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BETWEEN BREXIT AND THE NORTHERN IRELAND PROTOCOL: WHAT WILL BECOME OF HUMAN RIGHTS PROTECTION IN THE FUTURE OF NORTHERN IRELAND?

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ACRONYMS

BIC	British-Irish Council
DUP	Democratic Ulster Party
ECHR	European Convention on Human Rights
ECNI	Equality Commission for Northern Ireland
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EVEL	English Vote for English Laws
EU	European Union
GB	Great Britain
GFA	Good Friday Agreement
IRA	Irish Republican Army
HM	Her Majesty
IHREC	Irish Human Rights and Equality Commission
MOU	Memorandum of Understanding
MP	Member of Parliament
NIA	Northern Ireland Act
NICRA	Northern Ireland Civil Rights Association
NI	Northern Ireland
NIO	Northern Ireland Office
NIHRC	Northern Ireland Human Rights Commission

NSMC	North South Ministerial Council
PIRA	Provisional Irish Republican Army
PM	Prime Minister
PSNI	Police Service of Northern Ireland
RUC	Royal Ulster Constabulary
SDLP	Social Democratic and Labour Party
STV	Single Transferable Vote
TCA	Trade and Cooperation Agreement
TEU	Treaty on European Union
UDA	Ulster Defence Association
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UVA	Ulster Volunteer Force
UK	United Kingdom
US	United States
UUP	Ulster Unionist Party

INTRODUCTION

Most of the attention in the debates on Brexit has focused on the impact this process is having on the United Kingdom economy and the resulting additional costs for trade. On the contrary, I believe that the consequences for human rights mechanisms in the UK, and particularly in Northern Ireland, have been radically underestimated and could lead to a potential diminution of the rights guaranteed by the Good Friday Agreement. The period known as *The Troubles,* three decades between the late 1960s and 1998 which indelibly marked Northern Ireland's history and caused around 3700 victims, was only the culmination of a conflict only apparently arising from a religious divide between Catholics and Protestants. But the reality was much more complicated than this, and the real divide was ethnic and political, based on the history of Northern Ireland, troubled since its inception. Protestants on the one side, Loyalist for the majority, wanting Northern Ireland to remain part of the UK; and Catholics on the other side, Republican for the majority, wanting the British territory of Northern Ireland to become part of the Republic of Ireland after decades of oppression and inequality. Not surprisingly, in the context of a post-conflict society "reconciliation and healing in social and cultural relations are difficult to achieve, not least because inter-personal compromise between erstwhile enemies is difficult."[1] Therefore, a project based on power-sharing and cross-consent which aims at a more equal society by bridging the gap between the two communities was vital to mark discontinuity from the past.

The Agreement reached in 1998 in Belfast was not just a peace treaty among the paramilitary forces opposed in the civil war, but an international treaty which involved the Northern Irish political parties as well as the governments of Ireland and United Kingdom, with their common membership to the European Union at its core. It was the beginning of a new era for Northern Ireland and that agreement served as the constitutional basis on which to build a new society based on equality and integration. Cross-consent and power-sharing were as important as the commitment by the government of Westminster to finally incorporate the high standards of human rights protection that were set in the 1953 European Convention on Human Rights.

[1] Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5, p. vi.

Within this thesis I argue that, as a consequence of the choices made by successive Conservative governments in recent years in an attempt to bring the Brexit process to a conclusion, there is the possibility that human rights will be eroded, and key elements of fundamental rights protection will be diluted in the wake of Brexit. This follows the narrative, typical of populist and nationalist political forces of regaining control over national issues and, in this case, is expressed in the creation of a British version of rights protection which is less influenced by European standards. At present, these rights are protected by European bodies and can only be changed by EU legislation, instruments that could be repealed by decision of the Westminster government: this is how the risks that Brexit potentially poses may become real. It does not necessarily have to be so, as Brexit could be rights neutral. But, as I try to prove herein, the path embarked by the government is clear and is not going in this direction. I mention the openness to a review of the Human Rights Act, along with the proposal to set aside all the work done in these past years on the Northern Ireland Human Rights Bill in favour of a broader UK Human Rights Bill instead, and the threat to weaken the implementation of the ECHR. Additionally, considered the status of devolved administration, I also stress the rather contemptuous attitude the central government has had towards devolved administrations and the Sewel convention. I investigate how the Brexit process has been carried out and how it endangers to process of implementation of the Good Friday Agreement, with a particular focus on some of its provisions. I seek to explain why the respect, preservation and advancement of those human rights recognised as a fundamental part of the Good Friday Agreement is non-negotiable, as well as the constitutional implications of Brexit that put them at risk. My wish is that I am wrong, and that those responsible for these matters actually take this situation more seriously than I think.

I open the first chapter outlining the constitutional framework of the United Kingdom, the devolution mechanism, and its operation. I attempt to offer a condensed but comprehensive overview of Northern Ireland's history in order to contextualise the significance of the Good Friday Agreement, together with the role it played in the peace-making process and as a beacon for post-conflict Northern Irish society. In the second chapter, I offer an analysis of the Good Friday Agreement: its multi-level governance character, the peculiarities, strengths and weaknesses, and the subsequent implementation process. With the third chapter, I move on to discuss Brexit and the upheaval it has created

in the Northern Irish context, both in the GFA implementation process and in the framework that has been created around it. I then shift the focus to discuss the central role that human rights have played in the success of the GFA, how the mechanisms that ensure their protection are under threat, and what the Westminster government has done in recent years to address this issue, which in my view has not been successful and is in fact leading to further disruption. In conclusion, I seek to reason about the possible solutions proposed by relevant national and international bodies, leading experts and organisations dealing with human rights protection, and what the constitutional future of Northern Ireland might be, both in the United Kingdom or in a united Ireland.

CHAPTER 1:

NORTHERN IRELAND IN THE UNITED KINGDOM

UK constitution

What is referred to as United Kingdom is a sovereign multi-national state, whose unitary trait has lately been particularly precarious, composed of 4 constituent countries: England, Wales, Scotland, forming all together Great Britain, and the six counties located in the north-west of the Irish island that represent the territory of Northern Ireland. The origins of the process of formation of what is today the United Kingdom can be singled out in the annexation of Wales to the Kingdom of England between 1535 and 1542, under the leadership of Henry VII. In this occasion, the English common law system was extended to the new possession of the Crown to create a unitary legal framework. The circumstances related with Scotland and Northern Ireland were more complicated instead. Scotland was not conquered: albeit James V of Scotland had inherited the crown of England by unifying the Kingdom in 1603, and even though in the XVII century Ireland was already under the English control, the formal unification was still unaccomplished. If for Scotland the process was realised in 1707, with the unification of political institution and the assimilation (although not complete) to England, the case with Ireland was even more complex and the union was issued in 1800 with the Ireland Act.[2]

Without going into the details of what will be later discussed, I believe it is useful to have clear in mind from the beginning that in 1998 the central government of Westminster attempted to definitively settle the tensions that dominated its relations with the other constituent states. With this in mind, the Labour government introduced devolved administrations, with the due differences in relation to the specificities of each of the three countries. Nevertheless, and this is particularly true for Scotland and Northern Ireland, time proved how the doubts that were expressed by part of the public opinion about this type of solutions were justified. If, in the case of Scotland, only the negative outcome of the 2014 referendum for independence has prevented the attempt of leaving the United

[2] Encyclopedia Britannica, *United Kingdom*. Available at: https://www.britannica.com/place/United-Kingdom (Accessed: March 13 2022).

Kingdom, considering the long periods of suspension of the works in the Assembly due to the vacancy of a government in Stormont during this time, it is hard to say that the solution adopted through the 1998 *Northern Ireland Act* was an absolute success. But it is better to proceed step by step to better analyse the topic of this work.

When analysing matters dealing with the constitutional status of the UK, its specificities constitute a distinguishing element. Following the most common categorisation, constitutions are divided in written and unwritten and the British one falls into the second category. As suggested by Eric Barendt, it is more appropriate to talk about codified and uncodified constitutions. In fact, even though it is not a unique and all-encompassing document, and the common law represents a crucial source, "the British Constitution consists of statutes, some old like the Bill of Rights of 1869, some more recent like the Human Rights Act of 1998".[3] In other words, there is not a single document, or a series of them, known as constitution. And perhaps this is the most distinctive characteristic of the UK constitution, meaning that it has never been subject to a formal process of codification resulting in any single constitutional document or related series of documents.[4] As Dicey affirms, it comprises a "variety of specific enactments or agreements of different dates, possibly proceeding from different sources, intermixed with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority".[5] Hence, the British constitution is not just constantly resuming tradition in the attempt of changing it the least possible: its peculiarites, indeed, consisting of features related to tradition and customary rules have been complemented by events of production of specific documents having the status of legal sources. Because of this process known as positivisation of the law, the British constitution cannot be referred to as unwritten, as more and more written sources have been included in its legal system. But being instead a sequence of statutes, norms, judicial decision and treaties, it is proper to describe it as uncodified rather than unwritten. What distinguishes the British constitution from the others, is that the majority of its constitutional practice[6] is regulated

[3] Eric Barendt, *An introduction to Constitutional Law (1998),* 26ff. Mentioned in The Oxford Handbook of Comparative Constitutional Law: edited by Michell Rosenfeld - András Sajó, 2012, Oxford University Press, Chapter 4 Dieter Grimm: Types of Constitutions 98-132, p. 106.
[4] Leyland P., *The Constitution of the United Kingdom* (Oxford, Hart Publishing, 2012), p. 2.
[5] Bryce J., *Flexible and rigid constitutions* (New York, Oxford University Press, 1905), p.7. Available at: https://archive.org/details/constitutions00brycrich/page/n23/mode/2up (Accessed: March 13 2022).
[6] Generally, they represent just a small part of a constitutional system.

through what the British legal scholar A. V. Dicey first defined in 1883 as *conventions of the constitution*.[7] With this he referred to a set of rules composed by "customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, make up a body not of laws, but of constitutional or political ethics"[8]. That being said, it is easier to understand how the "the evolution of the constitution has been possible because conventions are capable of being easily modified to accommodate changing circumstances".[9]

To not dwell on what are very interesting constitutional matters but not the focus of this study, I will briefly introduce what in my opinion are still functional elements to understand the framework in which the topic that will be discussed is embedded. The British constitution is derived from a variety of sources, whose main ones are the following. The first of them is the *Statute Law*, meaning that set of normative acts issued by the Westminster parliament. But, not having a formal recognition regarding their constitutional nature, "their approval process […] doesn't differ from that of those laws with no constitutional connotation"[10]. The second source is the *Common Law*, consisting of a combination of customary laws and precedent judicial decisions achieving constitutional significance, "used to develop the law on a case-by-case basis"[11]. As aforementioned, another particularly important source is that of *Constitutional Conventions*, a set of non-legal rules having an important practical dimension as they determine many of the practices of government and aspects of conduct of state institutions[12]. With Alessandro Torre's words, its ratio is "essentially pragmatic, and its prerequisite lays in the understanding that is established among different parties, including political opponents".[13] As it will be herein pointed out, because of their very nature they are at risk of being violated in situations in which a government considers one

[7] In his book, *Introduction to the Study of the Law of the Constitution*.
[8] Albert V. Dicey A. V., *Introduction to the Study of the Law of the Constitution,* (8th ed. London: Macmillan, 1915), p.277.
[9] Leyland P., *The Constitution of the United Kingdom* (2nd ed. Oxford, Hart Publishing, 2012), p. 26.
[10] Torre A., *Regno Unito* (Bologna, Il Mulino, 2013) p. 43.
[11] Leyland P., *The Constitution of the United Kingdom* (Oxford, Hart Publishing, 2012), p. 28.
[12] Leyland P., *The Constitution of the United Kingdom* (Oxford, Hart Publishing, 2012), p. 34.
[13] Torre A., *Regno Unito* (Bologna, Il Mulino, 2013) p. 44.

or more of them to be an obstacle for its action, and in this perspective "[i]t is well established that the courts of law cannot enforce a political convention"[14].

An additional category of sources is the so-called *Books of Authority*, i.e. those works of constitutional experts that judges can apply, in the absence of those sources previously mentioned, to determine where the doctrine stands on certain constitutional matters involved in the proceeding. Examples of this kind are: the *Institutes of the Laws of England* by Edward Corke (1250 ca); *Commentaries on the Laws of England* by William Blackstone (1628); but also the more recent *The English Constitution* by Walter Bagehot (1867) and *An introduction to the study of the law of the constitution* by Albert Venn Dicey (1885).

Northern Ireland and its troubled history: from 1922 to 1998

The long journey of the Irish Home Rule, begun with Gladstone's first attempt in 1886, came to fruition on December 6, 1921, when the *Anglo-Irish Treaty*[15] was signed. The treaty, joined by representatives of the United Kingdom of Great Britain and Ireland on the one side and representatives of the Irish Republic on the other, provided that twenty-six counties would come together and constitute the *Irish Free State* (Saorstát Éireann in Gaelic). The remaining six counties, under the name of Northern Ireland, were given the chance to withdraw which they exercised. But the former was severely limited in its national sovereignty by the imposition of an oath of allegiance to the Crown and the obligation to join the Commonwealth, and this constituted an unacceptable constraint for the most radical nationalists. Adding to this a financial agreement that also established the payment of the so-called *Land Annuities*[16], it is quite easy to understand that for their part there was more than one valid reason for rejecting the conditions imposed by the British. But threats of war from British Prime Minister Lloyd George forced the Irish delegation to accept the agreement to avoid the catastrophic consequences that the invasion of the British army on the island would have caused. Furthermore, there was a widespread hope among the Irish delegates that this agreement could ultimately represent

[14] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5, on appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85. Available at: https://www.supremecourt.uk/cases/uksc-2016-0196.html (Accessed: 14 March 2022).
[15] Officially the Articles of Agreement for a Treaty Between Great Britain and Ireland.
[16] Mortgage payments that Irish tenants were forced to undergo under the land laws of 1891 and 1909 if they wanted take possession of the land they worked on.

a means of obtaining effective freedom from Great Britain. Complaining that the agreements sanctioned the acceptance of colonial status with the relative constraints imposed by the British, and not accepting any kind of link with the figure of the King, the radical nationalist wing remained inflexible in their demand for a formally independent republic recognized by Great Britain. The tensions caused by the men led by Éamon de Valera finally exploded on June 28, 1922: the regular army, which responded to the provisional government and was led by Michael Collins, was forced to bomb the Four Courts[17]. Pressures from Westminster threatened a new armed intervention in Ireland if the matter was not resolved internally. This episode triggered what is remembered as the *Irish Civil War*: the object of the dispute was the treaty just signed and the factions involved were the irregular republicans opposed to the treaty on the one side, and the nationalists, representatives of the institutions supported in the elections by most of the population, on the other side. With the rift within the independence front now irremediable, the British strategy proved a success. Despite their relatively short duration (June 28, 1922 - May 24, 1923), the fighting that saw the government forces prevailing were dramatically significant. The costs in terms of human, economic, cultural, and social life were enormous. The death toll was higher than that of the just ended War of Independence, and the resulting divisions within society survived for generations.

The process by which Northern Ireland was founded, although it lasted about five years (1920-1925), proved to be artificial and rather deficient. The new Northern Irish state essentially owed its birth to Gladstone's decision to disengage from a situation which, in more than two years of conflict, had entailed considerable costs for military intervention. But the Gladstonian project didn't prove to be very successful. A civil war had broken out in the South, while in the North the unionists, fearful of a possible abandonment by Westminster, were already undertaking a political strategy that would protect their dominion over the ever-growing Catholic minority.

The partition of Ireland had in no way mitigated partisan mistrust and the separation between Catholics and Protestants in the Unionist-controlled northern counties:

> "[e]ach community continued to be defined by its religious affiliation, with little mixture between the two groups. Education, neighbourhoods,

[17] From mid-April, the IRA paramilitary forces occupied the building that formed the centre of the Irish judiciary. The attack on the Four Court is considered the beginning of the Irish civil war.

workplaces, entertainment, and numerous other social activities remained segregated. The names of places also continue to be used to denote religious and national affiliation. For example, those aligned with the Protestant Unionists call Londonderry by its official name, while those of Nationalist sentiment refer to it as Derry"[18].

The lack of a political force representing the interests of Catholics by putting pressure on the government with a view to change its political direction, left the field free for unionists to implement their own agenda. To the abolition of proportional representation in the context of local administrations, which significantly weakened the political weight exercised by nationalists in this area, followed the approval of the reform of the constituencies based on the criterion of gerrymandering[19] as a short-term expedient. But the real attack on the credibility and fairness of the system came in 1929 with the abolition of proportional representation in the context of Parliament. Thus, in 1929 new elections were punctually held, resulting in the foreseeable Unionist victory. It is also worth mentioning the *Special Powers Act*, which entered into force in 1922 and presented as provisional despite being abolished only in 1973. This law provided severe limitations for any expression of dissent that sought to question the status quo. Disproportionate measures in relation to minor offenses, such as illegal possession of weapons or failure to comply with prohibitions regarding the assembly or organization by groups considered subversive, included penalties such as internment without trial, forced labour, the flogging of prisoners, or even the death penalty.

In 1946, with the approval by the Unionist government of a new electoral law called the *Representation of the People Act,* the right to vote for Irish Catholics was further restricted, by denying passive electorate to tenants who did not pay local taxes and making available to owners the opportunity to cast up to a maximum of six votes. A further

[18] Rowthorn B., Wayne N. (1988). *Northern Ireland: the political economy of conflict*. London: Polity Press. Mentioned in Hancock L., *Northern Ireland: Troubles Brewing*, 1998. Available at http://cain.ulst.ac.uk/othelem/landon.htm (Accessed: 16 March 2022).

[19] Consisting in the redesign of the boundaries of the majority constituencies in order to favour the candidates of a certain party. Created in the United States in the twentieth century, the system was an actual electoral fraud with which the population of Northern Ireland was divided into unbalanced constituencies lacking proportional representation. In this way, a greater number of Catholics concentrated in a few constituencies had fewer representatives of a minority of Unionist voters divided into a higher number of constituencies. A prime example is that of the city of Londonderry in 1967, where 14,429 Catholic voters elected eight municipal councillors while 8781 Protestant voters elected twelve.

evolution was the one desired by the Labour government chaired by of Clement Attlee which, aware of the precious role played during the war, issued the 1949 *Ireland Act*[20], granting the Stormont assembly the power to decide the eventual withdrawal from the United Kingdom. By making parliament the final arbiter of the decision, the control of the assembly acquired an even higher strategic importance and the mechanism of the "party-state was perpetuated"[21].

The revived unrest within the Catholic community gave birth to two movements which parallelly developed in the early 1960s to then find their definitive consecration on the political scene in 1968-69: a new socially active nationalism on the one hand, and the awakening of a renewed republican movement on the other. The Campaigns for Social Justice (CSJ) run by Catholics, and the Campaigns for Democracy in Ulster (CDU) by Liberal Democrats, channelled their efforts and in April 1967 formed the Northern Ireland Civil Rights Association (NICRA)[22]. Heavily influenced by the work of Martin Luther King, in 1968 the association launched a campaign of popular protest marches: the model of civil rights unrest, developed by the rights movements of the African American community in the United States, was therefore adopted. This was an important novelty for the historic battle pursued by the Catholic community in the name of emancipation, as "it was explicitly non-political. Rather than tie up allegations of anti-Catholic discrimination with traditional nationalist objections to the border, the new wave of agitation asked merely for «British rights for British citizens»".[23] Many historians agree that the birth of this movement represented a fundamental watershed in the history of Northern Ireland. Specifically, the requests were the following: the abolition of discrimination in access to the distribution of public housing; the abolition of discrimination in the workplace; the abolition of repressive laws and the stop of harassment by the police; greater access to positions inside institutions; the abolition of

[20] This act recognized that what was now called the Republic of Ireland ceased to be part of Her Majesty's domains, and, whereas Northern Ireland would have never left the United Kingdom unless with the explicit consent of its citizens. The equalization of the welfare system with Great Britain and a preferential legislation on citizenship (in favour of British citizens on Irish soil) and trade with the Republic were also sanctioned.

