August 2017); see also BBC, ‘Irish Brexit Report Sets Out United Ireland Proposal.’ *BBC News* (2 August 2017) <https://www.bbc.co.uk/news/uk-northern-ireland-40799475>.

70 ‘Peter Robinson Queen’s University Speech: Full Text’ *Belfast Telegraph* (9 June 2018) < <https://www.belfasttelegraph.co.uk/news/northern-ireland/peter-robinsons-queens-university-speech-full-text-36992405.html>>.

Beyond the political sphere, our research has also revealed a shift in how the general public in NI are feeling about and discussing a border poll that is directly linked to Brexit. For example, a UUP MLA told us:

Well for the first time I've had friends who would be unionists but are business people who trade with Dublin, with the Republic, just asking the question, 'what would be wrong with the united Ireland? What's the downside for me? I'm up and down the road on a monthly or perhaps even weekly basis, I do trade with them, I enjoy Dublin and I like the rugby, blah blah blah.' And so it has, it has made people stop and think and a lot of the thinking is not, is not underpinning the union of Great Britain and Northern Ireland.⁷¹

Research completed by John Garry demonstrated that 42 percent of self-identified Catholics would vote for a united Ireland, 21 percent would vote to remain in the UK, and the rest were undecided or would not vote.⁷² That said, the vote for a united Ireland would rise to 53 percent of Catholics if the UK left the EU Customs Union and Single Market.⁷³ If the UK decided to stay in the EU, only 28 percent stated that they would vote for Irish unity. His research revealed though that Protestant support for Irish unity was very low and more resistant to changes when presented with various exit conditions. A more recent online poll carried out by Delta Poll of a representative sample of 1,119 of adults for the campaign group for young people 'Our Future Our Choice' (which is campaigning for a 'people's vote' on the final Brexit deal) found that 52% of people in NI would vote for a united Ireland if the UK quits the EU with the numbers rising to 56% in the event of hard border.⁷⁴

Whatever the reliability of competing polls, as former DUP leader Peter Robinson has argued, discussions on a united Ireland are clearly a part of the political discourse across the island. The heightened prominence of these discussions has had a predictable effect in unsettling working class loyalist communities in particular, most of which appeared to vote strongly in favour of Brexit. Some unionist and conservative politicians have warned that the Irish government 'saying silly things about the border and the constitutional issues' could provoke a violent reaction from loyalist paramilitaries.⁷⁵ While loyalist paramilitary groups themselves have generally been more circumspect about issuing any such threats, prominent 'Hard Brexit' posters have appeared in working class areas of Belfast apparently placed there by loyalist paramilitary factions. As one senior local government official told BrexitLawNI:

71 BrexitLawNI, Interview with UUP MLA (Belfast, 9 January 2018).

72 'Brexit and the Island of Ireland' (The UK in a Changing Europe, May 2018) <<http://ukandeu.ac.uk/wp-content/uploads/2018/05/Brexit-and-Island-of-Ireland.pdf>> 7.

73 'Brexit and the Island of Ireland' (The UK in a Changing Europe, May 2018) <<http://ukandeu.ac.uk/wp-content/uploads/2018/05/Brexit-and-Island-of-Ireland.pdf>> 7.

74 'Brexit Would Boost Support for a United Ireland, Poll Finds' *Irish Times* (3 September 2018). The DUP have questioned the results of this poll suggesting that it is 'out of sync with a lot of other polls we have seen.' See 'DUP Pours Cold Water on "Strongest Pro-Unity Opinion Poll in History"' *Newsletter* (4 September 2019)

75 'David Trimble: Ireland Risks Provoking Paramilitaries Over Post-Brexit Border' *The Guardian* (6 April 2018).

In Belfast, Antrim, Newtownabbey, Middle and East Antrim, places like that, local government officials are worried. Part of it is the 'united Ireland threat' and the whole push for a united Ireland linked to Brexit. They are seeing people ploughing on, Simon Coveney and his boys [Irish Foreign Minister and the Irish Department of Foreign Affairs] just ploughing on with this. It is heightening an agenda and that is going to be played out.⁷⁶

In sum, despite the strong advocacy of the largest unionist party in NI (the DUP) for Brexit, one clear consequence of the referendum result in favour of leaving the EU has been a much greater prominence given over to the issue of Irish reunification. The prominence of such discussions is a recognition of significant levels of anger on the part of northern nationalists with regard to Brexit, shifts in attitudes towards the issue amongst politicians and the government in the Republic, and some acceptance at least on the part of elements within the unionist community (including former DUP leader Peter Robinson) that the issue requires some 'contingency planning'. As Mr Robinson remarked, 'there are a range of matters thrown into sharp relief by the experience of the Brexit referendum and its aftermath that add to the need for change – by the way Brexit is an obvious example of where contingency planning should have been carried out but clearly was not.'⁷⁷ Certainly there has been very little discussion in the context of the enhanced focus on reunification as to how such a process would affect issues related to human rights and equality protections, as well as important aspects of political identity, for the unionist community.