[21] Mulholland M., *The Longest War: Northern Ireland's Troubled History* (Oxford, Oxford University Press, 2002, I ed), p.59.

[22] The Northern Irish Civil Rights Association was an ensemble of middle-class Catholics, Republicans, Socialists and Protestant liberals.

[23] Mulholland M., *The Longest War: Northern Ireland's Troubled History* (Oxford, Oxford University Press, 2002, I ed), p.61.

restrictions on voting due to wealth, and the abolition of gerrymandering. Through this renewed strategy, which therefore provided for the non-violent approach of civil disobedience in claiming for justice and democracy, an attempt was made to give international relevance to a fact that until then had remained almost unknown outside the United Kingdom.

The London government responded to the manifestation of these instances by sending very specific orders to the Northern Irish authorities, who responded accordingly by attacking and arresting the demonstrators in the marches and treating them as dangerous criminals. Although the first march organized in Dungannon had already caused unrest, it was the second, that of Londonderry on 5 October 1968, which precipitated the situation and represented a critical moment in the history of the six northern counties of the Irish island.

During this period of great upheaval, two other paramilitary groups entered the scene. While between 1969 and 1970 the most restless militants of the IRA, the clandestine army which remained practically inactive until the end of the 1960s, decided to form the so-called Provisional IRA (PIRA)[24], in 1971 various loyalist paramilitary forces responded by joining the Ulster Defense Association (UDA)[25]. Moreover, the construction of the peace lines[26] dates back to this two-year period, including that of Northumberland Street, which still today separates the republican area of Falls Road from the loyalist area of

[24] The split between the "Official" and "Provisional" IRA occurred in December 1969, when the most extreme wing decided to distance itself from the rest of the organization with the intention of resuming the armed struggle against the British. Not agreeing with the change in the strategy, which involved abandoning violence in favour of a commitment in the parliamentary sphere and accusing their comrades of not being able to adequately defend the interests of Catholics, the so-called "Provos" immediately committed acts of terrorism. Engaged in a campaign they called "Long War", they extended the range of their attacks to Britain as well: it is estimated that between 1969 and 1994 they killed about 1,800 people, including approximately 600 civilians. In 2005, the Provisional IRA announced the end of the armed struggle and declared its willingness to destroy its arsenal. Despite this, its militants refused to dissolve the organization, in order to continue to pursue the goal of the reunification of Ireland through the exclusive use of peaceful means.

[25] The Ulster Defense Association, a loyalist paramilitary group, was founded in Northern Ireland in 1971 with the task of coordinating the forces of Protestant groups in the context of the conflict. Responsible for political killings of Catholics and Republicans, it was banned in 1992 by the British government. In 2007, the UDA definitively renounced violence and announced its disarmament.

[26] Also known as peace walls, these separation barriers made of metal, concrete or barbed wire fences have police-guarded gates that are closed at night. Their construction began in 1969. After the outbreak of the Troubles, the residents of Short Strand, a Catholic area of Belfast, raised walls to defend themselves from attacks by loyalists, which were reinforced and extended over the years. of barriers. Initially presented as interim measures, they have progressively multiplied and today are about eighty by 21 kilometres in length, most of them in Belfast. Remained in place even after the Good Friday agreement was reached, and even raised in recent times, they represent evidence of the tension that still exists. As the result of the 2012 research carried out by photojournalist Cathal McNaughton testifies, the citizens of both sides of the wall are in favour to maintain it.

Shankill Road (an area that has been the scene of numerous and violent clashes between the two communities). Meanwhile, the tension in the country was increasing.

At the end of the year, the police arrests without a warrant during raids in Catholic areas amounted to about nine hundred and in the following six months over two thousand people were interned without charge or trial. In force until 1975, through this internment regime thousands of nationalists were unjustly imprisoned. As for the interrogation techniques, they consisted of tortures that the security forces began to apply to the fourteen people (later renamed as Guinea Pigs by the press) arrested in August 1971. The victims, locked up in detention centres, were forced to gruelling interrogations and, between a third degree and the other, subjected to specific techniques under experimentation, known as *five techniques*: the interned prisoners "were hooded, made to stand against a wall for prolonged periods of time, subjected to continuous white noise, permitted little sleep and fed on bread and water".[27] As a unicum in Europe, where these techniques were used for the first time, the release of rumours about it caused an outcry that led to the launch of an investigation by the European Commission for Human Rights; concluded in 1976, it ascertained that the methodologies adopted were even authorized by high-ranking officers. Despite this, no measures were taken against the material perpetrators and, in addition, reports by Amnesty International and other human rights NGOs, certify that the British security forces have continued to use these methods detrimental to the human dignity until the 1980s.

The definitive collapse of public order occurred on January 30, 1972. A civil rights march attended by unarmed civilians to protest against discrimination against Catholics with regard to housing and employment was underway in Derry. This time, however, the conditions were unprecedented: the number of participants had never been seen before for such an event and the special troops of the Parachute Regiment were deployed to block their way. As evidenced by the stories of the reporters present at the time and the images available on the internet, the epilogue was shameful: the military opened fire on the unarmed demonstrators, causing thirteen victims and fifteen injuries (one of them will die five months later) in what went down in history as *Bloody Sunday*.

[27] Newbery S. *Intelligence and Controversial British Interrogation Techniques: The Northern Ireland Case, 1971–2,* Irish Studies in International Affairs 20 (2009): 103–19, p.104. Available at: http://www.jstor.org/stable/25735153 (Accessed: 16 March 2022).

The resulting outrage arising from around the world convinced the British authorities that the unionist regime they had created about fifty years earlier was unreformable, and that the only solution was to suppress the Stormont Parliament and transfer the related powers to Westminster. With what ultimately seemed to be the best solution for everyone, on March 28, 1972, the system inaugurated with partition was suspended and in July of the following year, through the approval of a constitutional law, the Direct Rule officially came into force. Given the inability manifested in the fifty years of uninterrupted administration to strengthen its position in the relationship with Westminster, the Parliament of Stormont ended up being subjected to a semi-colonial regime. The *Northern Ireland Office* was established, a department of the UK government whose leader was both Irish Secretary of State and a member of the Westminster cabinet.

After the death of ten IRA detainees engaged in a hunger strike, the republican political strategy took a different path: violence aimed at "national resistance" was not abandoned but simply incorporated into a broader strategy including political participation. The goal was to take the place of the Labour Party as a defender of nationalist demands in the north and, at the same time, to build a consistent presence in the south by attracting the consensus of the working class. By joining the electoral competition in the south as well as in the north, Sinn Féin in fact recognized for the first time in 1986 the institutions that were created with the partition of 1921.

With Arthur Aughey's words,

> "[t]o examine the Belfast Agreement is rather like exploring an archaeological site in which the remains of past initiatives have been incorporated into it like functional layers in a new constitutional edifice. The Agreement contained within itself the reworked remnants of failures in the hope that their reworking would deliver success. In short, it can be read as a brief constitutional summary of the Troubles ".[28]

In fact, in the twenty-five years from 1973 to 1998, several attempts were made for an agreement that would resolve the internal conflict, and despite the short-term failure they proved to be extremely valuable in paving the way for the achievement of the Good Friday

[28] Aughey A., The Politics of Northern Ireland: Beyond the Belfast Agreement (Abingdon, Routledge, 2005, I ed.) p.85.

Agreement, also known as Belfast Agreement, in 1998. Hence, those attempts cannot be considered as failures tout court, because on April 10, 1998, the inheritance accumulated through the previous agreements was given full meaning.

The turning point came with the election of Tony Blair[29] and his Labour government on May 1, 1997. Not having, unlike his predecessor Major, a unionist base to come to terms with in parliament, he immediately declared that the Northern Irish peace process would be a priority for his government and that negotiations would resume in September to be concluded in May of the following year. Blair's decision was welcomed by the IRA and following the announcement of a new ceasefire for July 20, Sinn Féin was admitted to the negotiations.

From the outset, talks were monopolized by Trimble's UUP and Hume's SDLP. Since these were two essentially moderate parties, the proposals did not have the objective of overturning the equilibrium and the negotiation revolved around the question concerning the degree of interactions between the two states, and the ways in which the Dublin government would be involved in internal affairs in the North as guarantor of the Catholic community. The matter of the progressive assimilation of Northern Ireland to the Republic for the formation of a united Ireland was not even mentioned. When the principles of an agreement were found in January 1998, the republicans of the IRA immediately expressed their dissent, causing a stalemate in the negotiations. But thanks to the joint diplomatic work of US Senator Mitchell, British Prime Minister Blair and Irish Prime Minister Ahern, an agreement was finally found on April 10, 1998, the day of Good Friday.

As previously mentioned, the agreement represented the evolution of those previously stipulated and simultaneously worked on different levels. The Northern Irish state, while remaining within the United Kingdom, finally took on the characteristics of a democratic state, in which the two communities constituting it were equally protected and represented. The two governments, protagonists of the negotiations which now continued, albeit with some periodic interruptions since the early 1970s, deeply committed themselves to the role of guarantors, while renouncing their ambitions for the six north-western provinces. The principle was consolidated according to which the future of

[29] Tony Blair (born in 1953), British MP from the Labour Party from 1983 to 2007, held the position of Prime Minister from 1997 for the following ten years and played a key role in concluding the Good Friday agreement as well as in the creation of the Assemblies of Wales and Scotland.

Northern Ireland should be a matter to be decided by its citizens, starting with a referendum held in May through which the population would express their opinion on the agreement. The Belfast Agreement was approved by 77% of the voters (of which only 55% unionists) in Northern Ireland, while a similar referendum in the Republic of Ireland received 95% of consent.

On both sides, it was approved with reservations. The ambiguities characterizing it were well-known by the governments of Ireland and the United Kingdom; the two protagonists had, however, prioritised reaching the conclusion of an agreement, albeit imperfect, leaving the task to fill in the gaps to the parties that would have crowded the new Parliament. For this reason, many of the most controversial issues (such as the organization of the police and the disarmament of paramilitary forces) had been postponed or left unsolved.

Having to reckon with the scenarios that could have arisen from an eventual step backwards by the Ulster Unionists, Sinn Féin exerted strong pressure on the IRA to stop its terrorist attacks. While reiterating that the unification of Ireland remained the main objective, the IRA laid down their arms and declared willingness to negotiate in May 2000. The decisive pressure on the militant Republicans to do so came from the leadership of the Sinn Féin itself, concerned with losing a considerable number of votes by reason of further episodes of violence. The response of the IRA came on July 28, 2005, with the announcement that the clashes should end, and the arms definitively laid down in favour of the development of political and democratic programs based on a peaceful attitude. The good intentions on both sides came to light with the negotiation of the St Andrews Agreement in October 2006. The DUP accepted the restoration of the Northern Irish assembly and the idea of a shared government, while Sinn Féin recognized the powers conferred on the new police service and the criminal justice system.

Therefore, it can be noticed how the reality of the years 2000s had inherited those problems deriving from the period of the Troubles. Society remained characterized by the physical division between the two communities: different schools, different churches, different versions of the past, different neighbourhoods, and even different cemeteries. Beyond the rhetoric produced in terms of tolerance and equal rights, the parties have proven to be able to put these theoretical principles into practice: there have been neither winners nor losers, but rather mutual sacrifices and renunciations to ensure peaceful

collaboration and coexistence. Or better, "[t]he Agreement was choreographed so that the parties to the agreement could claim to have «won» in the negotiations. The UUP leader claimed it had strengthened the Union, while Gerry Adams claimed the peace process was leading to a united Ireland."[30] Hence, republican militants decided to recognize the institutions produced by the partition; unionists, for their part, accepted the role played by cross-border entities within the government. Furthermore, the constitutional dogma according to which the Northern Irish citizens should decide on the future of their country has been increasingly consolidated.

Devolution

I have already mentioned that the UK is a multi-national state, but this has not always been the case. Until 1998 the United Kingdom could be categorized as a centralized unitary state, except for the previous and unsuccessful experience of devolution in Northern Ireland, from the creation of Stormont institutions in 1921 to their suspension in 1972, when Westminster stepped back and regained the control. But it is also true that there are major differences between the two models, as the fundamental one can be identified on the electoral system and the composition of Parliament. The first consisted with the transition from a first-past-the-post[31], designed to favour the unionist dominion, to the implementation of the D'Hondt[32] aimed at promoting power-sharing with a view to ensure representation between the two communities would be as equal as possible. Hence, it can be said that in 1998 the goal was not just filling in the gaps that came to light with the first experience, but more precisely to radically change what was created before to

[30] Mowlam (2002). Mentioned in Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5.

[31] This electoral system, based on simple majority, has historically contributed to the political domination of large parties in the UK: Tories and Whigs in the 12th century, Conservatives and Liberals afterwards. The nation is divided into 645 electoral districts, as equivalent as possible in terms of population, each of which elects as a member of Parliament the candidate winning the majority of votes within the constituency for which he or she is running. As already mentioned, the system favours the parties with the widest following at national level, particularly those that manage to collect a percentage of votes exceeding the 30% threshold; with 40/45% of the national votes, a party has a good chance of winning the overall majority of seats in the House of Commons and thus forming a government.

[32] This method is used to distribute several seats within an electoral area and works by recalculating each party's number of votes in several rounds each time that a seat is allocated. Each party's votes are divided by the number of seats it has won plus one, meaning that once a party wins a seat, its total votes are divided by two. If it wins two seats, its votes are divided by three (the number of seats it has, plus one). The party having the most votes after these calculations are made wins the next seat being assigned, until all those up for election have been distributed.

then lead society to disruption, as well as laying the foundation for a new society that would grow free from the old grievances and inequalities.

But it is in the last twenty years that the particularistic demands of single states generated the acceleration of that process, already underway, concerning the revision of the relationship between central power and decentralized administrations. After the failure of both the Northern Irish experience and the Labour attempt to introduce devolution regimes in Wales and Scotland between 1974 and 1979, the debate over devolution was resumed only in 1997: in that year the Labour party returned to the leadership of the government with an election program that had devolution at its core. At this point, the proposed legislation presented by the new government in the two dedicated W*hite Papers* was approved by referendum in Scotland and Wales and by the Westminster Parliament.

While the process was definitively activated in 1998 through the *Scotland Act* and the *Government of Wales Act*, the case of Northern Ireland was different. In this context, in the wake of the Good Friday Agreement, devolution was specifically aimed at the pacification of society. Based on the positive outcome of the referendum, the devolved administrations that had been suspended in 1972 was restored with the enactment of the *Northern Ireland Act*. The next step was the election of single-chamber representative assemblies with a four-year mandate for each administration: the Scottish Parliament, the Welsh Assembly and the New Northern Ireland Assembly. Precisely "the devolution legislation which was introduced in 1998 conferred varying degrees of decision-making authority to Scotland, Wales and Northern Ireland […] The effect of these changes has been to set up a new set of democratically elected bodies and to confer substantial powers on devolved legislatures and executives."[33]. Despite the transfer of powers, previously under the exclusive jurisdiction of central institutions, to regional bodies, the latter remain subordinate to parliament. In fact, the Scottish, Welsh, and Northern Irish governments are referred to as *devolved administrations*, while the related legislative assemblies as *devolved legislatures*. In the devolution operation, the Westminster Parliament assumed a particular and in some ways contradictory role, ending up occupying "a position with

[33] Leyland P, *The Constitution of the United Kingdom* (Oxford, Hart Publishing, 2012), p. 243-244.

dual responsibilities, as the government and parliament for the whole United Kingdom and also as the government and parliament for England only."[34]

The first difference is easy to notice. In fact, the name of the Scottish legislative body stands out, as it is the only one to have the title of *Parliament* and enjoy greater freedoms, including limited fiscal powers. There is neither a great constitutional prototype nor a univocally applied principle, but rather each model has been developed in relation to the different historical and political heritage of the nation to which it was dedicated. While in Scotland and Wales it was presented by the Labour government as "a way of strengthening the Union through decentralization and subsidiarity and consequently of weakening any separatist tendencies"[35], devolution was for Northern Ireland "part of both a peace and a political process accommodating internal cross- community and all- Ireland dimensions"[36]. It follows that, being the devolution system characterized by a clear asymmetry, the different parts of the territory do not exactly enjoy the same status since historically justified differences are met through different constitutional arrangements. To mention a substantial difference, in the cases of Northern Ireland and Scotland the principle of exclusion was used, which means that matters not listed as reserved for the Westminster Parliament were necessarily devolved. The consequent implication of this procedure is that "any «new governmental powers» that emerge, for example, related to climate change, are constitutionally devolved unless the UK Government decides to take action to prevent devolution."[37] As for the Welsh case, the opposite principle was used, and the specific areas subject to devolution have been detailed in schedule 22 of the Government of Wales Act.

Yet, some common guiding principles can be identified with the following: the preservation of the supremacy of the Parliament of Westminster; the distinction between matters devolved to territorial institutions and those reserved for central institutions; political and administrative autonomy; the combination of devolution and direct democracy; the adoption of electoral laws other than the majority. In fact, a mixed electoral system was preferred to the traditional first-past-the-post typical of the United

[34] Birrell D., *Comparing Devolved Governance* (Basingstoke, Palgrave Macmillan, 2012), p. 3.
[35] Jowell J., Oliver D (eds), *The Changing Constitution*, (Oxford, Oxford University Press, 2011, VII ed.), p. 214.
[36] Jowell J., Oliver D (eds), *The Changing Constitution*, (Oxford, Oxford University Press, 2011, VII ed.), p. 214.
[37] Birrell D., *Comparing Devolved Governance* (Basingstoke, Palgrave Macmillan, 2012), p. 12.

Kingdom, which tempered the elements of the majority with others specific of proportional methods. Even in terms of the form given to their institutions, the three models are similar. Although not properly defined Cabinets, the executives essentially reproduce the structure of the central body based in Whitehall, although coalitions and pacts between extremist parties have been established in Scotland and Northern Ireland rather than the usual one-party form. The Prime Minister, appointed by the Crown, chooses his own ministers and, based on what is provided for in the devolution model, these will have a certain regime of direct responsibility for the delegated matters towards the assembly supporting them.

Therefore, in the light of the above, the central distinction to be made when it comes to devolution is that between transferred and excepted powers: the former are obviously those passed from the Parliament of Westminster to the devolved institutions, the latter are the residual ones which remain of exclusive competence of the central institution. The result of the asymmetry to which I referred means that some matters devolved to one of the three assemblies can instead be reserved for the other two. Making a rough classification, here are the non-devolved matters for which the Westminster Parliament remains solely responsible and those instead constituting the central body of those devolved in all three cases. As regards the first category we find: the constitution; Royal succession; international relations; defence and armed forces; nationality, immigration and asylum; elections; national security; nuclear energy; UK-wide taxation; currency; conferring of honours; international treaties. The second category includes: health and social services; education; employment and skills; agriculture; social security; pensions and child support; housing; economic development; local government; environmental issues, including planning; transport; culture and sport; the Northern Ireland Civil Service; equal opportunities; justice and policing. This scheme is completed by a third category, that of reserved matters, in relation to which legislative authority generally rests with Westminster, but where the Northern Ireland Assembly can legislate with the consent of the Secretary of State.