For other unionists, the issue of reunification stirred by the Brexit result is conjoined with the shift in demographics in NI itself. As one UUP MLA interviewee told the BrexitLawNI team:

So it [Brexit] is potentially an existential threat to Northern Ireland's place within the United Kingdom because you have these... aspirational nationalists, who are now agitated in a way they haven't been for a long time, and they are the ones if you look at the demographics, who are likely to make the decision. If you look at, look at the numbers at primary school today, my calculation is, and here I'm using religion as a proxy for constitutional preference and I don't like doing that but needs must – around 55,000 Protestants around 87,000 Catholics. So the numbers within traditional unionist voters are not there anymore to maintain the union so unionism has to realise that the only way to, to keep the numbers viable are to make sure that those who are from sort of traditional nationalist sides of the fence are too comfortable, to busy getting on with life, to be bothered, and Brexit does not do that.⁷⁸

76 BrexitLawNI, Interview with senior local government official (Newry, 24 May 2018).

77 Robinson (n 4).

78 BrexitLawNI, Interview with UUP MLA (Belfast, 9 January 2018).

The Limitations of the Law

As noted above, EU membership is assumed as axiomatic in the key peace process related documents produced by the two governments in the years leading up to the Good Friday Agreement. It is also embedded in the Agreement itself. The International Treaty signed between the United Kingdom and the government of Ireland as part of the Good Friday Agreement refers to 'the unique relationship' between the two countries 'as partners in the EU.' Article 17 of the Agreement also requires that the Northern South Ministerial Council (set up to govern related between the devolved government in NI and the Republic of Ireland) shall consider the EU dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework.

One of the consequences of Brexit will be that people in NI will not have the ability to use the EU Charter of Fundamental Rights (ECFR) brought into force by the Lisbon Treaty in 2007. Although it is an instrument in its infancy in comparative terms, the ECFR restates the rights contained in the European Convention on Human Rights (which will not be affected by Brexit) but also contains additional provisions concerning economic and social rights – effectively, the single-market rights – of living, travelling, working and claiming benefits around the EU, plus the democratic rights of engaging with the European Parliament. All of these rights are ultimately enforceable through the European Court of Justice (ECJ). While the UK entered an opt out to the Charter, in practice many of the charter rights apply to EU laws to which the UK government has already signed up.⁷⁹ A central challenge, particularly for the Irish government, will be whether Irish passport holders in NI will be able to access the same services in the Republic and throughout the EU as their fellow Irish citizens who live south of the border. In such a context, as the Equality Commission for NI has pointed out, there is a possibility of different levels of equality protections between Irish and British citizens living in NI.⁸⁰ While issues concerning rights protection have not permeated much in terms of unionist discourses on the impact of Brexit in NI, they have been quite prominent amongst nationalist and republicans.⁸¹ As the nationalist commentator Brian Feeney has argued recently, the removal of rights protections guaranteed under the Good Friday Agreement and the EU framework in a context of the alliance between the conservative party and unionists which was formalised in 2017 have conjoined to alienate nationalists in NI from Westminster. He stated:

'As Britain ignores the EU Charter of Fundamental Rights and leaves the European Court of Justice, this Conservative government begins to unravel the network of rights-based provisions in the GFA. It was never envisaged that the final arbiter of human rights and equality here would be the UK Supreme Court. Nationalists looked to the international clout of the EU as a final court of appeal.'

79 For a useful overview see Human Rights Consortium, 'Rights at Risk: Brexit, Human Rights and Northern Ireland' (2018) <<https://brexitlawni.org/assets/uploads/HRC-Rights-at-Risk-Report.pdf>>.

80 Equality Commission for NI, 'Ireland UK's decision to leave the EU: Recommendations on the EU (Withdrawal) Bill' (Equality Commission for NI, October 2017).

81 'Brexit and Rights a Route for Republicans to Closer Unity with the EU' Irish Times (12 July 2018).

Northern nationalists turned their backs on Westminster in last year's election when the British kicked away these two pillars of the peace process; neutrality, and EU guarantees of rights and equality.⁸²

It is certainly true that a number of important Brexit-related legal decisions have underlined the reluctance of the courts to interfere with the Brexit process vis a vis NI. In NI, two applications were brought by politicians and civil society activists challenging the impact of Brexit upon the constitutional landscape of NI. In *Agnew and McCord* (heard together in the High Court in Belfast)⁸³ a range of arguments were heard on the triggering of Article 50. For example, the applicants argued that EU withdrawal would remove some of the constraints on the powers of the NI Assembly and Executive and in so doing, would narrow the scope for protecting individual rights in the jurisdiction and complicate both North/South and East-West relations – all of which are built into the architecture of the Good Friday Agreement and the international treaty between the UK and Irish states. McCord's lawyers also argued that since the majority of the NI electorate had voted against Brexit, the Article 50 withdrawal process from the EU could not be triggered since it amounted to a change in the constitutional status of NI contrary to the Good Friday Agreement and section 1 of the Northern Ireland Act. In the event Mr Justice Maguire rejected these and all related arguments, stating the consent principle related only to the question of whether or not Northern Ireland should remain part of the United Kingdom.

In the Miller judgement – which was heard before the UK Supreme Court in London – the key issue considered related to the respective powers of the UK executive and parliament to trigger the Article 50 withdrawal process from the EU. However, part of that case was also whether there was a legal requirement to consult with or indeed obtain the consent of the devolved Assemblies before Article 50 was enacted.⁸⁴ The government lost the key question (8-3) on whether or not Article 50 could be invoked using prerogative power rather than via Parliament. However on the issue most pertinent to the peace process in NI, the Supreme Court ruled unanimously that there was no legal requirement to consult or secure the consent of the devolved institutions on Brexit.

The decisions in *Agnew*, *McCord* and *Miller* have provoked some criticism. For example, Anthony has argued that it signals a potential U-turn from the recognition in the seminal *Robinson* case of the specific constitutional importance of the Northern Ireland Act 1998 (which gave legal effect to the Good Friday Agreement), arguing that the Court failed adequately to engage with issues arising from the Sewel Convention on the consent of devolved Assemblies.⁸⁵ Anthony goes on to argue that the very traditional notions of sovereignty adopted by the courts in these cases – in effect that the sovereignty of Westminster trumped all of the complexities of the competing claims and allegiances contained in the Good Friday Agreement and Northern

82 'Polls Show Final Alienation of Northern Nationalists from the British Government' *Irish News* (5 September 2018).

83 Reported as *Re McCord's Application* [2016] NIQB 85.

84 *Miller & Anor, R (on the application of) v Secretary of State for Exiting the EU (Rev 3)* [2017] UKSC 5 (24 January 2017).

85 The 'Sewel Convention' is usually interpreted to mean that the UK parliament will not normally legislate with regard to devolved matters without the agreement of the relevant devolved legislature.'

Ireland Act – is an illustration that Brexit has taken ‘...power-hoarding to its logical – and perhaps even undemocratic- conclusion.’⁸⁶

Anthony’s critique of the lack of legal redress to challenge the legitimacy of the decision to implement Brexit is well made. Despite the clear opposition of the majority of the people of NI, in effect the High Court in Belfast and the UK Supreme Court confirmed a very traditional doctrinal notion of Westminster parliamentary sovereignty as trumps – and appeared to distance previous decisions which had underlined the special constitutional status of the Good Friday Agreement and the Northern Ireland Act which enacted it. As will be discussed further below, this lack of legal redress is important not merely legally but also politically. For example, in *Re Robinson*, in a 3-2 majority decision, the House of Lords chose to emphasise how the Northern Ireland Act was almost without comparison and that its provisions should be interpreted in the light of the general principles and values that underpinned the Good Friday Agreement. As Lord Hoffman said:

In choosing between (different) approaches to construction, it is necessary to have regard to the background to the 1998 Act. It was passed to give effect to the Belfast Agreement concluded on Good Friday 1998. This Agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland ... The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast... According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start.⁸⁷

The Miller judgment, as Anthony has argued, marks a ‘quiet retreat from Robinson and the constitutional promise of that earlier judgment.’ It certainly missed the point that the Northern Ireland Act 1998 and the Good Friday Agreement represented more than a simple devolution act. Part of the broader promise of law, rights and equality framework has been as a protection against majority domination of minorities in NI but also as a buttress against the capacity of the British government to act in ways that do not adequately take into account the interests of the people in NI in decisions that directly affect them. For example, within the nationalist/ republican community, one of the key ‘selling points’ put forward by those within Sinn Féin and the broader republican movement who favoured the ending of political violence was that political mobilisation together with the ‘rights and equality’ agenda could achieve more than political violence.⁸⁸ The failure by the courts to protect the special status of the Good Friday

⁸⁶ Gordon Anthony, ‘Sovereignty, Consent and Constitutions: The Northern Ireland References’ in Mark Elliott, Alison L Young and Jack Williams (eds) *The UK Constitution After Miller* (Hart, 2018) 201.

⁸⁷ In *Re Robinson*, in a 3-2 majority decision, the House of Lords chose to emphasise how the NI Act was almost without comparison and that its provisions should be interpreted in the light of the general principles and values that underpinned the Good Friday Agreement. *Robinson v Secretary of State for NI and Others*, [2002] UKHL 32.

⁸⁸ See further Kieran McEvoy, ‘Law, Struggle, and Political Transformation in Northern Ireland’ (2000) 4 *Journal of Law and Society* 542-571.