But there is also a third category of powers, the one concerning concurrent or rather overlapping powers. This category has not been formally established with ad hoc measures but has indeed arisen spontaneously with the implementation and development of the devolution process. In certain areas there are cases where the responsibilities of the

UK government and devolved administrations overlap and intersect, as their respective powers to legislate are so similar that they seem to coincide. Having roughly defined the scenario of competences, the essential limitations that have been imposed on the assemblies are the following three: these will not be able to produce laws that also imply effects outside their respective territorial areas; nor will they be able to do so in contrast with Community rules; nor in violation of fundamental rights established by the Human Rights Act of 1998.

In charge to ensure compliance with these essential rules are the Parliament of Westminster and the Supreme Court of the United Kingdom. The courts therefore have the delicate task of monitoring the limits of the application of the matter, a role that in addition to the necessary legal implications also involves a constitutional interest. They may, in fact, be called upon to judge the legitimacy of a parliamentary act and determine whether it falls within the powers reserved for the administration that produced it, and, in the event that it falls outside those competences, they have the right to declare it null and void.

The aspect concerning the administrative coordination between central institution and devolved ones was not defined through ordinary legislation, but rather at the informal level using a particular category of conventions, the concordats. The main among these is the *Memorandum of Understanding (MOU)*[38], in which principles such as good communication, exchange of information, mutual consultation and cooperation in matters of mutual interest are expressed. Among the other agreements, one is of particular interest at this stage, and is that concerning international relations that affect the responsibilities of devolved administrations.

There are essentially two perspectives from which the British devolving model can be analysed. The first of these looks to the United Kingdom as a unitary state, in which power derives solely from Parliament and the London government. Devolution, therefore, represents in this perspective a way of granting, or rather delegating, the power from the centre to the regional institutions which will then exercise the powers that will be devolved to them as long as they remain within their competence. The alternative

[38] It consists of a document containing a series of understandings (not legally binding) between the UK government and devolved administrations outlining the principles underlying the relationships between the parties. The drafting of this document dates back to 2011, updated in October 2013. As a result of Brexit, the actors involved are planning a review of intergovernmental relations, including the MOU.

perspective, on the contrary, emphasizes the aspect of the secular formation of the United Kingdom in the various acts of union that involved England, Wales, Scotland, Ireland first and Northern Ireland later. According to this vision, devolution would be a return to the origins, to the situation preceding the Union; the differences in historical, legal, cultural and administrative terms between the components of the United Kingdom are thus emphasized, contrasting the previous perspective based on "a constitutional and historico-political monolith composed mainly of the sovereign Westminster Parliament and central government based on support (at least until the 2010 general election) for one of only two nationally based political parties."[39]

Devolution as introduced in 1998 by the Labour government created a hybrid system, with elements deriving from both perspectives, which took the shape of a "kind of asymmetrical federalism", a very anomalous solution in the British legal system. The union was traditionally based on an element of equality that gave all members of parliament the right to vote on any issue, without any distinction between the territory of application of a given measure and that represented by single MPs. With the introduction of the devolution regime, however, it is difficult to even define which matters can be considered exclusively internal politics without influencing, even if to a minimal extent, the internal politics of others. But a move to balance what was defined as *West Lothian question*[40] was taken in 2015 by the government led by the Conservative party; by launching the *EVEL*[41], an ad hoc procedure was thus established for those bills that the speaker of the House of Commons identifies as being of exclusive English interest, reserving the British representatives the task of voting or amending them as long as it is ascertained that the devolved assemblies have the competence to enact similar provisions at the regional level.

[39] Jowell J., Oliver D (eds), *The Changing Constitution*, (Oxford, Oxford University Press, 2011, VII ed.), p. 214

[40] Also known as *English question*, is a matter of British politics. It concerns the fact that, while the Scottish, Welsh and Northern Irish parliamentarians present in the House of Commons had the possibility to vote in matters relating exclusively to England politics, on the contrary English parliamentarians could not do so for matters of interest solely to Scotland, Wales and Northern Ireland. The term was coined in 1977 by the MP Enoch Powell after Tam Dalyell, Labour MP for the West Lothian constituency of Scotland, had repeatedly raised the issue in the House of Commons as part of the debate on devolution

[41] This acronym stands for *English Vote for English Legislation*, that category of bills in respect of which the vote is reserved to English parliamentarians, as the matter of law that is of exclusively of English interest.

Although the central authority has over time delegated some of its prerogatives to the institutions of Scotland, Wales and Northern Ireland, "it would be a mistake to underestimate the continuing role of central government"[42]. As paragraph 14 of the Memorandum of Understanding states,

> "[T]he United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature."[43]

The corresponding convention is known as *the Sewel Convention*[44]: recent events have clearly demonstrated numerous violations by the Westminster government associated with Brexit, and a consequent and immediate need to reform it.[45] There are many cases in which it is appropriate for Westminster to legislate in devolved areas. One among all is the case in which a decree on confidential matters cannot have practical effect without invading the field of one or more delegated matters: in this case, the authorization can be granted by the relevant legislative body with a *Legislative Consent Motion*. Although it was created with the aim of limiting the intrusiveness of the central Parliament, given the high rate of consent granted by decentralized institutions, this instrument has basically had the opposite effect. The fact that in 1998 the specific form of each model of devolution was outlined in separate parliamentary acts, underlines how each administration turns out to be a creation of the Parliament of Westminster and, just as they saw the light through ordinary legislation, likewise these they can be amended or developed with the consent of the representatives who compose them. Since the status of the devolved systems is subject to the central institutions, this cannot be described as federalism but rather as devolution.

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[42] Leyland P., *The Constitution of the United Kingdom* (Oxford, Hart Publishing, 2012), p. 245.
[43] Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee.
[44] Named after Baron John Buttifant Sewel, the Scottish Labour Lord who proposed it.
[45] Institute for Government (2020). *The Sewel Convention has been broken by Brexit – reform is now urgent*. Available at: https://www.instituteforgovernment.org.uk/blog/sewel-convention-has-been-broken-brexit-reform-now-urgent (Accessed: 17 February 2022).

The crucial role of the UK Parliament becomes explicit with regard to the financing of the devolution. Therefore, the financial agreement is another aspect of devolution that deserves to be considered. The system of funds granted to Scotland, Wales and Northern Ireland, which was in place prior to the start of the process, remained unchanged after 1998. Since the late 1970s the UK Government has been providing grants to fund most of the devolved administrations' spending, and the block grant is the main one. In fact, most of the revenue available to the three administrations was determined according to the principle established by the *Barnett Formula*[46] even though of a non-statutory nature, meaning that it is not set out in legislation. Its aim is "to give each country the same pounds-per-person change in funding as the change in funding for comparable government services in England"[47], and to do that it incorporates population proportions. This system "takes the change in a UK Government department's budget and applies two figures that consider the relative population of the devolved administration (population proportion) and the extent to which the UK department's services are devolved (comparability percentage)".[48] Whenever the budget for comparable services[49] in England are revised, the Barnett formula aims to adjust fundings for each devolved administration by applying a population proportion. With regards to further devolution of spending and taxation powers to the devolved administrations, case "new tax powers or spending responsibilities are being devolved, or have been devolved, block grants are being adjusted. This ensures that neither the UK Government nor the devolved administration is left worse off simply from the transfer of power".[50]

The total budget allocated to the devolved administrations is divided into two categories of public expenditure: the *Departmental Expenditure Limits (DEL)*, established with provisions on a three-year basis following the criteria established by Lord Barnett and the *Annual Managed Expenditure (AME)*, set annually and independent of the previously mentioned criteria. Although funds allocated outside the Formula have

[46] Named after Lord Barnett, the Chief Secretary of the Treasury Department responsible for its introduction.
[47] Keep M., The Barnett formula (House of Commons Library, Briefing Paper. Number 7386, 23 January 2018), p.4. Available at: https://researchbriefings.files.parliament.uk/documents/CBP-7386/CBP-7386.pdf (Accessed: 20 March 2022).
[48] *Ivi, p.5*.
[49] Generally, if a service is devolved it is also considered as comparable.
[50] Keep M., The Barnett formula (House of Commons Library, Briefing Paper. Number 7386, 23 January 2018), p.15. Available at: https://researchbriefings.files.parliament.uk/documents/CBP-7386/CBP-7386.pdf (Accessed: 20 March 2022).

increased in recent years, the UK Treasury Department and England continue to play a central role in determining funding for devolved institutions. Supporters claim that, thanks to this formula, equity was ensured in the allocation of resources between Scotland, Wales, and Northern Ireland, thus avoiding the disputes that would have arisen if each country had to negotiate an agreement individually and annually. But critics complain about a now obsolete criterion that refers to demographics rather than needs, the excessive power in the hands of the central administration and above all the lack of autonomy for the states in terms of tax collection. Although numerous calls have come from the institutions, including Lord Barnett himself, for an update of the criteria for the allocation of funds, no government has yet taken the responsibility to come up with a substantial reform in this regard.

To conclude this overview, it can be said that being it a process rather than a single measure, devolution is therefore dynamic and in constant progress. Although the whole system still formally depends on Westminster's sovereignty, it is undeniable that the trend is that of a progressive greater proximity between decision-maker and citizens. The referendum held in Scotland in 2014 resulted in the majority of society still being in favour of union. However, it showed how the aim of the devolution process was an attempt to appease the nationalist parties' demands for independence, even though in this case the result was a failure. And in fact, following the victory of the *leave* campaign in the Brexit referendum, the request for a new referendum was not long in coming. This is explained by the fact that both independence sentiments and the parties supporting them in the political arena continue to have an impact in the societies of the three devolved administrations. Similarly, the portion of the population in Northern Ireland that favours the possibility of a referendum giving citizens the opportunity to decide whether to remain in the United Kingdom or join the rest of the Irish island is gradually increasing.

However, the proposal for a federal system would appear to be impracticable. This is due not only to the very high costs that such a reform would entail, but mainly to the conflict that would necessarily arise from the creation of an English parliament that represents 80% of the UK population and which would end up being a cumbersome competitor for the Westminster Parliament. The only way to keep the Union together and fill the representation gap that, expressed in the West Lothian Question, creates discontent in England, would be to introduce greater autonomy at the regional and local level as has

already been done for the city of London through the establishment of the *Greater London Authority*[51].

Northern Ireland post-conflict society and the GFA: the crucial role played by power sharing and cross-consent

When the peace and state building process started the attitude adopted by both nationalists and loyalist was that of feeling and acting as the endangered and threatened minority: the first because they were the minority in Northern Ireland and because of the discrimination they suffered in their home country, the second because they feared being abandoned by London and becoming a small minority in a united Ireland. The consequence in political competition was an ethnically divided representation, with parties entrenched in defending the interests of the part of society they represented and challenging the other side without any intention to compromise. Given the history of Anglo-Irish relations on the one side, and the division of its society since Northern Ireland was created, it was inevitable that the bone of contention would be that of stateness; "[t]hreat, fear, and victimhood are a triple obstacle for conciliation in a divided society".[52]

Based on the assumption that, in a post-conflict scenario, peacebuilding and the reconstruction of public institutions are crucial for a long-term sustainable society, the post-conflict constitution-building process is an opportunity to "create a common vision of the future of a state and a road map on how to get there"[53]. The document under consideration in this case, namely the Good Friday Agreement of 1998, played a twofold role, a peace agreement on the one side and, on the other, a framework setting up those rules and institutions on which the new model would be based on and operate. It can be considered, in my opinion, the perfect example of how an "ideal constitution-making process can accomplish several goals. For example, it can drive the transformative process from conflict to peace, seek to transform the society from one that resorts to

[51] Established in 2000, the new Greater London Authority comprising a directly elected mayor and a 25-member assembly has taken on some of the responsibilities that the central government had taken back the control of since 1986 (the year in which the previous experience of the Greater London Council ended). It is a public body in charge of administering London, essentially an authority devolved to the local level, to which management powers are delegated in various areas including transport, police service, emergency services and promotion of the city.

[52] Oberschall, A. (2007). *Conflict and Peace Building in Divided Societies: Responses to Ethnic Violence* (1st ed.). Routledge, p.159. https://doi.org/10.4324/9780203944851

[53] Samuels, Kirsti (2006). *Post-Conflict Peace-Building and Constitution-Making*, Chicago Journal of International Law: Vol. 6: No. 2, Article 10, p.159.

violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources, all key reasons for conflict. It must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence."[54] The GFA should not be considered as a separate attempt, but at the contrary as the culmination of a process to peace and societal reconciliation that had been underway for the previous two decades. And most of all it had its main inspiration in the *Framework Documents* elaborated in February 1995. The central element of the proposal was the shared executive, according to which both the Assembly and the panel had to be composed of representatives of both communities. According to Lijphart, guru of the consociative model adopted by the drafters of the Framework, this document was inspired, in its basic lines, by a consensual model of democracy, confirming how power-sharing was a necessary (although not sufficient) condition for a stable democracy in a deeply divided society[55]. Added to the core of the proposal, which was the shared executive comprising representatives of both communities, was the balance underlying the two organs, the Panel and the Assembly, both in terms of their counterbalances in the separation of powers and their proportional composition. Also providing for both the proportional electoral system and the veto power of the minority, the Framework Agreement adopted two of the most important principles underlying the model of consociational democracy.[56]

Constitutionalism in a context of transition from a civil conflict, as the case of Northern Ireland in 1998, must be centred on features as political equality, social justice provisions, human rights protections, and stronger accountability mechanisms as well as avoid the strengthening of power in the hands of certain groups in the long terms. But the creation of sustainable and democratic institutions based on such elements, in a post-conflict society, is an authentic challenge as it could further "ferment conflict in sharply divided societies"[57]. As confirmed by the considerable difficulties affecting the Stormont

[54] *Ivi,* p.664.
[55] Lijphart, A. (1996). *The Framework Document on Northern Ireland and the Theory of Power-Sharing. Government and Opposition*, 31(3), 267-274, p.267. Available at: Doi:10.1111/j.1477-7053.1996.tb01190.
[56] *Ibid.*
[57] Stewart F., O'Sullivan M. *Democracy, Conflict and Development - Tree Cases*, in Gustav Ranis, Sheng-Cheng Hu, and Yun-Peng Chu, eds, 1 The Political Economy of Comparative Development into the Twenty-First Century: Essays in Memory of John CH. Fei (Edward Elgar 1999); cited in Samuels, Kirsti (2006) *Post-Conflict Peace-Building and Constitution-Making*, Chicago Journal of International Law: Vol. 6: No. 2, Article 10.

institutions since their creation, with extended and repeated periods of absence of an agreement to form the government and both the political sides contesting parts of the GFA provisions, the attempt to create new democratic, equal and participated institutions might have the adverse effect of exacerbating sectarian and political divisions and tensions in society, and the refusal to recognise such institution as legitimate in representing the whole population. In this perspective, the choices of the Single Transferable Vote (STV) instead of the traditional and majoritarian first-past-the-post, the introduction of a power-sharing government combined with the element of cross-consent when major matters are under discussion, are intended to avoid the dominance of the majority, moderate divisions between ethnic identities while encouraging moderation and conversation between different political groups.

However, a constitutional reform establishing new institutions supervising mechanisms and public administration is still not enough to ensure a self-sustaining and durable peace. The other pivotal pillar is a radical societal transformation process, having at its core the involvement of the two communities in a common and shared vision of the future for their country, in other words the abandonment of the traditional divisions that made up the segregated society and resulted in a civil conflict. And, as I will try to prove throughout this work, is a responsibility that belongs to politics that of providing citizens with the means to end a segregated society, developing instead equal and integrated services in crucial areas such as education and policing.

Worth to be mentioned in post-conflict constitution building is the role played by external actors as well as the international community. In the case of Northern Ireland both single states, as Ireland and the US, but also the UE as the regional organisation to which UK was member at the time, were active role in the peace and institution-building process. These actors were directly involved in the talks between the parts of the conflict and subsequently received a role in monitoring that the provisions agreed would be correctly implemented. And in the aftermath of Brexit, these balances are necessarily changing due to the UK's exit from the European institutions, with consequences on the stability of the GFA.

CHAPTER 2:

THE GOOD FRIDAY AGREEMENT

The Agreement

As already mentioned, it would be wrong to regard the Good Friday Agreement as a separate stage in the achievement of peace in Northern Ireland. Rather, it was the final stage in a process that, with ups and downs, had been ongoing since the Sunningdale Agreement of 1973. At that point, there was a shared general awareness that "[W]hatever Northern Ireland's future constitutional status, self-sustaining and durable peace requires strong infrastructures and institutions to be put into place"[58]. With the most hard-line parties on both sides, DUP and Sinn Féin, relegated to the margins, the negotiations were in the hands of two moderate parties: the SDLP on the republican side, and the UUP on the unionist one. They challenged each other on two main issues: the distribution of power in the Northern Ireland Assembly and the degree of influence the Irish Republic would have on Northern Irish domestic politics through its work in the North-South bodies. Although still conflicting, differently from the past, the reciprocal objectives had become reconcilable. Indeed, while nationalists declared themselves willing to abandon the pretence of an immediate reunification of Ireland at the cost of British influence, the unionist counterpart was willing to create an executive based on power-sharing.

In an attempt to break the new deadlock that had arisen, and in his capacity as chairman of the multi-party negotiations, US Senator George Mitchell decided to set the deadline for reaching an agreement at 9 April 1998. Despite the general scepticism regarding the possibility of reaching an agreement in just over two weeks, the risk taken ended up paying off. In the last days available to conclude the negotiations, the parties proved to be exceptionally involved and worked day and night to bridge the gap between the two previously described positions. The nationalists, Sinn Féin above all, had to present any agreement to their voters as transitional, embedded in a dynamic aimed at achieving Irish unity in the long run. On the Unionist side, the DUP had to make it look like the salvation for the future of the Union. The challenge was therefore to "come up with something

[58] International Conflict Research Institute (2015), *Guide to Peacebuilding in Northern Ireland: New Trends, Opportunities & Challenges*, available at: https://www.incore.ulster.ac.uk/services/cds/newcfni/statebuilding/ (Accessed: 25/03/2022).

either so detailed and complex, or else so vague and ambiguous, that both sides can claim victory"[59]. After all the protagonists involved (the Northern Irish parties, the British Prime Minister Tony Blair and the Irish Taoiseach Bertie Ahem) had decided to remain in Stormont Castle until the works were definitively concluded, at 5pm on April 10, 1998, they announced that the agreement was reached.

The decision of the participants from both sides of the negotiation was therefore not to announce it "as a victory for any particular party, but rather as the best agreement that could be achieved in the circumstances".[60] And

> "[A]s Bell (2013) notes, this political agreement founded on a consociationalist model is built around ensuring that political participation and decision making reflects group divisions – arrangements which O'Leary argues seek «to manage differences equally and justly» rather than surmounting them (2004, 270). Moreover, in spite of the contested and politicised nature of human rights in Northern Irish society, a series of innovative human rights and equality provisions were successfully negotiated as part of the Good Friday Agreement, which endorses «the protection and vindication of the human rights of all» and «partnership, equality and mutual respect»."[61]

Beyond this aspect, the entire structure of the Agreement was built on the assumption that the institutionalization of the process of change and pacification would definitively put an end to the conflict phase to then give rise to one of cooperation. The practical legislative consequences, detailed and complex, would need years to be implement, but what was achieved was the mutual recognition that new the ground of contention was to be exclusively that of politics; unionists and nationalists would have challenged each other upon how the new mechanisms and new institutions were to best embody the fundamental principles of the agreement that was concluded.