Agreement in such a seminal case did not go unnoticed in that community. As one veteran republican told the BrexitLawNI team:

I wouldn’t want to overstate its impact amongst republicans but yes of course I watched the case [Miller] on the news. What it said to me was, if the British state wants to do something in their own selfish or strategic interest, regardless how people in Ireland feel about it, then don’t be expecting British courts to stop them.⁸⁹

The Threat of Dissident Republican Violence

This final section on the impact or potential impact of Brexit focuses on the threat of violence emanating from dissident republicans who are opposed to the peace process. In order to discuss such potential consequences, it is necessary to provide some basic background on the emergence of these groups, their history and capacity for violence, levels of community support and the symbolic importance of the border.

The Provisional IRA ceasefires of 1994 and 1997 were essential pre-requisites to the Good Friday Agreement of 1998. Given the long history of violent schisms within Irish republicanism, much of the tortuous preparation for the ceasefires and the stewardship of the republican constituency by the Sinn Féin leadership was focused on trying to minimise the risks of splinter organisations emerging to undermine the peace process.⁹⁰

While that strategy was largely successful, a small cohort remained fundamentally opposed to the cessation of the campaign of political violence. The term ‘dissident’ is an umbrella term employed to refer to those republican groupings who reject the peace strategy pursued by Sinn Féin and the Provisional IRA. It includes those who remain committed to the continuation of an armed campaign and those who simply express political opposition to the mainstream republican position.⁹¹

In general dissident republicans regard the Sinn Féin peace strategy as a ‘sell-out’ and a betrayal of the sacrifices of past generations of republican comrades.

⁸⁹ BrexitLawNI, Interview with senior republican (Belfast, 23 November 2017). The reference here to ‘no selfish or strategies interest’ refers to a famous speech by former Secretary of State for Northern Ireland Peter Brooke in 1990 which is widely viewed to have influenced the IRA’s shift away from violence. Mr Brooke said that he could envisage no military defeat of the IRA, that if violence stop the British government would have to respond imaginatively, and that, ‘The British Government has no selfish or strategic or economic interest in Northern Ireland...but to ensure democratic debate and free democratic choice’. See David McKittrick and David McVea *Making Sense of the Troubles: The Story of the Conflict in Northern Ireland* (New Amsterdam Books, 2002) 178-179.

⁹⁰ Ed Moloney *A Secret History of the IRA* (WW Norton and Company, 2003).

⁹¹ PM Currie and Max Taylor (eds) *Dissident Irish Republicanism* (Continuum Publishing, 2011).

They remain committed to the ideal of a 32-county sovereign and socialist Irish republic and believe that ‘propping up’ a partitionist Assembly in NI is only perpetuating the ‘illegal occupation’ of their country. Support for this analysis grew in light of key strategic decisions such as Sinn Féin’s decision to sign up to the 1996 Mitchell Principles (which included a commitment to total disarmament of all paramilitary organisations and exclusive support for democratic and peaceful methods). There was further defection a decade later following Sinn Féin’s endorsement of the Police Service of NI at their 2007 Árd Fheis.⁹²

The three most prominent ‘dissident’ groups are the Real IRA (RIRA), the Continuity IRA (CIRA) and Óglaigh na hÉireann (ONH). In addition to CIRA, RIRA and ONH, some dissident republican groups such as Republican Action Against Drugs (RAAD) have focused on internal policing issue (including attacking alleged drug dealers and anti-social criminals).⁹³ In 2012 the RIRA merged with RAAD to form an organisation styled as the ‘New IRA’. The dissident republican analysis has since 2006 been represented politically by both the 32 county sovereignty movement and a campaigning political party called Éirígí. In September 2016 a new political organisation titled Saoradh was formed as a ‘Revolutionary Irish Republican Party’. This was an attempt to pull together the various dissident political organisations under one banner and to renew the commitment to complete the ‘unfinished revolution’ by liberating Ireland and realising the social emancipation of the Irish people in a 32-county socialist republic. Although it is a political organisation, Saoradh has been linked to the ‘New IRA’.

In the 20 years since the signing of the Good Friday Agreement, there have been over 50 people killed by dissident Irish republicans.⁹⁴ 29 people died and over 200 were injured in one incident when the Real IRA detonated a bomb in the centre of Omagh, Co. Tyrone in 1998. The level of violence dropped in the aftermath of Omagh but sporadic fatal attacks against police officers, army personnel and prison staff have continued. Between 2009 and 2017 dissident republicans were responsible for the deaths of two PSNI officers, two British soldiers and two prison officers.⁹⁵ The official security threat level posed by dissident paramilitaries is still classified as ‘severe’.

It is important to stress that the current capacity of these groups to engage in violence is significantly less than their Provisional IRA predecessors twenty years ago. All dissident groups are heavily monitored by the police and security services – a task made easier by their much smaller size. In addition, their level of community support within the nationalist community

92 John F Morrison *The Origins and Rise of Dissident Irish Republicanism: The Role and Impact of Organizational Splits* (Bloomsbury, 2014).

93 Andrew Sanders, *Inside the IRA: Dissident Republicans and the War for Legitimacy* (Edinburgh University Press, 2011).

94 Jon Tonge, ‘A Campaign Without End?: “Dissident” Republican Violence in Northern Ireland’ (2014) 5 *Political Insight* 14-17.

95 Security Service, MI5, ‘Dissident Republican Terrorist Groups’ MI5 <<https://www.mi5.gov.uk/northern-ireland>>.

is much lower than that of the Provisional IRA.⁹⁶ Notwithstanding their diminished capacity and low levels of community support, it is also important to note that it would be foolish to dismiss the potential for increased republican dissident violence as a result of Brexit. The history of militant Irish republicanism suggests that widespread popular support is not a necessary precursor to an armed campaign. For example, in the aftermath of the Second World War, the IRA was essentially decimated but this did not prevent a resurgence in the 1950s.⁹⁷ Although the organisation existed merely in skeletal form, it still managed to engage in a violent border campaign between 1956-1962. During that campaign, eight IRA men, four republican supporters, and six RUC members were killed, and a further 32 RUC members were wounded and 400 republicans were interned without trial in NI and the Republic.⁹⁸

Interestingly the IRA ‘Border Campaign’ of the fifties was cited by several republicans to the BrexitLawNI team by way of a caution against dismissing the potential threat of dissident republicanism post-Brexit. One veteran South Armagh republican recalled that when he expressed doubts in the late 1960s that an armed struggle would emerge, an older neighbour reminded him of the border campaign and cautioned that it could ‘all happen again’. Indeed, to underline the historical lineage of armed resistance to partition this interviewee referred the team to a 1961 play by Michael J. Murphy titled ‘Men on the Wall’. This play in his view powerfully captured both the symbolic importance of the border as an inspiration to engage in political violence and the ‘spill-over’ effect in Irish history, wherein each generation took up the mantle of ‘republican struggle’ passed on by the previous one. Interestingly he noted that the current Brexit debate had prompted him to organise a reading of this play in his local border village.⁹⁹

Most dissident republican groups supported Brexit in the belief that a) the EU represents the interests of capital rather than working class people b) it infringes on Irish sovereignty and c) it undermined the Good Friday Agreement.¹⁰⁰ In particular, Brexit is broadly viewed by dissidents as ideological confirmation of Britain’s imperialist attitude and a classic example of the usurpation of Ireland’s right to sovereignty and self-determination.

96 After the mainstream republican movement adopted the conjoined strategy of ‘the Armelite and the Ballot Box’ in the early 1980s Sinn Féin’s political support plateaued in the nationalist republican community at approximately 33% of the nationalist electorate while the conflict was ongoing, with the SDLP picking up the bulk of the remaining 66% of the nationalist vote. By way of comparison, at the moment political parties linked to dissident republicanism would only be able to point to a handful of independent councillors elected, with a share of the overall vote in the last council elections (2014) of just 1.5% of the total votes cast. By contrast, in the same election, Sinn Féin polled 24% of the total of first preference votes and the other nationalist party the SDLP polled 13.5%. See <<http://cain.ulst.ac.uk/issues/politics/election/2014lg/rd2014.htm>>. See further Brian Feeney *Sinn Féin: A Hundred Turbulent Years* (O’Brien Press, 2003) and Bernadette Hayes and Ian McAllister, ‘Public support for political violence and paramilitarism in NI and the Republic of Ireland’ (2005) 17:4 *Terrorism and Political* 599-617.

97 Tim Pat Coogan *The IRA* (Harper Collins, 1987).

98 J Bowyer Bell, *The Secret Army: The IRA 1916-1979* (Poolbeg, 1997).

99 BrexitLawNI, Interview with veteran republican (South Armagh, 24 May 2018).

100 ‘Dissident Republicans in Northern Ireland Seize Moment to Fight Partition’ *The Guardian* (25 June 2018).

Given that the majority of people in Ireland, North and South, are clearly opposed to Brexit it represents what one life-long republican described to us as:

the embodiment of Britain's colonial mind-set towards Ireland, ignoring what the Irish people want, or what is in the interests of the Irish people and simply pursuing their own selfish and strategic interest which is based on narrow British jingoism. The Good Friday Agreement was supposed to put an end to all that but it clearly hasn't.