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[59] Breen 1998: 7. Mentioned in Aughey A., *The Politics of Northern Ireland: Beyond the Belfast Agreement* (Abingdon, Routledge, 2005, I ed.) p.98.

[60] Jeson Ingraham (1998), *The Irish Peace Process*. Available at: http://cain.ulst.ac.uk/events/peace/talks.htm#frame (Accessed: 22 March 2022).

[61] Donnelly C., McAuley C., Lundy L. (2020), *Managerialism and human rights in a post-conflict society: challenges for educational leaders in Northern Ireland*, School Leadership & Management, DOI: 10.1080/13632434.2020.1780423, p.4.

After giving an overview of the context underlying the agreement, as well as the motivations, fears and expectations attached to it on both sides, it is now time to go into the details of the provisions contained in the Good Friday Agreement. With the words of Christopher McCrudden, it was "both a peace agreement, and a blueprint for a wide range of future political arrangements. It is complex and multi-faceted and, clearly, some parts of the Agreement have worked better than others."[62]. With regard to the dimension of the peace agreement it proved to be reasonably successful, since it has put an end to the 30-years sectarian conflict known as the Troubles. It must not be omitted that terrorist attacks by paramilitary groups have also taken place after the Belfast agreement. But, compared to frequency of the previous period they can be considered sporadic[63], and nothing like the estimated 3700 victims and 40-50.000 injured during the Troubles[64]. The interpretation on the origin and meaning of the peace process is not univocal, both across and within the two sides. The Belfast Agreement was considered by some groups as a defeat, a complete surrender to the opponents' requests. This is the case of unionist hardliners, depicting it as the victory of IRA and a major step forward towards the unification of Ireland: in their opinion, Westminster institutions were showing their willingness of giving up their control over Northern Ireland in the mid/long term. On the other side, the most inflexible wing of the IRA was accusing nationalists of having betrayed the catholic population and given up the project for a united Ireland.

But, in order to attain peace, a constitutional arrangement that could receive the support of both nationalist and unionist representatives in the assembly had to be found, and "[P]ower sharing, with some kind of Irish dimension, was always the most likely".[65] The problem was then how to achieve this support. A solution was found with a multi-layered agreement that "intended to transform three interlocking sets of relationships: between the island of Ireland and Britain, between Northern Ireland and the Republic of

[62] McCrudden C. (2018). Twenty years on from the Good Friday Agreement. Available at: https://www.thebritishacademy.ac.uk/blog/twenty-years-good-friday-agreement/ (Accessed: 23 March 2022).
[63] Nolan P. (2018), The *cruel peace: killings in Northern Ireland since the Good Friday Agreement*. Available at: https://www.thedetail.tv/articles/the-cruel-peace-killings-in-northern-ireland-since-the-good-friday-agreement (Accessed: 25 March 2022).
[64] Fay et al. (1999). Mentioned in Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5.
[65] Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5.

Ireland, and between the communities in Northern Ireland."[66] These were identified as the three strands of the agreement.

> "Under Strand One, a power-sharing Executive with devolved powers over specified areas was to be formed, following Assembly elections by PR-STV[67]. Key decisions would be taken either by parallel consent — a majority of all members and of unionist and nationalist blocs within the Assembly, or by a weighted majority (60 per cent of all members present, including at least 40 per cent of nationalists and of unionists)."[68]

The parties of the negotiation affirmed in the introduction to the text of the Agreement their commitment to: "recognise the legitimacy of whatever choice is freely exercised by a majority of the population of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland"[69]; guarantee that there would be no outside interference in the decision-making process by the Irish people regarding the future of the island; and to reaffirm that, whatever choice the Northern Irish population had made , the power of the sovereign government would have been exercised "on behalf of all the people in the diversity of their identities and traditions"[70] and with a just and equal treatment for both communities. Considering it as a word encompassing different meanings, "«Democracy» in Northern Ireland is the form of democracy instantiated in the Agreement, and that is a power-sharing democracy. This means that both communities have a guaranteed place in government.

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[66] McCrudden C. (2018). Twenty years on from the Good Friday Agreement. Available at: https://www.thebritishacademy.ac.uk/blog/twenty-years-good-friday-agreement/ (Accessed: 23 March 2022).

[67] Proportional representation by the single transferable vote. With preference vote in multi-member colleges, instead of an absolute majority, it is sufficient to obtain a certain share (determined by the Droop quotient) of votes. This mechanism provides for the redistribution of any surplus votes obtained by the elected candidates; the purpose of this redistribution is to favour the candidates who are positioned as second in the winner's constituency and thus to balance the electoral result. Therefore, it guarantees a significant role to the minority represented by the second candidate and moderates the distance between the parties. Also, since voters may rank order all of the candidates listed on the ballot paper, voters are offered a choice of candidate between parties, within parties, and without regard to party. Consequently, there is both inter-party and intra-party electoral competition.

[68] Tannam, E. (2001). *Explaining the Good Friday Agreement: A Learning Process. Government and Opposition*, 36(4), 493–518. http://www.jstor.org/stable/44482961, p.505.

[69] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[70] *Ibid.*

Both «sides» have a veto. Differing identities and aspirations are recognised and respected; no one wins, and no one loses".[71] Power-sharing and the newly established Assembly were the core of the historic compromise that gave birth to the new democratic scheme. And indeed, the Agreement provided for an assembly of one hundred and eight members, elected according to the method of proportional representation with the method of Single Transferable Vote.

Besides officially establishing the new Northern Ireland Assembly and designating its legislative powers, the Northern Ireland Act also emphasised the essential principles of the exercise of that legislative power: specifically, power-sharing and equality. These acts, issued following the meeting of the *Privy Council* and personally approved by the Crown, fall into two categories. Some, such as those transferring functions between Ministers of the Crown, are produced using powers conferred by Acts of Parliament and are therefore defined as *statutory*; others, such as those appointing new officials to the administrative body of the state, fall within the prerogatives of the sovereign and called *prerogatives*. Although formally approved by the sovereign himself, the Orders are supervised in their substance by the government. The requirement for the newly elected representatives to declare themselves *unionist*, *nationalist* or *other* reflects the need to ensure, through intercommunal voting (which could take the form of parallel consent or weighted majority), that the most important decisions are shared and supported by a large majority and no longer confined to the old sectarian logic. As a result of the consociationalist scheme put in place to ensure full and equal political participation, in addition to the consequences arising from the categorisation between *transferred/ excepted/ reserved* matters, the Assembly is bound by clear constitutional limits. Under the above distinction, the Northern Irish legislative body is not only free to legislate in the areas whose powers have been transferred, albeit subject to the reaffirmed supremacy of the Westminster Parliament, but, with the consent of the Secretary of State, may also do so in reserved matters. In order to be considered as valid, such acts must comply with a number of limits ranging from non-extra-territoriality, respect for powers established through statute, as well as different religious beliefs and political opinions.

[71] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

As foreseen by article fourteen of the first section, the executive authority (competent for transferred matters[72]) was to be composed of a Prime Minister and his Deputy, both elected by the Assembly with inter-community vote, and by a Minister plus a deputy for each department "allocated proportionally, using the d'Hont system"[73] with full executive authority in the specific areas of competence. A series of safeguards were designed to ensure that all sections of both communities were protected and able to "participate and work together successfully in the operation of these institutions."[74] Among the other measures implemented within the first strand, the following ones play a pivotal role. The creation of the Northern Ireland Equality Commission, charged with promoting equal opportunities and equal dignity between the two communities and dealing with any complaints from citizens about the performance of public bodies, extended the principle of power-sharing not only to the political arena, but also to the administrative apparatus, ensuring that equal representation and non-discrimination applied to all public authorities, as set out in Section 75 of the Northern Ireland Act. Of the same importance was the entry into force, and consequent inviolability, of the *European Convention on Human Rights* (ECHR) and any Bill of Rights for Northern Ireland that incorporated it. For all these purposes, the Agreement intervened by establishing the *Northern Ireland Human Rights Commission*, to monitor government and public authorities and make sure they respect and fulfil human rights regulations. Its task, in practical terms, was to ensure that the legislation produced by the Westminster government on the subject would define rights additional to those set out in general terms in the European Convention, so as to adapt national legislation to the particular circumstances of Northern Ireland. Also, in the direction of including citizens in the new democratic processes, the Agreement provided for the creation of the *Civic Forum*. This consultative institution, made up of sixty members drawn from various sectors and aimed at broadening the range of participants in the political arena, represented the application of the idea of deliberative democracy[75].

[72] The Westminster government decided to retain power in areas such as security, taxation, foreign and European policy, under its exclusive jurisdiction. Therefore, the position of the Secretary of State for Northern Ireland was preserved within the London cabinet.

[73] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[74] *Ibid.*

[75] Deliberative democracy affirms the need to justify decisions made by citizens and their representatives. In a democracy, leaders are expected to give reasons for their decisions, and respond to the reasons that citizens give in return. Its first and most important characteristic, is its reason-giving requirement.

Strand Two deals with a North-South dimension and is aimed at the establishment of mechanisms for greater cooperation between the Republic of Ireland and Northern Ireland. This governmental activity was composed of a *North-South Ministerial Council*, together with cross-border implementation bodies for specific issues, and an additional arrangement for agreed cooperation between bodies in charge of designated functions in each jurisdiction.[76] To this end, the North-South Ministerial Council was established "to develop consultation, co-operation and action within the island of Ireland - including through implementation on an all-island and cross-border basis - on matters of mutual interest within the competence of the Administrations, North and South."[77] A total of twelve areas for co-operation were identified. For six of these areas (namely: transport; agriculture; education; environment; health; tourism) "common policies and approaches are agreed in the North-South Ministerial Council but implemented separately in each jurisdiction".[78] Members of the Council are Northern Ireland's First and Deputy-First Minister, the Irish Taoiseach as well as Irish and Northern Irish ministers. For the remaining six areas, co-operation is not only commonly agreed but also implemented through North-South implementation bodies: Waterways Ireland; Trade and Business Development; Special European Union Programmes Body (SEUPB); Language Body; Foyle, Carlingford and Irish Lights Commission; Food Safety Promotion Board. The main reason why the North-South Council and its implementation bodies were brought into existence by British-Irish legislation was the "attempt to «split the difference» between nationalists desiring the Council to be subject to Westminster and Oireachtas legislation and unionists wanting legislative underpinning from the new Assembly and the Dáil."[79] Furthermore, the Agreement foresaw the chance of extending the co-operation to additional areas, prior consent of the Council and with the approval of both Stormont and Dublin. With respect to the dimension of human rights protection, a

[76] Doyle O., Kenny D., McCrudden C. *The Constitutional Politics of a United Ireland.* The Brexit Challenge for
Ireland and the United Kingdom: Constitutions under Pressure (Cambridge University Press, 2021). Available at: https://ssrn.com/abstract=3684386 (Accessed: 6 October 2022).
[77] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[78] North South Ministerial Council (2022). Available at: https://www.northsouthministerialcouncil.org/ (Accessed: 18 April 2022).
[79] Brendan O'Leary, *The Nature of the Agreement*. Mentioned in Tannam, E. (2001). Explaining the Good Friday Agreement: A Learning Process. Government and Opposition, 36(4), 493–518. http://www.jstor.org/stable/44482961, p.506.

provision established that the rights "protected in Ireland (including socioeconomic rights, such as labour and employment rights) will be equivalent to those in Northern Ireland, that Ireland would incorporate the ECHR into Irish law, that there would be a joint committee of the Northern Ireland and Irish human rights commissions, and that an all-Ireland Charter of Rights would be produced."[80]

To complete the new scheme, Strand Three dealt with the dimension of British-Irish relations. A new forum was established for this purpose, under the name of *British-Irish Council* (BIC). It comprises representatives from the Irish Government, UK Government, Scottish Government, Northern Ireland Executive, Welsh Government, Isle of Man Government, Government of Jersey and Government of Guernsey, and is aimed to "promote the harmonious and mutually beneficial development of all relations among the populations of these islands."[81] Strongly advocated by unionists, which considered strengthening ties with the Union a fundamental counterweight to the permanent collaboration relationships established through the Ministerial Council, the areas identified for the work of this body "could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues."[82] A new *British–Irish Intergovernmental Conference* was also created to replace and incorporate both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Anglo-Irish Agreement.

Regarding the disarmament of paramilitary groups, the Agreement reaffirmed the willingness of the participants to ensure that this process would be completed within two years of the approval of the referenda.; the parties also recognized the authority of the *Independent International Commission on Decommissioning*, engaged in the dismantling of illegal arsenals, and confirmed their willingness to continue constructive collaboration with it. As for political prisoners, both governments undertook to develop mechanisms that favoured their release. Given that those who fell into this category were to be released within two years of the start of the release process, two conditions were established: the first concerned the seriousness of the offense for which the defendant had been convicted and the consequent need to defend the community; the second, instead, specified that

[80] McCrudden C (2017). *The Belfast Good-Friday Agreement, Brexit, and Rights.* Royal Academy – British Academy Brexit Briefing Paper Series, p.2.
[81] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[82] *Ibid.*

were not to benefit from such agreements "prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire."[83] In Annex B, the two governments undertook, among other things, to validate and implement the Agreement reached in Belfast as soon as possible. Reference was therefore made to the new British-Irish Agreement, aimed to replace the Anglo-Irish one drafted in 1985 and containing constitutional agreements as well as the commitment to support what was agreed by the participants in the negotiations. Above all, a special mention for the referenda that were to be held in both Northern Ireland and the Republic by May 22, 1998. Following the indications of the text of the Good Friday Agreement, the Government of Ireland Act of 1920 was repealed and the Northern Irish consultative referendum would delegate the final decision on the agreement reached in multi-party negotiations to the people. The two elements briefly mentioned above are, as a matter of fact, central to the GFA: I refer to the provision establishing referenda on constitutional matters in both Northern Ireland and the Republic of Ireland on the one hand, and the role of external actors in the success of the multi-party negotiations on the other.

Several constitutional matters were addressed in the Agreement, provided that they were to be approved by the majority of the population in both referenda, simultaneously held in Northern Ireland and Éire. Just in this case, the provisions included in the GFA would have come into effect.

With regard to Northern Ireland, it was established that voters had to decide on whether or not they supported the new Northern Ireland's constitutional status within the UK. Westminster Parliament consented to the binding obligation to recognise the possibility for a referendum "if in the future, the people of the island of Ireland exercise their right of self-determination […]to bring about a United Ireland"[84], as well as to introduce legislation to support that wish and to accordingly amend Northern Ireland's constitutional status. Additionally, "[T]he 1920 Government of Ireland Act would be repealed — to underpin the establishment of new North/South institutions and East/West

[83] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[84] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

institutions."[85] As concerns citizenship, it was decided that "the people of Northern Ireland may choose to have either Irish or British citizenship, or both. Those born in Northern Ireland (and their spouses and children) are thus entitled (in the case of spouses after a period of residence) to both UK and Irish passport."[86] And on May 22, 1998, 81% of the voting population of Northern Ireland approved the referendum and decided to support the outcome of the Belfast Agreement with the 71% of consensus: this undeniably expressed the popular desire, shared by voters beyond their community of belonging, to finally achieve pacification for their country and embark on a path towards prosperity.

As for the Republic of Ireland, the same commitment to provide for a referendum for a reunited Ireland in case the majority of the population required it, and in conjunction with the one in Northern Ireland, was part of the Agreement. A central provision for the accomplishment of the GFA, essential condition for northern Irish unionist, was the amendment of articles Two and Three of the Irish constitution, which consisted in the refusal to accept the 1920 Government of Ireland Act and the related division of the Island of Ireland, essentially claiming sovereignty over the territory of Northern Ireland. Article Two was to introduce "the entitlement and birth right of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation"[87], as well as to cherish the Irish nation's "special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."[88] Article Three, to be considered in conjunction with the constitutional reform that occurred in the North, focussed instead on the mutated approach for the relationship within the two national entities in the island of Ireland, affirming the

> "will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by

[85] Brendan O'Leary, *The Nature of the Agreement*. Mentioned in Tannam, E. (2001). Explaining the Good Friday Agreement: A Learning Process. Government and Opposition, 36(4), 493–518. http://www.jstor.org/stable/44482961, p.507.
[86] McCrudden C (2017). *The Belfast Good-Friday Agreement, Brexit, and Rights*. Royal Academy – British Academy Brexit Briefing Paper Series.
[87] *Nineteenth Amendment of the Constitution Act 1998*, art.2. Government of Ireland. Available at: https://www.irishstatutebook.ie/eli/1998/ca/19/enacted/en/pdf (Accessed: 27 March 2022).
[88] *Ibid.*

peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island."[89]

The Irish constitution was also enriched in article twenty-nine by a specific subsection, introduced to give explicit consent and facilitate the implementation of the Agreement within its own jurisdiction. The support for these constitutional changes and the implementation of the Agreement was undisputable, with 94% of consensus. As affirmed by Marjorie Mowlam, at the time Secretary of State for Northern Ireland, in her speech on May 1 at the House of Commons, "[B]y these referendums, the people of Ireland, north and south, have voted overwhelmingly to say yes to the principle of consent; yes to using only peaceful means to resolve political disputes; yes to fairness and equality; and yes to building new relationships based on agreement, not coercion."[90] The picture is now complete as to how a united Ireland could emerge if, and only if, it received majority consent in both jurisdictions.

Peculiarities, strengths, and weaknesses

As already mentioned, the nature of the Good Friday Agreement is that of an international treaty. It was signed by Tony Blair and Marjorie Mowlam for the Government of the United Kingdom, Bertie Ahern and David Andrews for the government of the Republic of Ireland. It has a twofold dimension: one is the international agreement between the governments of Ireland and United Kingdom; the other and complementary one is a multi-party agreement between the political parties in Northern Ireland and the two governments. I have already explored how the involvement of Éire is a constitutive element of the Agreement, considering that the commitment to be bound by the British-Irish agreement as well as to amend articles Two and Three of its constitution are explicitly laid out in Annex B of the GFA. I believe it now worth acknowledging the prominent role other external actors played in reaching the agreement as well as supporting it in its implementation. Especially the US and the EU.

[89] *Nineteenth Amendment of the Constitution Act 1998*, art.2. Government of Ireland. Available at: https://www.irishstatutebook.ie/eli/1998/ca/19/enacted/en/pdf (Accessed: 27 March 2022).
[90] Mowlam M., Secretary of state for Northern Ireland (1998, June 1). *Statement on the Northern Ireland Referendum*, to the House of Commons. Available at: https://cain.ulster.ac.uk/events/peace/docs/mm1698.htm (Accessed: 27 March 2022).

The United States actively contributed to the start of the peace process. The presence of Irish immigrants in the US is historically relevant, and the Irish roots of the actual US President is an example of this. The migration started during the Eighteenth century, and around 40 million people claiming to have Irish ancestors in 1980. Bearing this in mind, the emergence of a small group of Irish-Americans with important political and corporate connections was instrumental in persuading the White House under Bill Clinton to get involved in Northern Ireland. Traditionally sympathetic to militant republicanism, many moderated their attitude and encouraged Irish republicans to consider the benefits of an eventual ceasefire and peace process. The US President, for whom the Northern Ireland affair was a low-risk foreign policy endeavour, declared in 1993 his willingness to act as a mediator between the parties. In the international body of the *Independent International Commission on Decommissioning,* created during the ceasefire of 1994, one of the three components of the commission was the U.S. ambassador Donald C. Johnson, substituted in 1999 by the U.S. Foreign Service officer Andrew D. Sens. But, unquestionably, the most important task on the U.S. side was performed by George Mitchell, Senator at the time. Sponsored by the U.S. administration and sent to Northern Ireland as peace broker, he was invited by the British and Irish governments to serve as Chairman of the peace-talks which led to the Good Friday Agreement on 10 April 1998. In the forum of principles negotiations that lasted two years, he devised the 6 so-called *Mitchell principles*[91], which bound the parties affiliated with paramilitaries organisations to use only democratic and peaceful methods for advancing their political objections. For these reasons, he is considered as the architect of the GFA.

As regards the European Union, its role was even more substantial and central to the implementation of the Agreement reached in Belfast. Broadening the perspective of the resolution to the conflict that came with the Belfast agreement is not just useful but also necessary, considering the significance that the common membership to the UE has had. Being both the UK and the Republic of Ireland members of the EU at the time of

[91] To democratic and exclusively peaceful means of resolving political issues; to the total disarmament of all paramilitary organisations; to agree that such disarmament must be verifiable to the satisfaction of an independent commission; to renounce for themselves, and to oppose any effort by others, to use force, or threaten to use force, to influence the course or the outcome of all-party negotiations; to agree to abide by the terms of any agreement reached in all-party negotiations and to resort to democratic and exclusively peaceful methods in trying to alter any aspect of that outcome with which they may disagree; and, to urge that "punishment" killings and beatings stop and to take effective steps to prevent such actions.

ratification of the Agreement (the former since 1973 and the latter since 1972), it goes without saying that they were both under the regulation established by the regime of the so-called *four freedoms* established by the Treaty of Rome: the freedom of movement for goods, services, capital and persons. This treaty, originally devised for the establishment of the European Economic Community, is now one of the pillars of the European Union. Thus, these four freedoms where of paramount importance in allowing movement of people, goods and favouring any kind of business across what previously was a hard border within the island. It undoubtedly favoured the movement of cross-border workers as well as business relations and public services. For instance, art. 5 of Strand Three included a specific reference to "approaches to EU issues" to be dealt in cooperation through the BIC, proving that the membership to EU provided a common ground where to work together in the same direction to bring legislation across the island in line with European standards. In connection with this, I would like to underline that as EU members, both UK and the Republic of Ireland where to respect and apply European legislation, in respect of the doctrine of supremacy of communitarian over domestic law. As a consequence, in those areas delegated by national states to European institutions, both states were necessarily legislating in same direction and unifying legislation within the island as a consequence. This is in addition to North-South cooperation, which provided for the creation of specialised bodies to harmonise legislation in other specific matters and facilitated the possibility for people born in Northern Ireland to choose British or Irish citizenship, or both if they wish. But the common membership goes beyond this and involves the judicial system: it is also to be considered that both governments were bound by the same conventions, charters and jurisdiction of supra-national courts for additional appeal. Accordingly, it can be said that "[C]ompeting British and Irish identities and aspirations were set in a wider, cosmopolitan, European context."[92]

Having said that, it is now time to try to answer a few questions that may arise at this point: how can be the Agreement ultimately be assessed? What is the state of implementation? And has it been a success so far?

For the first time in its history, despite keeping strong ties with both governments of Westminster and Dublin, Northern Ireland developed its own sphere of independence.

[92] McCrudden C. (2018). Twenty years on from the Good Friday Agreement. Available at: https://www.thebritishacademy.ac.uk/blog/twenty-years-good-friday-agreement/ (Accessed: 23 March 2022).

Furthermore, Northern Irish people had a third option other than identifying themselves as Irish or British, which would necessarily follow a scheme of opposition and refer to old grievances: it was now possible for them all to identify as Northern Irish. In this sense, a crucial element was the principle of consent, providing the chance to decide about the future of the country through the abovementioned referendum, to be held simultaneously in Éire and whose question would concern the assent or dissent to the unification of the island. In case of a positive result on both sides, the island would reunify after the partition that became official on May 3, 1921. Consolidating relations with Great Britain on the one side and the Republic of Ireland on the other, after years of Direct Rule from London and the historical refuse by Dublin institutions to recognise as legitimate the existence of the Northern Ireland devolved government, it is indisputable that this was the spark for the birth of a new concept of national sovereignty. The Belfast Agreement, and particularly a body such as the BIC, represents "a shift away from the tendency towards «oneness» and cultural homogeneity in traditional nationalism, and a repudiation, on a theoretical level at least, of outdated assertions of sovereignty"[93]. For the first time, the UK and the Republic of Ireland ceased to be rivals competing for dominance over Northern Ireland and started to cooperate in shared institutions instead. The strategical aim of supporting the community akin to them didn't magically disappear, but started being counterbalanced in a wider framework based on the precondition of working together towards the creation of a sustainable, non-violent, peaceful, and more cohesive society. It can be said that the GFA was an "ideological compromise between two or more ideologies: Irish nationalism and British unionism, compromise on both sides on absolutist conceptions of sovereignty."[94] The redefinition of the sovereignty principle, both internally and in the framework of Irish-British relations, also represented a rethinking of the object of policy-making for Northern Ireland.

But reaching the 1998 Agreement was not in itself a magic potion, the solution by which all the above-mentioned problems would vanish the next day and an idyllic society would magically appear. Such an attainment was a step in the right direction, that needed to be followed up by the next one: its implementation. And, indeed, the strategy of the

[93] G. Walker, *The Council of the Isles and the Northern Ireland Settlement*. Mentioned in Tannam, E. (2001). *Explaining the Good Friday Agreement: A Learning Process. Government and Opposition*, 36(4), 493–518. Available at: http://www.jstor.org/stable/44482961, p.510.
[94] Tannam, E. (2001). *Explaining the Good Friday Agreement: A Learning Process. Government and Opposition*, 36(4), 493–518. http://www.jstor.org/stable/44482961, p.513.

negotiation was that on the most critical matters of contention, those on which it would have been almost impossible to find a compromise, it would have been established just a general agreement and left to the future political class to discuss and decide over it. This approach has been both "an effective and moral way of dealing with the complex and difficult negotiations of the peace process."[95]. Part of the success of the peace process was therefore based on a deliberate but "constructive ambiguity"[96], due to the need for each of the parties to the negotiations to present the Agreement as a success to their voters. To do so, it was crucial to set aside that narrative of winners and losers that, until then, had made it impossible to achieve political stability and work together for a shared solution. And, in this perspective, the Belfast Agreement "was supposed to be a balanced settlement under which the political and cultural identity of everyone would be respected and protected."[97] What needed to be addressed were the reciprocal anxieties and expectations held by each side of the Northern Irish society: while nationalists where more prone to support the Agreement, but with a particular attention to the aspects of justice, equality and peace, unionists were particularly sceptical due to the anxiety related to the formation of new institutions, their trajectory overtime, and the effective decommissioning of IRA's arsenal of weapons.

Thus, the Irish and British governments together with the Northern Irish political parties, recognising the unique opportunity to end the conflict but also the impossibility of eliminating the deep rift within Northern Irish society overnight, saw in the Agreement the solid normative basis on which to begin building a society free of the sectarianism that had hitherto torn it apart. The elements of that cornerstone were made explicit in the commitment to human rights, equality and the use of democratic methods, all of which were to contribute to the formation of a constitutional law proper to a democracy. We can describe the technique adopted by politicians in trying to advance the peace process as a "pragmatic realist approach"[98]. Particularly, the Belfast Agreement was ambiguous with regard to key issues as decommissioning, the release of prisoners, the role of

[95] Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5. P.38.
[96] Aughey A., *The Politics of Northern Ireland: Beyond the Belfast Agreement* (Abingdon, Routledge, 2005, I ed.) p.97.
[97] *Ivi,* p.45.
[98] Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5.

paramilitaries holding executive positions, as well as the need for a reform of policing. Considering this strategy adopted on both sides by politicians from the perspective of political theory, "Burke argued that the ability to interpret the Agreement in such divergent ways was not, as many people thought, a source of weakness but rather its essential strength."[99]

If, one the one side, it is true that the implementation of the Agreement has been far from perfect, on the other is beyond doubt that it kept the promise of bringing peace and a sustainable constitutional framework. And in fact, the most striking result is that notwithstanding further acts of terrorism that followed and the vacancy of a government for extended periods of time in the past 24 years, the framework established at the time did stretch but not break. In my opinion, bearing in mind the flaws and the numerous aspects on which there is still much work to be done, this outcome is not to be underestimated considering the history of Northern Ireland between its foundation and 1998. Considering the years of British colonial rule on the island of Ireland, the history of Northern Ireland characterised by the dominance of Protestants over the Catholic community and the related discrimination at government level, the violence on both sides with the involvement of paramilitary groups, the intervention during the Troubles of the British Army which was responsible for deplorable actions against civilians, and the deployment of techniques violating human rights, the Good Friday Agreement can also be seen as a new beginning for the rule of law in Northern Ireland. Every single citizen played a part in this paradigm shift, representatives elaborating it and voters supporting it at the referendum and committed to share principles as well as responsibilities attached to it. It is not excessive to state what follows:

> "[T]he Agreement would become the foundation myth that told the story of how this new Northern Ireland had come about and explained the authoritative moral consensus in which its institutions were grounded. That myth would justify not only the political architecture of power-sharing but also its single passionate thought: that everyone was absolutely committed to democracy and the peaceful resolution of difference."[100]

[99] Burke 1999: 21. Mentioned in Arthur Aughey, The Politics of Northern Ireland: Beyond the Belfast Agreement (Abingdon, Routledge, 2005, I ed.) p.99.
[100] Arthur Aughey, *The Politics of Northern Ireland: Beyond the Belfast Agreement* (Abingdon, Routledge, 2005, I ed.) p.107.

It is undeniable how the Good Friday Agreement provided the first occasion for any interested actor to work together in the framework of shared institutions. The aim was to transform the nature of the political arena and society itself, both of which were marked by divisions and grudges on an ethnic basis that had hitherto made cooperation impossible. Up to that time, the province had been characterised by a unionist dominion over public institutions, the close connection between political parties and paramilitary groups, and the antagonism between the governments of Dublin and London over the history of the island and the consequences on the present.

The three different layers of dimension on which the Agreement was built aimed exactly at this, addressing rivalries and providing the basis for a shift through the establishment of a new pattern of productive relationships at all levels. Power-sharing and cross-consent in the internal dimension, a special regime of agreed rules and participated bodies both in the West-East and North-South dimensions, and the centrality given to human rights. This are all elements that made it possible for Northern Ireland to open an unprecedented phase of peace and economic growth.

Despite the complexity concerning the discontinuous functioning of the institutions, another positive outcome of the GFA was surely the heightened sense of security in Northern Ireland. In addition to improving the quality of life for residents, it favoured growth in tourism as well as the attraction of foreign capital investments. Different elements characterising the GFA such as the pacification, the centrality for the respect of human rights, the demilitarisation of the border within the island, the achievement of a new framework of inter-state collaboration and the creation of dedicated bodies, facilitated Northern Irish citizens and businesses to develop their lives and interests on both North/South and East/West direction as it had never been possible before. This was made possible by the common membership to the EU, as well as "partnership government and a complex set of interlocking relationships across the different islands."[101]

Two interdependent as well as imperative preconditions for the success of the Belfast agreement were a real and verifiable paramilitaries' decommissioning on the one side,

[101] UK in a changing Europe (2018). *Good Friday Agreement: why it matters in Brexit.* Available at: https://ukandeu.ac.uk/good-friday-agreement-why-it-matters-in-brexit/ (Accessed: 3 April 2022).

especially with regard to IRA, and the major reform of the RUC[102] on the other. The problem lay in the fact that both Republicans and Unionists competed over which should be the priority and that the parties did not trust each other too much. Nationalists wanted to put an end to the militarised and biased police force that during the period of the Troubles was repeatedly responsible of misconduct towards Catholics, while loyalists were concerned that the IRA could have threatened the government and held it in check with Sinn Féin entering the institutions.

With regard to the reform of the police force, the Belfast Agreement foresaw an *Indipendent Commission on Policing for Norhern Ireland*: chaired by Lord Patten of Barnes, and known as *Patten Commission*, its work resulted in 1999 in what was called the *Patten report*. As stated in its introduction, the approach adopted was "restorative, not retributive – restorative of the values of liberty, the rule of law and mutual respect, values that have sometimes been casualties of the years of violence"[103], while the final goal was "to help ensure that past tragedies are not repeated in the future."[104] The report explicitly made it a priority to place the knowledge and respect of human rights at the core of the new police service. A new oath was proposed[105] along with a new Code of Ethics that would integrate the European Convention on Human Rights and replace the already existing one, and a training on fundamental principles and standards of human rights was recommended in order to guarantee their full respect in the performance of duty by every police officer. The commission recommended "a comprehensive programme of action to focus policing in Northern Ireland on a human rights-based approach"[106]. Concerning the issues of accountability, a new Policing Board representative of both the legislative Assembly and the different fields of the society was conceived and established by the *Police Act (Northern Ireland) 2000*, to be representative of society, transparen,t and to be held to account. Composed of 19 political and independent members, the *Northern*

[102] Independent Commission on policing for Northern Ireland (1999). *A new beginning: policing in Northern Ireland*. Available at: https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf (Accessed 11 July 2022).
[103] *Ibid.*
[104] *Ibid.*
[105] "I hereby do solemnly and sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable, and that in so doing I will act with fairness, integrity, diligence and impartiality, uphold fundamental human rights and accord equal respect to all individuals and to their traditions and beliefs."
[106] Independent Commission on policing for Northern Ireland (1999). *A new beginning: policing in Northern Ireland*. Available at: https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf (Accessed 11 July 2022).

Ireland Policing Board (NIPB) is responsible to secure an effective and efficient public service, set priorities and targets for police performance, appoint or and dismiss the most senior police officers. It also performs the delicate task of monitoring the compliance of PSNI activity with the Human Rights Act 1998.[107]

But besides these relevant elements, the crucial one was the composition of the new police force, officially established in 2001 under the name of *Police Service of Northern Ireland*. Having noted that both parties concluded that a new police service representative of its society was needed, and having received "many submissions from all parts of the community arguing that there should be more Catholics/Nationalists and more women in the police"[108], while the RUC was instead "widely seen as overwhelmingly Protestant and male"[109], the commission agreed to the following solution: rebalancing the composition of the police force by "recruiting more Catholics/Nationalists than Protestants/Unionists over a period of years"[110]. The aim was to reach a 50:50 recruitment policy of Catholics and Protestants over a period of ten years.

The text of the GFA clearly stated that these measures had to be complemented by a reform of the criminal justice system so that it would be fair, impartial, as well as independent, and that "these arrangements should be based on principles of protection of human rights and professional integrity and should be unambiguously accepted and actively supported by the entire community."[111] Additionally, it foresaw a "structured co-operation between the criminal justice agencies on both parts of the island"[112] and that a review had to be conducted by a group of civil servants and experts independent of Government. This review of the criminal justice system for Northern Ireland, as established in the GFA[113], was to be conducted by the British Government by means of

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[107] Carr, Nicola (2017). *The Criminal justice system in Northern Ireland*. In: Criminology. Oxford University Press, Oxford, pp. 1-13. Available at: http://eprints.nottingham.ac.uk/45379/1/Carr%202017%20Criminal%20Justice%20System20in%20Northern%20Ireland.pdf (Accessed 11 July 2022).

[108] Independent Commission on policing for Northern Ireland (1999). *A new beginning: policing in Northern Ireland*. Available at: https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf (Accessed 11 July 2022).

[109] *Ibid.*

[110] *Ibid.*

[111] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[112] *Ibid.*

[113] The Government proposes to commence the review as soon as possible, consulting with the political parties and others, including non-governmental expert organisations. The review will be completed by Autumn 1999.

an independent element, and the consultation with the political parties. Such an independent body took the name of Review Group and consisted of civil servants and experts independent from the Government. As Marjorie Mowlam (at the time Secretary of State for Northern Ireland) recognised, this paper was the starting point of this consultative process, of an important debate which this paper was intended to stimulate.[114] The review began on 27 June 1998 with the participation of a small team of officials in representation of the Secretary of State for Northern Ireland, the Lord Chancellor and the Attorney General, all assisted by a number of independent assessors bringing objectivity and expertise in the criminal justice field.[115]

The fact that among the guiding principles and values some very basic ones were to be expressly mentioned, as for instance the respect for the rule of law, the insurance of a fair trial before, an independent and impartial tribunal, fairness to all regardless of their belief or belonging as well as the promotion of public confidence in the new criminal justice system, is explicatory of the system that was in place before. In order to be able to measure the performance of the new justice system and hold it into account, a set of specific objectives and key performance indicators were developed.

Since the Police (Northern Ireland) Act 1998 envisaged that targets for the police service would be published annually, the Review Group suggested that the performance against the objectives they outlined should have been concurrently measured, reported and published. This to support the opinion expressed in the Patten report that saw the reform of policing as inextricably linked with that of the criminal justice system, as a crucial conditio sine qua non for ensuring a lasting new framework as pictured by the GFA. An office independent of the police and aimed at investigating complaints made against the police itself was established under the aforementioned Act: it is the *Office of the Police Ombudsman for Northern Ireland* (OPONI), working to "ensure the effective operation and public legitimacy of the criminal justice system, a range of justice inspection and oversight bodies"[116]. Complementary to this, a *Prisoner Ombudsman for*

[114] Criminal Justice Review Group (1998). *Review of Criminal Justice in Northern Ireland. A Consultation Paper*. Available at: https://cain.ulster.ac.uk/issues/law/cjr/review98.pdf (Accessed: 12 July 2022).
[115] *Ibid.*
[116] Carr, Nicola (2017). *The Criminal justice system in Northern Ireland*. In: Criminology. Oxford University Press, Oxford, pp. 1-13. Available at: http://eprints.nottingham.ac.uk/45379/1/Carr%202017%20Criminal%20Justice%20System20in%20Northern%20Ireland.pdf (Accessed 11 July 2022).

Northern Ireland (PONI) was established in 2005. This body is appointed by the Minister for Justice and works independently from the prison service, to guarantee the respect of prisoners' rights and ensure no abuse is perpetrated against them.

For the sake of completeness, the devolution of criminal justice and policing from the British Government to Stormont institutions was expressed in the GFA. The British government, declaring to be "ready in principle [...] to devolve responsibility for policing and justice issues"[117], found a shared support by all parties and consequently pushed towards its realisation through the St. Andrews Agreement. After a renewed commitment to keep consultations open and work together to build the necessary community confidence in the new criminal justice system and police force, these two matters were transferred to the Northern Ireland Assembly with the signature of the 2010 Hillsborough Castle Agreement, when cross-community consent was finally achieved.[118]

Progress and challenges in the implementation process

Having outlined the measures in the Good Friday Agreement, it is now time to look at how the follow-up phase unfolded before turning to the latest developments arising from Brexit. As I often repeated so far, both sides were particularly wary towards becoming involved in the implementation process as they were in overseeing that the clauses most dear to them would be prioritised and respected. Put it simply, there was no unconditional trust in institutions, which were seen as controlled by the other side. This was also due to the fact that the Labour Government prioritised reaching a general agreement over defining every detail of it during the negotiations. For instance, as it has been argued, it "was «highly foreseeable» that the statements and actions of the Labour government during the campaign misled the people of Northern Ireland into believing that decommissioning would precede both prisoner releases and Sinn Féin sitting in government"[119]. As a demonstration of this approach, the British Prime Minister's assurances about the certainty of IRA decommissioning before any release of paramilitary

[117] *The Good Friday Agreement: Agreement reached in the multi-party negotiations (1998)*. Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[118] Institute for Government (2020). *Criminal justice and devolution*. Available at: https://www.instituteforgovernment.org.uk/explainers/criminal-justice-devolution (Accessed 12 July 2022).
[119] Armstrong C. I., Herbert D., Mustad J. E. (2019). *The legacy of the Good Friday Agreement*. Palgrave Macmillan, Cham, p.vi. Doi. https://doi.org/10.1007/978-3-319-91232-5. P.53.

prisoners and the consent for Sinn Féin to enter government were not actually made explicit in the text of the Agreement, as republicans would not have given their support if such clauses were included.