Invoking an age-old republican dictum, one of Saoradh's leaders told us that *'from a republican perspective, we always look at England's disadvantage as our advantage.'* Although he was personally sceptical about the benefits of EU membership he explained that: *'you are getting to the point where you don't care what happens as long as Britain breaks up, or the union breaks up - if somewhere in the middle of that milestone we manage to get back our national sovereignty [...] we will take national sovereignty whatever way it comes to us.'* Likewise, although he clearly had 'no love' for what he termed 'establishment parties' he welcomed the general emboldening of moderate Irish nationalism north and south of the border and added *'anything that brings an end to partition closer, you know, personally it is to be welcomed.'* He delighted in what he viewed as the *'marred swamp of British constitutional politics'* since the Brexit vote and added, *'everybody is just sitting waiting for the so called United Kingdom to implode.'*¹⁰¹

The most welcome aspect of Brexit from Saoradh's perspective is the spotlight that it has placed on the Irish border. The leading member that we interviewed for BrexitLawNI suggested that Brexit had exposed *'...what basically has been since 1998 a soft occupation in the North.'* When questioned about the views of republican dissidents on a 'hard' versus 'soft' Brexit, this interviewee suggested *'the harder the better.'*¹⁰² In particular he noted that any kind of a military presence on the Irish border would be an extreme provocation to Irish republicans:

I think that everybody is in agreement that if the North doesn't stay within the Customs Union or within the EU that the British will be forced to build some sort of infrastructure and I don't think they would be able to police that in a civilian style. They would either have to have a very heavily armed severed motor force, or the British army back on the border...it would be very very highly antagonistic.¹⁰³

This senior dissident republican told us *'Brexit was manna from heaven from our perspective.'*¹⁰⁴ Another senior dissident republican spokesperson told a crowd commemorating the Easter Rising in Belfast in 2018:

101 BrexitLawNI, Interview with Saoradh spokesperson (Dungannon, 24 May 2018).

102 *ibid.* See also reports of the Saoradh Ard Fheis (annual party conference) - 'Dissident Group Saoradh in Pledge to "Exploit" Brexit' *Belfast Telegraph* (20 November 2017).

103 Saoradh interview (n 101).

104 *ibid.*

Brexit has the potential to break up the British state... with the inevitable infrastructure of a hard border imminent, this will drive home to the Irish people the partition of our country... and as history teaches us it will inevitably stoke the fires of resistance against British rule in Ireland.¹⁰⁵

A veteran independent republican that we interviewed in South Armagh concurred:

If there is a hard Brexit - I don't know what way the thing will go - but I know that if there are customs posts or any kind of posts they will be attacked.¹⁰⁶

Whilst this interviewee did not have any sympathy for dissident republican analysis, he admitted that his initial reaction to the passing of the Brexit vote was one of 'elation' because he felt that *'suddenly, the border is on top of the agenda again.'* He also welcomed the fact that moderate nationalists, north and south, have been 'radicalised', adding: *'You even now have Fine Gael talking about a united Ireland, like, who could have predicted that?'* He went on to say that, in addition to provoking violence, any attempt to re-establish border posts would in his view prove futile. Reflecting on the rural and close-knit nature of local communities he suggested that individuals would simply circumnavigate any attempt to police the border. He also highlighted the potential for exploitation of any new border crossings including through smuggling, quipping that: *'if there is a hard Brexit, the only thing that gives me a bit of hope is that I missed the smuggling first time around. So, I could be a smuggler yet.'*¹⁰⁷

Amongst the interviews carried out by BrexitLaw NI team members with Republicans (including dissident republicans) in border areas in NI in Newry, South Armagh and Fermanagh/South Tyrone there was widespread consensus that Brexit and the prospect of a hard border in particular may indeed be a potential mobilising agent for not only violence and protest but also illegal smuggling activities. Other colleagues at Queens have argued that a hard border could potentially result in support for violence in the nationalist community well beyond the border regions. For example, research by Garry et al suggests that more than 50% of Catholics, and 70% of Sinn Féin supporters would find customs checks *'almost impossible to accept,'* and if customs agents were protected by British soldiers these figures rise to almost three quarters of Catholics, and 82% of Catholics who support Sinn Féin. One in ten Catholics who support Sinn Féin would support border infrastructure or installations being attacked.¹⁰⁸

The security risks from dissident republicans posed by a hard border are apparently shared by security professionals in NI. In May 2018 the Chief Constable of the Police Service of NI (PSNI)

105 BBC, 'New Dissidents Hoping to Exploit Brexit' *BBC News* (15 May 2018).

106 BrexitLawNI, Interview with veteran republican (South Armagh, 24 May 2018).

107 *ibid.*

108 John Garry et al 'Northern Ireland and the UK's Exit from the EU: What do People Think?' (The UK in a Changing Europe, 21 May 2018) <<https://www.qub.ac.uk/sites/brexitni/BrexitandtheBorder/Report/>> See also John Garry and Brendan O'Leary, 'While May Must Decide what to do about Northern Ireland and Brexit, Here's What the People Themselves Think' *Huffington Post* (21 May 2018).

confirmed that he is preparing a business case for up to 400 extra police officers to ensure that they are 'match fit' to cope with the increased security risk posed by the post-Brexit era.¹⁰⁹ The Chief Constable also expressed particular fears about the risks associated with a 'hard border' between NI and the Republic.