There was no fixed term to regulate the release of prisoners, but the text affirmed that it was up to both governments to "complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners"[120]. This means that, in reality, there was no clear-cut link between IRA decommissioning on the one side and the release of paramilitaries on the other, which unionists were strongly requesting instead. Such a release of those prisoners was authorised through a bill, the *Northern Ireland (Sentences) Bill*, promulgated two weeks after the referendum and that was meant to release those eligible in accordance with the provisions of this Act.[121] Eligibility, as outlined in the text of the act, was based on the respect of at least three of the four conditions identified in the cases of those imprisoned for a fixed term, all four of them for those convicted for life.[122] Particularly worth to be mentioned is the second one, affirming that "the prisoner is not a supporter of a specified organisation"[123], where the definition of specified organisation was that of an organisation which "(a)is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and (b)has not established or is not maintaining a complete and unequivocal ceasefire."[124]. The conditions could therefore be interpreted in a flexible way by Mowlam, so that decommissioning was not required before initiating the process of prisoner release. Additionally, Sinn Féin was admitted to government in December 1999, without any prior commitment towards decommissioning by IRA (it will begin on October 23, 2001) as promised by the Labour government instead. This focus, and I will end it here, is to give an example of the discretion in the interpretation of clauses and terms that was left in the

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[120] *The Good Friday Agreement: Agreement reached in the multi-party negotiations (1998).* Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[121] *Northern Ireland (Sentences) Act 1998, c.35*. Available at: https://www.legislation.gov.uk/ukpga/1998/35 (Accessed: 13 July 2022).

[122] 1) The sentence has to be passed in Northern Ireland for a qualifying offence, and was one of imprisonment for life or for a term of at least five years; 2) the prisoner was not to be not a supporter of a specified organisation; 3) if the prisoner were released immediately, he would not be likely to become a supporter of a specified organisation, or to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland; 4) if the prisoner were released immediately, he would not be a danger to the public

[123] *Northern Ireland (Sentences) Act 1998, c.35*. Available at: https://www.legislation.gov.uk/ukpga/1998/35 (Accessed: 13 July 2022).

[124] *Ibid.*

hands of policymakers in applying the GFA, in this case to the Secretary of State for Northern Ireland, Marjorie Mowlam. This certainly was an advantage in favouring the conclusion of the Agreement, but also a source of uncertainty and political wariness. In the new phase, centred on co-operation and the shared participation in the institutions, both sides were trying to work together within the newly established power sharing framework and with Westminster, but always being on guard not to let the counterpart achieve any advantage.

While, as we have already seen, the implementation phase was proceeding on aspects such as police and justice reform, as well as IRA decommissioning, the political climate was tense due to both disagreement within the parties and the ongoing threat represented paramilitary groups. The final blow to the devolved government was delivered by the crisis resulting from the so-called Stormontgate, a scandal flared up by the opening of investigation into an alleged spying network being run by the Provisional Irish Republican Army[125] in the parliamentary building of Stormont. Even though all charges were dropped in December 2005, because there was no evidence about this crime being committed, it caused the collapse of Stormont institutions and opened a long season of government vacancy.

The good intentions of both sides to resolve the issue, came to light with the St. Andrews Agreement of October 2006, which "focused on achieving full and effective operation of the political institutions"[126] and committed the British government to repeal the Northern Ireland Act 2000 that had suspended the devolved government in Northern Ireland. The Government confirmed its will to "continue to actively promote the advancement of human rights, equality and mutual respect"[127], particularly through the following actions: establishing a *Victims' Commissioner for Northern Ireland* in the immediate future; establishing a forum on a Bill of Rights and holding its first meeting in December 2006; providing the Northern Ireland Human Rights Commission with additional powers, including "the power to compel evidence, access places of detention

[125] A radical wing of the main IRA, it was composed of members strongly believing that violence and terrorism were necessary to pursue their goal, which was to free Ireland from the British.
[126] Northern Ireland Office (2006). *The St Andrews Agreement*. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf (Accessed: 13 July 2022).
[127] *Ibid.*

and rely on the Human Rights Act when bringing judicial proceedings in its own name"[128].

The significance of the multi-party talks consists in that the DUP finally accepted the restoration of the Northern Ireland Assembly and the principle of a shared government, while Sinn Féin recognised the powers given to the new Police Service of Northern Ireland and criminal justice system as foreseen in the GFA. Both emerged victorious from the agreement, benefiting from a further boost from the support they received in the following elections in March 2007, through which the predominance within their respective communities was confirmed. With the appointments of Paisley and McGuinness, relatively as Prime Minister and Deputy Prime Minister, the collaboration was definitively sanctioned.

But the solidity of the peace was challenged when, in March 2009, a police officer and two British soldiers were killed by republican dissidents. This meant that the threat of sectarian extremism could not be considered as completely dismissed. With Continuity and the Real IRA refusing to surrender on the republican side, the final surrender of the UVF in 2007 was followed by the birth of the Traditional Unionist Voice, a party born in the same year after the withdawal from the DUP of some of its members strongly opposed to the Belfast Agreement. After all, in the years between Good Friday and the St Andrews Agreements much had been done in relation to pacification and the division of powers in Northern Ireland. The recurrent political instability which caused the absence of the Government in Stormont in different timeframes during the past 24 years (2000 – 2001; 2002 – 2007; 2017 – 2020; May 5, 2022 – to present day), and the return to the regime of Home Rule from Westminster by taking direct control of the devolved institutions, seems to prove that although it was an illuminated and far-reaching solution, much still needs to be done in the implementation of the principles defined by the GFA. With a brief reference to the contemporary situation, which will be later discussed in detail, following a survey related to the implementation of the NI Protocol[129], Northern Irish citizens

[128] Northern Ireland Office (2006). *The St Andrews Agreement*. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf (Accessed: 13 July 2022)..

[129] University of Liverpool (2021). *The Ireland/Northern Ireland Protocol: Consensus or Conflict?*, Available at: https://www.liverpool.ac.uk/media/livacuk/humanitiesampsocialsciences/documents/The,Ireland-Northern,Ireland,Protocol,Consensus,or,Conflict,v3.pdf (Accessed: 14 July 2022).

express their concern for the political instability it can generate rather than for the practical consequences that the clauses contained therein can have in their lives.

And in fact, in Northern Ireland, that successful phase of pacification that led to the GFA was not followed by societal integration. As a result of this, the province today somehow retains the same old fracture within itself and can still be considered as a divided society in which different communities within its society differentiate themselves on a cultural and historical basis. The aim of the Good Friday Agreement was that of setting the different constitutional aspiration in the short term (even though, in the long-term perspective, a clause was included to provide for the option to hold a referendum about the possibility for Northern Ireland to leave the UK) and prioritise a new shared sense of national belonging. A practice that started since the foundation of Northern Ireland in 1921, became a pattern in the course of time to then be boosted during the Troubles: it consisted of the creation of homogeneous neighbourhoods and the complete spatial segregation of the two communities. And contrary to what one might think, this has not substantially changed after 1998. Indeed, the so-called *peacelines*[130], supposed to be temporary but now well set up, are still in place and considered as a security measure to avoid clashes of sectarian nature between the two communities. And even though this is hard to believe, citizens living under the shade of these walls keep feeling more secure with them still in place, and they see the removal as a potential cause for the renewal of sectarian violence. Hence, these physical barriers represent a clear symbol of the segregation along religious and national lines within society, a reminder of where people belong. It indicates how the social space of cities like Belfast, "is still deeply marked with a conflict that had urban consequences – so that «spatial governance continues to reflect territorial struggle»."[131]

The guiding principle for urban planning and restoration as established in the GFA is that of equity between the two communities, a change of course compared to the years of unionist dominion over public housing allocation and the provision of public services within the territory prior to 1998. Now, very rigorous procedures are in place to ensure

[130] Originally barricades deliberately constructed by the community itself with the aim of separating the communities of different religious and political types. They were later strengthened by government or army.
[131] Schar, A. (2016). *Adaptive urban governance in Northern Ireland: Belfast planning issues*, IGU Urban Commission Annual Conference, 9th-16th August 2015, University College Dublin, Ireland 64. Available at:https://www.researchgate.net/publication/328688474_Adaptive_urban_governance_in_Northern_Ireland_Belfast_planning_issues/stats (Accessed: 14 July 2022).

that "neither community is seen to be gaining an unfair advantage in terms of public policy and public spending"[132]. Urban planning can play a substantial role in the creation of an equal society and in definitively overcoming the legacy of the conflict, but urban governance needs to address the elephant in the room in the first place, to then be able to move on with new neutral policies. Dealing with the past means the recognition that urban planning was dominated by segregating the two communities as the easiest method to try and sweep the issue of paramilitary violence under the carpet. More than that, this area of governance became a tool for the unionist political representatives, as well as central Westminster institutions during the years of Direct Rule, to be used as a tool to create an advantage for a community that would in return guarantee electoral support. With the achievement of pacification, the objective became a sustainable improvement for urban policies free of sectarianism, but this will not happen if not by being paralleled with serious efforts in making society and politics more cohesive as well. And present times unfortunately show how far that still is.

I believe this is just one but revealing example of how the lack of a serious process of reconciliation with the past is one of the reasons explaining the persistence of the separation within Northern Irish society. A serious search for the truth linked to acts of violence, armed clashes, bipartisan terrorism, and human rights violations committed by the British army is needed in order to heal from the traumas of the past and create a new sense of trust towards the shared institutions on both communities. In addition to the initial amnesty for all paramilitaries who immediately turned themselves in by admitting their responsibilities, and after trying to avoid trials against them for two decades, the UK government has published in July 2021 a paper including "a series of measures to address the legacy of the past in Northern Ireland."[133] This proposed the introduction "a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to the divisive cycle of criminal investigations and prosecutions, which is not working for anyone and has kept Northern Ireland hamstrung by its past.[134] This, from the words of

[132] *Ibid.*
[133] Lewis B., Secretary of State for Northern Ireland (2021, July 14). *Addressing the Legacy of Northern Ireland's Past*, to the House of Commons. Available at: https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-brandon-lewis-mp-oral-statement-wednesday-14th-july-2021 (Accessed: 14 July 2020).
[134] Northern Ireland Office and The Rt Hon Brandon Lewis CBE MP (2021). *Addressing the Legacy of Northern Ireland's Past*. Available at:

the Secretary of State for Northern Ireland himself, would literally mean "the end of criminal prosecutions"[135] towards republican and unionist paramilitaries, as well as British soldiers and police officers suspected of having committed crimes at the time of the Troubles, including in the event of future new evidence. The Council of Europe Commissioner for Human Rights reacted to this announcement in a letter expressing her concern about the proposal, and pointing out that, if this proposal goes through, it will consist in a conflict with UK international obligations, in particular with the European convention on human rights.[136] As she said, the impunity that would result from this unconditional amnesty is not just disrespectful towards victims and their families, but also "deeply problematic from the perspective of access to justice and the rule of law"[137]. Not to be underestimated is the message that the government would send by applying this policy, since a substantial share of those cases of killings involve police officers and soldiers that were acting on behalf of Her Majesty institutions. This wicked approach would for sure not help neither in the process of truth recovery and reconciliation with the past, nor with regaining the trust of those sceptical citizens blaming the central institutions responsibility for never acknowledging their historical responsibility in the escalation of violence in Northern Ireland.

Worth being considered is also the lack, which persists to these days, of the Northern Ireland's Bill of Rights, intended to supplement the European Convention of Human Rights as envisaged by the Good Friday Agreement in art. 5 of the section on safeguards. This subject will be in-depth discussed in the next chapter, but still I consider it useful to keep this in mind as of now: Westminster not having delivering such a legislation represents a substantial delay in building a common and solid ground of shared rights, crucial for a post-conflict society historically divided on ethno-national lines such as Northern Ireland.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002140/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf (Accessed: 15 July 2022)

[135] Lewis B., Secretary of State for Northern Ireland (2021, July 14). *Addressing the Legacy of Northern Ireland's Past*, to the House of Commons. Available at: https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-brandon-lewis-mp-oral-statement-wednesday-14th-july-2021 (Accessed: 14 July 2020).

[136] Syal R. (2021). UK plan to end Troubles prosecutions 'could breach international law', *The Guardian,* 23 September. Available at: https://www.theguardian.com/uk-news/2021/sep/23/uk-plan-to-end-troubles-prosecutions-could-breach-international-law (Accessed: 20 July 2022).

[137] *Ibid.*

To definitively move forward and heal from the still open wounds, and to pursue the project of building a more just society, it will be necessary to seriously confront the past. And the British institutions must have a leading role in this. However, even though so many years have passed after the agreement that in 1998 put an end to the Anglo-Irish conflict, the British state has never admitted its responsibility for what happened and not yet acknowledged that, with its actions, it has fomented the hatred triggered by centuries of colonialism, causing the death of hundreds of innocent civilians. The resistance in this direction, which takes the form of obstructing investigations intended to shed light on the bloody episodes that marked the years of the Troubles and give a name to the perpetrators, or in hiding reports certifying the responsibilities of British rulers, are certainly not helping to mark a new beginning, a turning point that affirms that those divisions are now a feature of the past.

What must be avoided is the risk that old grievances and division, characterizing the darkest years of the country's history when violence and sectarianism pervaded all spheres of society, are handed down to the new generations. By managing to overcome the tensions caused by the fierce competition between the two communities, Northern Ireland could become an example of how post-conflict societies can be successful in becoming united around principles as the recognition and respect identity pluralism. Only mutual respect and recognition can ensure that what for several centuries were two separate communities at war with each other can instead become a united and culturally rich society.

The aim of this chapter was to outline the historical context and the constitutional framework created by the Good Friday Agreement, the complexity in finding a compromise, the difficulties and flaws encountered in the process of implementation. This will serve as the foundation for the next topic. In the hope of having been clear and comprehensive, with the next chapter it is my intention to shift the focus to the event that in recent years has shaken the balance within the UK and called into question the successes obtained and the balance established in Northern Ireland since 1998: Brexit.

CHAPTER 3:
THE IMPACT OF BREXIT ON NORTHERN IRELAND AND THE GOOD FRIDAY AGREEMENT

The shock caused by Brexit

Starting from 1998 and among all the difficulties outlined above, the path embarked, or at least that supposed to be embarked, was that towards a societal integration based on the principles of consent and interdependence.[138] But with Brexit this already complicated process is being further endangered. The constitutional question has come to the forefront again, and with it the old divisions and grievances are at risk of being revived. As it can be drawn from the previous chapter, the crucial principles upon which the Northern Ireland constitutional status was established by the Good Friday Agreement are the following: power sharing, cross-consent and sovereignty, meaning that it is up to its citizens to decide about the future of the province.

Having this in mind, and then confronting it with what happened due to the Brexit referendum, what stands out is that these founding principles were bluntly violated. And indeed, although in the occasion of the Brexit referendum the majority of Northern Ireland citizens has voted for the *remain* by 55.8%, to 44,2%[139], the aggregated UK majority has chosen instead to leave the European Union (51.9% for *leave* and 48.1% for *remain*). Northern Irish citizens are thus experiencing the consequences of a decision matured elsewhere, taken by a foreign majority. As professor Justin O. Frosini recalls, if we agree with the definition of the UK as a multinational state that the Supreme Court has given in *R (Miller) v Secretary of State for Exiting the European Union*, it would have been constitutionally appropriate to plan a double quorum for the Brexit referendum: one related to the majority of the electorate of the whole United Kingdom, and the other one to the majority of the nations that make up the United Kingdom. Not considering such an

[138] UK in a changing Europe (2018). *Good Friday Agreement: why it matters in Brexit.* Available at: https://ukandeu.ac.uk/good-friday-agreement-why-it-matters-in-brexit/ (Accessed: 3 April 2022).

[139] The Electoral Commission (2019). *Results and turnout at the EU referendum.* Available at: https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum (Accessed: 1 September 2022).

eventuality was a mistake that led to this situation of rupture of the devolution scheme, as initiated in 1998 by Blair's government.[140]

The conservative government has repeatedly shown disregard for the Sewel convention after 2016, although for the first time "all three devolved legislatures refused consent to the same piece of legislation"[141]. A violation of constitutional nature committed by the Government was also brought to light by Miller 1 case, in which the UK Supreme Court ruled that the government cannot trigger article 50 of the TEU without previous consent of the UK Parliament. Furthermore, Brexit has revived the polarisation among the Northern Irish society, with 66% of those who identify as unionists voting to leave the EU against only 12% of nationalists expressing the same preference. These numbers bring back a contrast along ethnic lines on a pivotal matter, which is a combination of three factors: the historical divisions within the two communities; the failure of politics during this two decades after the Good Friday Agreement trying to ease the old fracture and establish a new political competition based on cross-community matters which are of interest for all citizens, notwithstanding the community of belonging; the fact that such a decision about a constitutional modification did not respect Northern Ireland peculiarities and legal commitments established in the GFA. These and other matters will be analysed in this chapter.

If, on the one hand, it is true that the Sewel Convention doesn't represent a legal rule justiciable by the courts but a political convention, and that the UK parliament has the power to legislate on all matters for the whole UK instead, on the other it is undeniable that this instrument had been functioning with undisputable success before Brexit. And indeed, more than 230 Acts of Parliament have received the green light by devolved administrations through legislative consent motions since 1999, 400 overall. Among these, the consent to proceed has been rejected in only twenty occasions, the majority of which after the 2016 Brexit referendum. The government has repeatedly affirmed that the UK leaving the European Union is a unique process, not a normal one, and that above all it uniquely interests reserved matters, together with the fact that international relations

[140] Frosini J.O., *Dalla sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit* (Milano, Cedam, 2020), p. 84.
[141] Institute for Government (2020). *The Sewel Convention has been broken by Brexit – reform is now urgent*. Available at: https://www.instituteforgovernment.org.uk/blog/sewel-convention-has-been-broken-brexit-reform-now-urgent (Accessed: 17 February 2022).

have been assigned with exclusive competence to the UK government under the devolution statues. But what is usually not considered it that "[h]owever, much of the legislation needed to implement Brexit related to devolved matters and amends the powers of the devolved institutions."[142] And just looking at the Northern Ireland case, although similar examples can be mentioned both for the Welsh and the Scottish assemblies, "[m]any bills that would have required consent from Belfast were passed without consent during the collapse of power-sharing in Stormont from 2017 to 2020."[143] Additionally, Stormont had withheld consent to pass the *2020 EU Withdrawal Agreement Bill*: but it was ignored and the bill became Act just three days after. On the one side, it must be said that the principles of power-sharing and cross-consent only applied to devolved matters[144]**,** and it is correct that according to the devolution scheme international relations as well as international treaties are among the excepted matters[145]. It means that these matters are of exclusive competence of the central government, which can decide autonomously without requiring the consent of devolved administrations. But, on the other side, I believe these examples demonstrate how, still not having violated any rule having constitutional value, Westminster has clearly forced its hand on the nature of this political convention, and on the trust upon which it was based. Not to be underestimated, this also goes the opposite direction with respect to the perspective of progressively expanding devolution with a view to bring the decision-making process closer to the people. Particularly, considering the specificity characterising the Northern Irish context in the wake of the Good Friday Agreement, it is of capital importance that the central government and the devolved administration of Stormont closely work together. This is necessary to avoid any practice that would endanger the worthiness of the principles of cross-consent, power-sharing and the provision for the possibility of a future self-determination[146] which underlie the 1998 Agreement.