The last thing we would want is any infrastructure around the border because there is something symbolic about it and it becomes a target for violent dissident republicans. Our assessment is that they would be a target because it would be representative of the state and in their minds fair game for attack.¹¹⁰

The Governance of Security More Generally

There are a number of other direct consequences related to Brexit which relate to the governance of security. For example, the European Arrest Warrant (EAW) facilitates the extradition of individuals between EU Member States. This EU legal framework has no provisions for third country membership, meaning that the UK is unlikely to be able to remain within it after it leaves the EU. In addition, the British government has stated its intention to remove the jurisdiction of the Court of Justice of the EU (CJEU) in the UK, and the CJEU is the final arbiter on extradition matters. Without CJEU jurisdiction it is unclear how the UK will have continued access to the EAW. Again the Chief Constable of the PSNI has warned that the EAW is 'critical' in its efforts to counter crime and terrorism,¹¹¹ a fact also acknowledged by UK Prime Minister Theresa May.¹¹²

In addition, security and policing experts interviewed by Brexit-Law NI have stressed the importance of Europol as well as information sharing arrangements with the EU for NI. Membership of Europol assists the PSNI in relation to serious and organised crime, cybercrime and counter-terrorism – all of which are complex and challenging aspects of policing which are greatly assisted by information sharing and cooperation with An Garda Síochána and other EU police and security services. Although willingness has been expressed by both the PSNI and An Garda Síochána to continue sharing information and maintaining a close relationship, it is possible that regulations at the EU level will inhibit the level of cooperation possible once the UK exits the EU. For example, the EU's position paper on data protection states that 'the UK's access to networks, information systems and databases established by Union law is, as a general rule, terminated on the date of withdrawal'.¹¹³

109 BBC, 'Police Ask for More Resources Ahead of Brexit' BBC News, 31 May 2018.

110 Police Chief says 'Hard Brexit' Irish Border Would be a Paramilitary Target' *The Guardian* (7 February 2018).

111 'Brexit: Northern Ireland Security at Risk if UK Kicked Out Of EU Extradition System, Warns Police Chief' *Belfast Telegraph* (20 June 2018).

112 'Theresa May Wants New Security Treaty With EU Next Year' *The Guardian* (17 February 2018).

113 See 'Position paper transmitted to EU27 on the Use of Data and Protection of Information Obtained or Processed before the Withdrawal Date' (TF50 (2017) 14 – Commission to EU 27, 6 September 2017) <https://ec.europa.eu/commission/sites/beta-political/files/use-data-protection-information_en.pdf> 2.

One of the key issues here is whether the UK will continue to be a trusted recipient of the personal data of EU citizens. For example, if the UK does not continue to align its data protection laws with the EU, it may not continue to have access to such data. Again such data regulation falls ultimately under the jurisdiction of the CJEU.¹¹⁴ As one senior legal and policing expert told BrexitLawNI:

Every meeting I go to, police officers and security services people express concerns as to whether the security implications of Brexit can be sorted out. The response from Brexit people is, 'well the EU are not going to cut off their nose to spite their face' in terms of security cooperation. However, in fact what we are doing is cutting off our nose to spite our face. It is very clear I think that there is not going to be the same access to EU databases, the UK is not going to be a trusted source, with, for example, personal data of EU citizens. So immediately there is going to be fewer opportunities to intercept people in terms of counter terrorism strategy in particular - it's an absolute disaster.¹¹⁵

114 See 'Post-Brexit Law Enforcement Cooperation: Negotiations and Future Options' (The UK in a Changing Europe, November 2017) <<http://ukandeu.ac.uk/wp-content/uploads/2017/11/Post-Brexit-law-enforcement-cooperation-negotiations-and-future-options.pdf>> 27.

115 BrexitLawNI, Interview with Senior Legal Practitioner (9 November 2018).

D. WAYS FORWARD

The EU has provided significant financial and political support for the peace process in NI since the 1980s. UK and Irish membership of the EU (formerly the EEC) has been crucial to improved Anglo-Irish relations since both joined the EEC in 1973. The improvement in Anglo-Irish relations which has evolved as a by-product of joint membership of the EU has been crucial in embedding 'habits of cooperation' between the two governments as co-guarantors of the Good Friday Agreement and as stewards of the broader peace process. The EU has also featured prominently in the key agreements between the two governments from the Anglo-Irish Agreement (1985) onwards and it is embedded in the architecture of the Good Friday Agreement (1998). The decision by the UK government to exit the EU has quite profound potential consequences for the peace process in Northern Ireland.