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[142] Institute for Government (2022). *Sewel Convention*. Available at: https://www.instituteforgovernment.org.uk/explainers/sewel-convention (Accessed: 1 September 2022).
[143] *Ibid.*
[144] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[145] Gov.UK (2019). *Devolution settlement: Northern Ireland*. Available at: https://www.gov.uk/guidance/devolution-settlement-northern-ireland (Accessed: 1 September 2022)
[146] Guelke A. (2019) *Northern Ireland, Brexit, and the Interpretation of Self-Determination, Nationalism and Ethnic Politics*, 25:4, 383-399, DOI: 10.1080/13537113.2019.1678307.

In the light of the above, I consider a reform of the Sewel convention to be necessary for the purpose of re-establishing a relationship of trust between the central government and the devolved administrations. It the "devolution settlements did not intend for the devolved administrations to be able to frustrate the UK government's exercise of reserved powers"[147], account must also be taken of how the citizens of the devolved provinces voted in the referendum, their negative views on the government policies implemented and their demand to be considered and heard in the process of drafting legislation in relation to leaving the EU. The central government should not underestimate that, while everything relating with international treaties is a reserved matter, all the decisions made at this level will necessarily have to be implemented in areas falling within the competence of devolved administrations: and this will require their consent.

Moreover, as Frosini points out, there is also a relevant constitutional issue raised by the Scottish government: matters of regional competence should revert to the devolved administrations once the Brexit process is over, and not be temporarily retained by Westminster, as is the central government's intention..[148] It can be argued that "the government could keep pushing legislation through regardless of the opinions of the devolved nations, but this is not a sustainable strategy, either politically or practically – the devolved administrations will also need to implement new trade deals in devolved areas."[149] Possible solutions in this perspective could be either to make "the Sewel convention legally enforceable or adding a stage to consider the views of the devolved administrations when Westminster passes legislation."[150]

Considering the conduct of the central government regarding Brexit, holding it to account to respect the national and international conventions and treaties could be a good idea. I refer to the choice made by Theresa May and David Davis (at the time respectively PM and Minister for Brexit) to invoke the power of Royal prerogative and embark on the path towards triggering article 50 of the TEU[151], with a view to leave the EU and bypass

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[147] Gov. UK (2020). *Letters to the Devolved Administrations on the EU (Withdrawal Agreement) Bill*. Available at: https://www.gov.uk/government/publications/letters-to-the-devolved-administrations-on-the-eu-withdrawal-agreement-bill (Accessed 2 September 2022).

[148] Frosini J.O., *Dalla sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit* (Milano, Cedam, 2020), p. 102.

[149] Institute for Government (2022). *Sewel Convention*. Available at: https://www.instituteforgovernment.org.uk/explainers/sewel-convention (Accessed: 1 September 2022).

[150] *Ibid.*

[151] "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

the Parliament of Westminster. As Frosini rightly points out, "the lack of a codified constitution makes everything more complicated and uncertain from a legal point of view, even though the most part of the doctrine believes that the process for leaving the European Union cannot be triggered without it being presented before Parliament."[152] And indeed, the one who shared this view and decided not to remain silent was lawyer Gina Miller, who together with other plaintiffs filed an action with the High Court of Judicial Review. With the ruling, considered as a "brief summary of British constitutional law"[153], the Court did not accept the argument put forward by the Government and affirms that, in compliance with the fundamental constitutional principle of the sovereignty of the Parliament, "the Government does not have power under the Crown's prerogative to give notice pursuant to article 50 for the UK to withdraw from the European Union."[154] Hence, in sentencing the need for a previous Act of Parliament to enact the procedure, "the Supreme Court began by confirming the well-established rule that prerogative powers cannot generally be used to change statute law or the common law, or to remove rights from individuals"[155]. Furthermore, very interesting to be noticed, is that the 2016 Brexit referendum was merely consultative, and that then the Government was not obligated to follow-up as it did. This is what the *House of Lords Select Committee on the Constitution* remarked on this matter:

> "[I]n our representative democracy, it is constitutionally appropriate that Parliament should take the decision to act following the referendum. This means that Parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU."[156]

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[152] Frosini J.O., *Dalla sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit* (Milano, Cedam, 2020), p. 88.
[153] *Ivi,* p. 89.
[154] *R (Miller) vs Secretary of State for Exiting the European Union* (2017), [2017] UKSC 5. Available at: https://www.supremecourt.uk/cases/uksc-2016-0196.html.
[155] [2017] UKSC 5. Mentioned in Anthony, G. (2018). *Brexit and the Common Law Constitution*. European Public Law, 24(4), 673-694. Available at: http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EURO2018039.
[156] House of Lords, Select Committee on the Constitution, *The invoking of Art.50,* Select Committee on the Constitution, 4th Report of Session. Mentioned in Frosini J.O., *Dalla sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit* (Milano, Cedam, 2020), p. 91.

Therefore, the policy chosen by the Tory Government completely lacked any constitutional ground and can be assimilated to that of other populist forces currently in government in other nations, coherent with the narrative of taking control back from the hands of the EU institutions.

Getting to the heart of the process aimed at reaching a withdrawal agreement with the European Union, it is precisely the specificities of the Northern Ireland situation which represented the crucial and most tangled aspect for the Tory government. The reasons are mainly two: the first relates with the fact that the removal of the physical border within the island of Ireland, one of the main achievements of the GFA, could not be questioned because the stakes would be too high; and the second being the key role that the unionist external support played in the Westminster parliament in keeping May's government alive. Frosini reminds that this external support, sanctioning the alliance between DUP and Tories, has aroused the concern of Sinn Féin's leader Gerry Adams. He noted the fact that this move has infringed the spirit of the Belfast agreement, undermining the role of the British government as a neutral arbiter responsible for the stability of the Stormont executive.[157] This is why it was necessary to address that specific aspect with a dedicated agreement, as part of the framework created with the Withdrawal Agreement, which is an international treaty agreed between the EU and the UK. As temporary solution the so-called *backstop* was designed to align the UK and the EU in a single custom territory, while Northern Ireland would instead keep abiding by European regulations. This complex option was meant to preserve two decades of peace on the island as well as that all-island economy that has developed after the removal of the hard border, elements which are indivisible and essential with a view to preventing a setback on the island. But this met with strong opposition from the DUP representatives in government, concerned that this scheme would have consequently separated them from the British mainland and substantially condemned Northern Ireland to the future unification with the Republic of Island.

With the failure of May's government in concluding a Brexit deal, Boris Johnson took over as Prime Minister. A new phase started for Brexit, under the slogan "Get Brexit done". Johnson's government attempted an unprecedented resort to a five-week

[157] Frosini J.O., *Dalla sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit* (Milano, Cedam, 2020), p. 48.

prorogation of Parliament, as a way to prevent the Parliament from having a debate about Brexit and thereby sanctioning a no-deal Brexit. This move was legally challenged and blocked by the Supreme Court, that judged it as an abuse of power by the Prime Minister. But before another controverse decision to dissolve the House of Commons and call for new elections, Johnson's government surprisingly found in October 2019 an agreement with the EU, which would define a new plan for Northern Ireland in relation with the UK leaving the EU Single Market and Customs Union: it went under the name of Northern *Ireland Protocol*. After this step, and the consolidation of Boris Johnson as the nation's leader in the early general election to be held on 12 December, the UK officially left the European Union on 31 January 2020, beginning a transition period that was supposed to be one year and instead lasted until 1 May 2020. During this period, the UK continued to remain subject to EU rules, as well as a member of the single market and customs union, while negotiations continued to reach a trade agreement between the two sides.

The Protocol substituted the backstop by creating what can be considered an actual border in the Irish Sea. This solution establishes customs controls and duties on goods travelling from Great Britain to Northern Ireland, with the latter being reimbursed in case the product is intended to remain in Northern Ireland. In practical terms, it requires for goods leaving Great Britain for Northern Ireland to have customs declarations; additionally, a specific provision for food and animals subjects this category of products to health checks. This means that, to avoid a hard border within the island of Ireland, Northern Ireland is assigned a special status in the United Kingdom and remains part of the European Union trading area: subject to a joint authority between the UK and the EU for certain regulatory provisions (i.e. those agri-food and animal products already mentioned) and with regard to customs infrastructures; still nominally and fiscally in the United Kingdom but bound to apply the European customs codes and comply with the standards on goods dictated by the European common market, i.e. with regard to EU's sanitary and phyto-sanitary (SPS) regulations. Certain categories of products transiting from Great Britain to Northern Ireland are therefore to be subjected to European import procedures upon their arrival in Northern Irish ports. Later on, a Trade and Co-operation Agreement was defined with the purpose of reducing tariffs applicable on goods traded between the UK and the EU. To be kept in mind is that because it has been a member of the EU and its customs union, Great Britain has also been following the same regulations,

even though there is now a strong political resistance to the formalization of an alignment as it would be seen as a derogation from the net detachment desired with Brexit.

As for the backstop, the DUP considered from the very beginning the Protocol as a betrayal by Westminster, as a way of cutting Northern Ireland off the British customs union and abandoning the province to be incorporated to the Irish Republic in the foreseeable future. Hence, the Protocol was immediately opposed and object of requests for abolition by unionists and most radical Brexiters. Analysing the subject from an economic point of view, there are two opposing views. On the one hand there are those arguing that the unique position that Northern Ireland enjoys thanks to it, consisting it of unfettered access to both the European and British markets, is an opportunity to relaunch itself economically and politically, as well as an advantage over British exporters. But on the other hand, the inevitable increase in bureaucratic procedures is considered by some as an insurmountable obstacle for GB-NI trade and, consequentially, as a breach of UK unity.

As anticipated, there was strong opposition from the Unionist side to both solutions agreed for Northern Ireland during the negotiations between London and Brussels. Supporters of a hard Brexit, they urged Westminster to scrap the Protocol from day one after its ratification. In their opposition they found fertile ground in the central government, whose representatives shortly afterwards began to criticise the same agreement that Prime Minister Boris Johnson had just signed, claiming that it was causing far greater damage than expected. For its part, the UK government refuses to keep implementing most of the clauses of the NI Protocol which they negotiated and signed with the EU and wants it to be amended, facing the strong opposition by EU institutions. Westminster has instead made explicit that it relies on the possibility offered by article 16 of the Protocol. This article, which can be considered as an emergency clause, reads as follows:

> "If the application of this Protocol leads to serious economic, societal, or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their

scope and duration to what is strictly necessary in order to remedy the situation."[158]

Article 16 of the Northern Ireland Protocol refers to Annex 7 for provisions regulating the potential safeguards measures outlined therein. The Annex establishes that the part taking such unilateral measures shall notify the other in order to "immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution"[159]. The Protocol provided for the creation of a Joint Committee "to resolve a dispute between the EU and the United Kingdom about the interpretation and application of the withdrawal agreement."[160] Extensive provisions have been made for enforcement and dispute resolution, so that the parties have recourse in the event of disputes. And the Joint Committee, made up of representatives appointed by the UK and EU, is at the apex of this system. With the sole exception of "exceptional circumstances requiring immediate action"[161] which allow parties to "apply forthwith the protective measures strictly necessary to remedy the situation"[162], safeguard measures may not be taken "until one month has elapsed after the date of notification under point 1, unless the consultation procedure under point 2 has been concluded before the expiration of the state limit."[163]. But generally, eventual safeguard measures are meant to "be the subject of consultations in the Joint Committee every three months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application."[164]. In view of the explicit admissions by UK government representatives of a willingness to openly break international law to protect what they identify as the national interest, the use of such clauses could be dangerous if what is being suspended concerns the very core of the NI Protocol governing Northern Ireland's position as part of the EU and UK markets.

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[158] *The Protocol on Ireland and Northern Ireland* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf (Accessed: 2 August 2022).
[159] *Ibid.*
[160] *The Protocol on Ireland and Northern Ireland* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf (Accessed: 2 August 2022).
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*

Representatives of the Westminster government have repeatedly threatened to trigger the aforementioned article 16, justifying it with the fact that the conditions allowing for its use have been met, due to the trade diversion they claim the Protocol represents for the UK internal market. In the meantime, even though this has not been converted into law yet, the UK has unilaterally decided to introduce a bill with a view to stop implementing some of the checks in the Irish sea border for those products exclusively destined to Northern Ireland. Being this in breach of what was agreed in the NI Protocol, the EU has recently cast seven legal actions as a response, which the UK government was supposed to address before September 15th but were suspended as a result of the death of the monarch, Queen Elizabeth II.

Legal actions can range from retaliatory tariffs to infringement proceedings and dispute resolution mechanisms. Particularly, these last two mechanisms are provided with procedures and bodies in charge of adjudicating the issues that are presented before them by one of the parties. In the case of infringement procedures, which can be opened by the European Commission if the UK fails to implement EU law as agreed in the NI Protocol, the designated body is the *European Court of Justice* (ECJ). The dispute resolution mechanism, to be invoked in the event of disagreement between the parties on the interpretation and application of the Termination Agreement, consists instead in the possibility of invoking the Permanent Court of Arbitration, within which an arbitration panel will be set up and whose members will be chosen from a list already deposited by both parties. The EU has already appealed to both instruments as a reaction to UK taking unilateral measures and could do it again if it considers that the UK has improperly invoked Article 16 to take unilateral measures that bypass aspects of the agreement.[165]

The UK government seems to be intent on discarding all barriers on products travelling from Great Britain to Northern Ireland. Truss and the DUP consider the clauses of the Protocol as an unacceptable interference in the UK's domestic market.[166] The latter claimed "it has eroded their ties to the UK and the stand-off has led to political paralysis

[165] Institute for Government (2021). *Disputes under the Withdrawal Agreement*. Available at: https://www.instituteforgovernment.org.uk/explainers/disputes-withdrawal-agreement (Accessed: 1 September 2022).

[166] Bounds A., Fleming S., Jenkins P. (2022). Brussels offers to reduce Northern Ireland border checks, *Financial Times*, 12 September. Available at https://www.ft.com/content/6840d753-6675-4c13-b222-ade281840fa6 (Accessed: 15 September 2022).

in the region."[167] Both allies expect the EU to fully accommodate their requests for a resolution to be reached, meaning the EU has to "accept, and respect, the integrity of the UK, its internal market and Northern Ireland's place within it."[168] Just to give another example of the stance adopted by the UK, Truss stated "she was willing to negotiate but only if the EU gave in to all UK demands."[169] This attitude could result in a trade war, with the EU imposing tariffs on the import of goods from the UK to its members and increase the level of checks to every cargo at its customs. It would result in prohibitively expensive costs and long waiting times. On behalf of the EU, the European Commission Vice-President and Brexit chief negotiator Mr. Maroš Šefčovič expressed the recent willingness to avoid this by reconsidering the amount of physical checks needed at the Irish Sea border, drastically reducing them as to make the custom border nearly invisible. He explained that "physical checks would be made only «when there is a reasonable suspicion of illegal trade smuggling, illegal drugs, dangerous toys or poisoned food»"[170]. This would require the EU to have access to real-time data on goods arriving at Northern Ireland ports, so that suspicious load could be inspected and, when appropriate, stopped. He claims that this way a fair balance would be found between "UK's demand for «no checks» and the EU's offer of «minimum checks, done in an invisible manner»."[171] This further effort to find a compromise came from the EU after UK repeated claims to be ready to scrap the Protocol and all the checks and limitations established by clauses contained therein.

It by no means could be a reasonable solution to end a long-term struggle over this matter, avoiding the legal battle that would arise from the UK triggering article 16 and being brought to court by the EU. But, as will be explained shortly, Westminster's expectations go far beyond that, to the point of demanding the complete removal of any control over goods destined exclusively for the Northern Irish market. The aim is also to

[167] Bounds A., Fleming S., Jenkins P. (2022). Brussels offers to reduce Northern Ireland border checks, *Financial Times*, 12 September. Available at https://www.ft.com/content/6840d753-6675-4c13-b222-ade281840fa6 (Accessed: 15 September 2022).
[168] *Ibid.*
[169] *Ibid.*
[170] O'Carroll L. (2022). EU offers to reduce Northern Ireland border checks to 'a couple of lorries a day', *The Guardian*, 12 September. Available at: https://www.theguardian.com/world/2022/sep/12/eu-reduce-northern-ireland-border-checks-brexit-uk (Accessed: 15 September).
[171] O'Carroll L. (2022). EU offers to reduce Northern Ireland border checks to 'a couple of lorries a day', *The Guardian*, 12 September. Available at: https://www.theguardian.com/world/2022/sep/12/eu-reduce-northern-ireland-border-checks-brexit-uk (Accessed: 15 September).

obtain the removal of the European Court of Justice from its role, which cannot be achieved through Article 16.

Worth to be mentioned is the challenge that some representatives of unionist parties launched against the Northern Ireland Protocol, to try to scrap it and end checks for goods entering Northern Ireland from Great Britain. This was based on the claim that it should have been declared null and void because it violates the 1800 Acts of Union, cornerstones for the creation of the United Kingdom of Great Britain and Ireland. The court explains its fundamental reasoning right from the introduction to the judgment where, after mentioning all the pieces of legislation composing the "jigsaw"[172] of acts related with the application of the Protocol, states as follows:

> "the withdrawal of the UK from the EU and the future arrangements for the relationship between the UK and EU have been effected by a number of overlapping, inter-related, complex and detailed treaties and statutes. There are no self-contained provisions by which the process can be analysed."[173]

Reaffirming the centrality of the doctrine of parliamentary sovereignty in the constitutional law of the United Kingdom, the Court emphasises that if the Act of Union is to be regarded as a constitutional statute, the same criteria must be applied to the Withdrawal Agreement and the implementing acts that Westminster has passed in recent years, including those relating to the Northern Ireland Protocol.. And with the words of the Court itself, "based on fundamental principles, the most recent constitutional statute is to be preferred to the older one."[174] The Court added that in no legal precedent has the mentioned Act of Union been used as a tool to nullify a subsequent Act of Parliament, also referring to Earl of Antrim and others [1967] 1 AC 691 as a legal precedent when a court sanction that "the Union with Ireland Act 1800, ceased to be effective on the passing of the Irish Free State (Agreement) Act 1922."[175] For these and other reasons, this attempt to obtain a judicial review proceeding was rejected by the court.