- Agreements need to be reached between the UK government, Irish government and the EU with regard to continued funding on peace process related work in Northern Ireland and the border region beyond Brexit. In particular, the British government needs to be specific about how their commitments to such projects will be enacted.
- As suggested by the Tánaiste, Simon Coveney, the UK and Irish governments need to revisit and enhance existing bilateral cooperation mechanisms between the governments to safeguard 'habits of cooperation' linked to their responsibilities as co-guarantors of the Good Friday Agreement and as stewards of the peace process.

Brexit has had quite profound political consequences upon relations in Northern Ireland. 56% of the population of Northern Ireland voted to remain in the EU. Brexit contributed to the collapse of the power-sharing executive in Northern Ireland and remains a formidable obstacle to it being re-established. In particular, we were told by interviewees from across the political spectrum that Brexit has had quite an unsettling effect and has led to an increased focus on 'identity politics' amongst northern nationalists. A number of failed legal challenges to the out-workings of Brexit in Northern Ireland have highlighted the limits of law as a means of redress for those opposed to Brexit. In addition, the removal of the human rights and equality protections associated with the EU Charter on Fundamental Rights and Freedoms, enforceable through the European Court of Justice, has been cited by some nationalist commentators as another source of nationalist disillusionment with Westminster. To address these issues:

- The UK and Irish governments must ensure that future intergovernmental relationships within the UK fully respect the constitutional fundamentals of the NI peace process and the principles embedded in its founding Agreements.

- The UK government, Irish government and EU negotiators should recognise that NI is already supposed to enjoy a special constitutional status within the UK and on the island of Ireland and work to ensure that this status is respected and protected in the EU-UK (and Ireland-UK) negotiations and in their legal and political outcomes.
- The UK government should make a reciprocal agreement with the EU to maintain all the existing rights of EU citizens in NI in return for all those born in the North, whether British or Irish citizens, having the rights of EU citizenship.
- The UK government should guarantee equality of rights of Irish and British citizens living in NI.

Brexit has also had a political impact across the island of Ireland in 'mainstreaming' discussion on Irish reunification – an issue that appeared to have been 'settled' by the Good Friday Agreement. The Irish government successfully argued for the inclusion of provisions in the EU negotiations guidelines to permit NI to re-join the EU as part of a united Ireland, similar to the process deployed by unified Germany after the fall of the Berlin Wall. Former DUP First Minister Peter Robinson has cited the lack of planning associated with Brexit as an example to highlight the need for contingency planning on this issue – referring to debates on reunification as 'the elephant in the room that is positioning to squat on their [unionist] laps.' There have also been concerns expressed by some unionist politicians and others that the increased focus upon Irish reunification may have an unsettling effect on loyalist paramilitaries. To date in the Brexit related discussions, there has been very little detailed attention given over to the human rights, equality and political identity concerns of the unionist community in Northern Ireland as part of the enhanced focus on Irish reunification.

- The two governments and local political parties in NI and the Republic should ensure that any future discussion on Irish reunification, including the conduct of a border poll, is done in a way that foregrounds the human rights, equality and political identity concerns of all – in particular those of the unionist community.
- As part of the renewed focus on the importance of human rights and equality for all in the wake of Brexit, a Bill of Rights for NI should be enacted that will guarantee a rights-based society and regulate the fair operation of the devolved institutions as well as a Charter of Rights for the island of Ireland that would help to underline the fundamental importance of human rights and equality in both jurisdictions.

Brexit is widely regarded as having been (as one spokesperson described it) 'manna from heaven' for republican dissidents opposed to the peace process and the Good Friday Agreement. From their perspective, particularly if Brexit results in some form of 'hard border', Brexit has brought home 'the reality of partition' previously obscured by a largely invisible border and the constitutional settlement of the Good Friday Agreement. Concerns about a hard border as a result of Brexit are widely shared, including by the Chief Constable of the Police Service of Northern Ireland, because any such installations would be 'fair game for attack' in the minds of republican dissidents. There are also significant concerns amongst the PSNI and other security officials that Brexit will have

a deleterious effect on their capacity to counter organised and cyber-crime, as well as dissident republican violence. Much of the information sharing and other practical cooperation between the PSNI and Garda Síochána is currently done through Europol and other EU regulatory structures. To deal with these concerns, the UK government, Irish government and the EU should:

- Avoid a hard border on the island of Ireland at all costs. Any such border would further deteriorate political relations within NI, between NI and the Republic of Ireland and between the UK and Irish governments. It would also, inevitably, become a target for dissident republicans opposed to the peace process.
- The UK government should prioritise continued membership in Europol and should take steps to ensure the continuation of data sharing with the EU, including the European Investigation Order. In addition, the UK must continue to allow jurisdiction of the CJEU to maximise law enforcement and security cooperation with the EU and ensure effective oversight.



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