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[172] Allister (James Hugh) et al's Application and In the matter of the Protocol NI [2021] NIQB 64. Available at: https://www.judiciaryni.uk/sites/judiciary/files/decisions/Allister%20%28James%20Hugh%29%20et%20al%E2%80%99s%20Application%20AND%20In%20the%20matter%20of%20the%20Protocol%20NI.pdf (Accessed: 15 September 2022).
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid.*

Without previously even resorting to article 16, on the 13 of June the *Northern Ireland Protocol Bill* was instead introduced in Parliament, and if enacted it will provide a legal ground for the UK government to ignore the Northern Ireland Protocol. The provisions of this Bill enable ministers by means of an executive fiat to ignore parts of the NI Protocol as well as parts of the Withdrawal Agreement, breaching these two international treaties that the government itself has intentionally ratified. Moreover, it includes the proposal of adopting a so-called *honesty box* approach[176] for goods aimed at remaining in Northern Ireland while removing the oversight role of the European Court of Justice as arbiter of the deal in the event of trade-related disputes. It is article 12 paragraph 4 giving the Court the power to supervise the implementation of the law deriving from EU treaties to Northern Ireland, meaning that an infringement procedure would be judge by this body. Westminster proposes instead a twofold reform to the current framework: on the one hand, replacing the ECJ with an independent international arbitration body; on the other, separating areas of jurisdiction so that the European Court of Justice would retain its role in matters specific to EU law, while the UK courts would manage the implementation of the Protocol and deal with internal Northern Ireland matters. Šefčovič reaction was not long in coming, severe and firm. He affirmed that the Bill at issue is illegal, since it violates article 5 of the Withdrawal Agreement which provides for the principle of good faith. Additionally, he clarified that it is out of question to remove the ECJ from that role, since it is the only court to deal with the EU single market rules which apply to Northern Ireland.[177]

But if this bill is converted into law the consequences would be even more serious. Senior academics and independent members of the House of Lords have said this Bill is a clear breach of international law. A senior Conservative member of parliament affirmed that a "[b]reach of the NI Protocol would be economically very damaging, politically foolhardy, and almost certainly illegal."[178] The government believes to be acting within

[176] Foster P. (2022). Truss's 'cakeist' approach to Northern Ireland, *Financial Times*, 15 September. Available at: https://www.ft.com/content/723edb6f-32f8-4c8c-8f07-1571695211a1 (Accessed: 17 September 2022).
[177] Young D. (2022). Removing ECJ oversight role in protocol 'out of the question', EU warns, *The Independent, 15* June. Available at: https://www.independent.co.uk/news/uk/boris-johnson-northern-ireland-government-liz-truss-bill-b2101656.html (Accessed: 17 September 2022).
[178] Brawn. S. (2022). Jesse Norman: Who is he and what did his no-confidence letter say? *The National,* 6 June. Available at: https://www.thenational.scot/news/20188943.jesse-norman-no-confidence-letter-say/ (Accessed: 18 September 2022).

international law and finds its legal justification in what if defined the doctrine of necessity. As affirmed in the position document, "[t]he doctrine of necessity provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions"[179], which is an argument that Brussels has already repeatedly rejected in the context of a potential resort to article 16. Westminster continues by recognising that "necessity can only exceptionally be invoked to lawfully justify non-performance of international obligations"[180], and then affirming that is the exceptionality of the current situation in Northern Ireland that makes this Bill necessary. But by reading article 16, it is quite clear how there is no case for necessity, and thus this Bill constitutes a breach of international law. Furthermore, the same document contains the following, and in my opinion false, assertion: "the UK has not contributed to the situation of necessity relied upon. The UK exercised its sovereign choice to leave the EU single market and customs union and the peril that has emerged was not inherent in the Protocol's provisions."[181] And indeed, the own government impact assessment performed by the HM Treasury and leaked, had already warned in 2019 that "[C]ustoms declarations and documentary and physical checks on W/E and E/W trade will be highly disruptive to the NI economy"[182]. This means that Johnson's government perfectly knew what the consequences could have been, and yet they agreed to the NI Protocol which they publicly presented as a great deal.

It is incorrect to simply say that the Protocol is not working and creating a damage to the economy of Northern Ireland. My assertion is proven by the fact that, except for the City of London, the growth of Northern Ireland's economy is outpacing that of the rest of the UK. According to the findings of the Office of National Statistics, Northern Ireland's GDP grew 1.4 percent between July and September 2021, the best result in the United Kingdom in the same period[183]. Accordingly, Ireland's Central Statistics Office

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[179] Foreign, Commonwealth & Development Office (2022). *Northern Ireland Protocol Bill: UK government legal position*. Available at: https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position.
[180] *Ibid.*
[181] *Ibid.*
[182] UK Government - HM Treasury (2019). *NI Protocol: Unfettered access to the UKIM.* Available at: https://www.politico.eu/wpcontent/uploads/2019/12/LSRFUR-slides.pdf (Accessed: 22 September 2022).
[183] UK Office for National Statistics (2022). *GDP, UK regions and countries: July to September 2021*. Available at: https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpukregionsandcountries/julytoseptember2021

reported that imports to Ireland from Northern Ireland had risen by €1.440 billion between the first 11 months of 2020 and the same period in 2021. As for exports, they rose by €1.078 billion, creating a trade surplus of €374 million on the island of Ireland in favour of Northern Ireland and increasing cross-border trade by over 50%.[184] This constitutes "a string of record-high trade figures between Northern Ireland and the Republic of Ireland since the January 2021 launch of post-Brexit trade rules."[185] Businesses around NI say that yes, there are issues that need to be addressed, but that the Protocol is necessary and is working in the right direction. Some economic analysis of critiques to the Protocol on which Westminster relies are erroneous in their very assumptions, since they measure the consequences of the Protocol with the pre-Brexit scenario, and not on what could be an alternative agreement to the Protocol, which is inevitable as a consequence of Brexit. But I will end here, as I do not pretend to unravel the incredibly complex economic analysis of the consequences of Brexit and the Northern Ireland Protocol.

Not to be underestimated is the fact that the majority of the newly elected Northern Ireland Assembly, even if a government has not been formed yet due to the obstacle posed by the DUP, is in explicit support of the Protocol. This means that after most of citizens in Northern Ireland had voted for the remain in 2016, Northern Ireland citizens have confirmed their stance by mostly voting for parties in favour of the Protocol. And considering that, as per Article 18 of the NI Protocol, after an initial period of four years the Northern Ireland Assembly will be asked to vote on whether or not to confirm it for a further four years, it is now more likely that in 2024 the Protocol will be extended. This clause was included as a tool that would guarantee the respect of the principle of consent**,** to ensure that Northern Irish citizens could vote for their representatives who would in turn be called to decide on the future of the Protocol itself. Keeping this in mind, what the Tory government is doing now with the Northern Ireland Protocol Bill is irresponsible and somehow undemocratic, inasmuch as it is not considering the result of the last two votes.

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[184] Fact Check NI (2022). *Economic effects of the Northern Ireland Protocol*. Available at: https://factcheckni.org/articles/explainers/economic-effects-of-the-northern-ireland-protocol/ (Accessed: 23 September 2022)

[185] Pogatchnik S. (2022). Northern Ireland economy outpacing post-Brexit Britain, *Politico,* 1 June. Available at: *https*://www.politico.eu/article/northern-ireland-economy-outpace-post-brexit-britain/ (Accessed: 23 September).

Therefore, I do not agree with the Westminster government claiming to be acting to protect the GFA, when in fact I believe what they are doing is actually undermining and potentially destroying the Belfast Agreement. They are colluding with the largest unionist force that has committed to prevent the formation of the new executive of Stormont until the Protocol is entirely scrapped. They claim that the Protocol is illegitimate due to the fact that it does not enjoy a support of a cross-consent nature. The situation as of today is that after Sinn Féin's victory in the 20 May 2022 political elections, which places the nationalist party as the majoritarian one in the Stormont assembly, Unionists are blocking the formation of the government by refusing to appoint their ministers. Now, I personally believe that two weights and two measures are being used: if in the case of Brexit it was fair that the decision to leave the European Union was made without there being cross-consent (I remind that the majority of the Northern Irish population had actually voted for the *remain*), in this case the Unionist front is blocking Stormont institutions by motivating it with the motivation that their voters are against the Protocol. It seems that the cross-consent principle is only applied when it suits their political battles. In addition, as a consequence of this choice, the North-South element of the GFA is now not operating. Even worse, if the Protocol is abandoned, Northern Ireland would stop having access to the EU market, endangering all the efforts to ensure that the physical border will never be an eventuality again. The government has acted unilaterally in terms of legislation with the Paper dealing with victims and survivors of the Troubles, and anticipated the introduction of a statute of limitations aimed at prohibiting future prosecutions related to fact occurring prior to 1998. Furthermore, they still threaten to withdraw from the EU Convention on Human Rights: these are building blocks upon which the GFA has been carefully constructed, and they are being deliberately undermined by the action of the government. This move by Westminster can be considered as a way of consolidating that strategic alliance previously mentioned with the Northern Ireland unionists strong, by blaming the EU for all the consequence of what was their unilateral choice instead. Or worse, they are ignoring that the refusal of any compromise would consequentially lead to the re-establishment of a hard border within the island of Ireland.

The attitude related with this case confirms the peculiar ease with which this government is openly violating international norms. It is emblematic the case of the

Overseas Operations Act (which **r**eceived Royal Assent on 29 April 2021), a piece of legislation setting restrictions on prosecutions for certain offences committed by British troops abroad after five years since they took place, as well as imposing a six-year time limit for bringing a compensation claim in case of personal injury or death relating to any event involving their actions.[186] This breaches international law since, as it is recognised in human rights treaties, "there is no formal time limit after the date of the alleged violation for filing a complaint under the relevant treaties."[187] This Act is the result of amendments of a proposed Bill that, if fully enacted, would have gone deeper by including under legal protections actions falling into categories of crimes of torture, war crimes, crimes against humanity and genocide. Of the same severity, is the partnership announced in April 2022 by both UK and Rwandan governments on migration and economic development. The critical point of this agreement concerns the relocation of asylum seeker and refuges to Rwanda for the asylum application processing phase. This would mean deporting vulnerable people to another continent, and moreover "to a state from which they have recently and regularly accepted refugees, and about whose human rights record the UK government has expressed its own misgivings."[188] Amongst many, no less than the UNHCR and the UN Special Rapporteur for Refugees reacted to this announcement by protesting that this practice will result in the violation of international law which the UK is committed to.[189]

And, shifting the focus to what directly relates with the topic herein discussed, I remind that in July 2021 the policy paper *Addressing the Legacy of Northern Ireland's Past* was published, consisting of a plan for legislation to end criminal prosecutions for facts during the Troubles era. From this resulted the *Northern Ireland Troubles (Legacy and Reconciliation) Bill*, presented and passed by the Commons. This is now under consideration at the House of Lords and, if not emended, will not just establish an amnesty

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[186] Overseas Operations (Service Personnel and Veterans) Act 2021, c. 23. Available at: https://www.legislation.gov.uk/ukpga/2021/23/contents/enacted (Accessed: 24 September 2022).
[187] United Nations. *Complaints procedures under the human rights treaties*. Geneva: OHCHR. Available at: https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties (Accessed: 28 September 2022).
[188] University of Birmingham (2021). *The UK's Rwandan refugee plan is postcolonialism in action*, 21 September. Available at: https://www.birmingham.ac.uk/news/2022/rwandan-refugee-plan-is-postcolonialism-in-action-1 (Accessed: 24 September 2022).
[189] United Nations (1951). *Convention relating to the Status of the Refugee (1951)*. Geneva: OHCHR. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees (Accessed: 28 September 2022).

from prosecutions, but also almost completely shut down inquests on civil cases and even complaints to the police ombudsman, and end up denying access to justice on many fronts. Moreover, the Bill doesn't just apply to cases involving victims of State violence, because it denies justice for victims of violence perpetrated by non-state actors as well, namely paramilitary groups. There is a very low hurdle for impunity under this Bill. All that is required is for the person seeking impunity to give "an account which is true to best of Person's knowledge and belief"[190]. It does neither require to actively engage or cooperate with the commission, nor to give a full and frank account or to exercise any kind of contrition to the rights of victims. The person seeking immunity just needs to admit having committed a crime and ask for immunity, this is fundamentally all that is necessary. It provoked the concerned reaction of the Council of Europe Commissioner for Human Rights for a potential breach of the ECHR. This ties in with what has already been emphasised in this chapter. By adopting measures such as the unilateral extensions of the grace period and especially the Northern Ireland Protocol Bill UK Internal Market Bill, Westminster was fully aware to be violating international law, to the point of even explicitly admitting it.

I believe it is also interesting to consider what correlation might exist between the British approach to international law and its repeated blatant violations. In order not to delve too deeply into a subject that is as interesting as it is vast, but which cannot be dealt with properly in this paper, I will only briefly mention the key aspects and try to represent how they intertwine with the context I have described. There are basically two main theories that have been proposed by scholars to describe this relationship between international and national law, monism and dualism: applying the first, "there is a single legal system with international law at its apex and all national constitutional and other legal norms below it in the hierarchy. There is no need for international obligations to be «transformed» into rules of national law, and in case of any apparent conflict, the international rule prevails."[191]; according to the dualist view instead, they operate on different levels. Hence, in order to be effective, international law "requires to be applied at national level, it is for each State to determine how this is to be done. If the international rule confers rights or obligations on individuals or entities created under national law, the

[190] Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022, HL Bill 37—EN. Available at: https://bills.parliament.uk/publications/47190/documents/2097 (Accessed: 20 October 2022).
[191] Evans M.D. *International Law* (Oxford, Oxford University Press, 2018, V edition), p.421.

national legislature may «transform» it into a rule of national law, and the national judge will then apply it as a rule of national, or domestic law."[192] And according to the British tradition, the second theory is applied in the UK. This means that what can happen is that some time may pass between the signature of a treaty and its actual entry into force. And this is what led the Committee on the Elimination of Discrimination against Women[193] to complain in its 2018 report that over the past twenty years it had "consistently noted the lack of measures taken to fully incorporate the provisions of the Convention into the UK's national legislation, leading to a fragmented and uneven legislative framework on the rights of women and girls."[194] As for the Human Rights Act, which came into force in 1998 with a view to incorporate into domestic law the European Convention on Human Rights, a reform could create a conflict between international and national law, leading to a consequent violation of the convention.

Built upon Strand Two of the Belfast Agreement, co-operation on an all-island dimension has been growing on various sectors during the past twenty years. As described in the previous chapter, twelve areas of co-operation where identified, among which security, tourism, energy, agriculture, environment, education and health. For six of them, measures and approaches were to be agreed in the North-South Ministerial Council (NSMC), a body composed by representatives of both governments and aimed at overseeing cooperation within the island. This favoured, over the past two decades, the growing interdependency of both economies, which became mutual major partners in import-export[195], services, integrated transport system, single all-island electricity market and cross-border workers flowing in both directions. Taking into account the global emergency represented by the Covid-19 pandemic, a special mention is to be reserved to the close co-operation in the area of Health based on the established Single Epidemiology Unit (SEU), through which the island of Ireland aligns on Sanitary and Phytosanitary

[192] Evans M.D. *International Law* (Oxford, Oxford University Press, 2018, V edition), p.421.
[193] The body made of independent experts monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
[194] United Nations (2019). *Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland*. Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/8&Lang=En (Accessed 28 September).
[195] Northern Ireland Statistics and Research Agency (2018). *Cross-Border Supply Chain Report (2015, 2016)*. Available at:https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/SCS_JUNE2018_FINAL.pdf#page=8 (Accessed : 1 October 2022).

rules for animal disease control: in this unprecedented context, the same practices were applied to monitor the spread of Covid-19.[196] Regarding regulatory divergence, which will further expand as a result of devolution[197], Northern Ireland has begun in 2015 to lower corporation taxes with a view to align to Éire corporation tax rates and become more competitive in attracting investments by foreign enterprises.[198] These are the reasons why I agree with the opinion that arguing "Northern Ireland maintaining regulatory equivalence with the EU would threaten the economic and constitutional integrity of the United Kingdom (Davis, 2017) is to needlessly and dramatically overstate the extent of the implications of a differentiated arrangement for Northern Ireland."[199]

The Belfast Agreement created a framework of political stability that made the competition between Unionists and Nationalists less tense and more secure, due to the fact that if the new shared system did not allow one side to dominate over the other, it would also protect them from being on the losing side. As I have just argued, the abolition of the former border dividing the island of Ireland, played a crucial role for what pertains economy and services. I think it is also not to be underestimated the role that it played on the societal level for nationalists in particular and for the society in general, as it allowed all citizens to move freely and break down that barrier establishing that the two society on the island were meant to live separated. But now, due to Brexit the political climate seems to be back as it was before 1998: this represented a watershed, which after two decades of moving in a clear direction, albeit not without setbacks, polarises the two communities again, and the issues attached to the formation of a new Assembly after the

[196] Institute for Government (2020). *North-South cooperation on the island of Ireland*. Available at: https://www.instituteforgovernment.org.uk/explainers/north-south-cooperation-island-ireland (Accessed: 1 October 2022).
[197] European Commission (2017). UK Withdrawal (Brexit) and the Good Friday Agreement. Luxembourg: Study for the AFCO committee- Policy Department for Citizen's Rights and Constitutional Affairs, Directorate General for the internal Policies of the Union, p.46. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf (Accessed: 2 October 2022).
[198] UK Government - HM Revenue & Customs (2016). *Northern Ireland rate of Corporation Tax: changes to small and medium-sized enterprise regime*. Available at: https://www.gov.uk/government/publications/northern-ireland-rate-of-corporation-tax-changes-to-small-and-medium-sized-enterprise-regime/northern-ireland-rate-of-corporation-tax-changes-to-small-and-medium-sized-enterprise-regime (Accessed: 3 October 2022).
[199] European Commission (2017). UK Withdrawal (Brexit) and the Good Friday Agreement. Luxembourg: Study for the AFCO committee- Policy Department for Citizen's Rights and Constitutional Affairs, Directorate General for the internal Policies of the Union, p.46. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf (Accessed: 2 October 2022).

elections is a clear example of it. Despite one's opinion about the reasons that brought to the UK leaving the EU, I believe we can all agree that Brexit has is having a negative impact on Northern Ireland and is posing a threat to the Good Friday Agreement, which can only be mitigated by finding the best compromise possible with the EU. Both communities suspected that the position taken by the other side on Brexit was an attempt to use this occasion to pursue their own partisan interests in a future perspective. The prevailing view in the nationalist bloc is that the "DUP supported the Leave campaign so aggressively in the hope of deepening and copper-fastening Northern Ireland's integration within the UK. The DUP was seen as calculating that Brexit would push to the margins any prospects of meaningful north–south cooperation, since the enabling framework of the EU would no longer exist".

The same is now happening in relation to the NI Protocol, with unionists accusing nationalist politicians of working for Northern Ireland to be conferred some form of special status with the aim of leading Northern Ireland into a united Ireland.[200] This means that "[w]hatever final Brexit settlement is reached, it is hard to see how one of the two communities will not view themselves as losers: there is no Brexit solution that will create a mutual gains bargain between nationalism and unionism."[201] In this scenario, Strand three would be required to take on and fill the gaps by reinforcing East-West co-operation, which is not easy if we consider that Dublin and London are on very different positions as to how Brexit should be pursued. I think that realism is what is needed the most in this delicate situation. Based on all the reasons outlined so far, the Northern Ireland Protocol seems to me as a reasonable solution, at least in the short term, to the dilemma posed in Northern Ireland by Brexit. Proposals have been advanced by the EU to improve the current agreement and adapt it as a consequence of the problems occurred in the implementation so far. It would be wise for the UK government to adopt a constructive approach, and at least seat at the table instead of threatening unilateral and disruptive measures. To conclude, in the same judgement to which I previously referred, *Allister v Secretary of State for Northern Ireland*, the Northern Ireland High Court of Justice was also called to rule on the complaint it was submitted about the alleged

[200] Teague P. *Brexit, the Belfast Agreement and Northern Ireland: Imperilling a Fragile Political Bargain*. The Political Quarterly, Vol. 90, No. 4, October–December 2019.
[201] *Ibid.*

inconsistency of the Protocol with the GFA. The argument was based on section 1 (1) of both the Northern Ireland Act 1998 and the Good Friday Agreement stating the following:

> "[I]t is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1."[202]

With regard to this claim, the Northern Ireland High Court pointed out that the right for Northern Ireland people to decide about the constitutional status of Northern Ireland was only referred to whether it would remain part of the UK or become part of a United Ireland, but it doesn't apply for any other constitutional change.[203]

Northern Ireland constitutional future

In the midst of the debate and uncertainties around the application of the NI Protocol, a collateral and unwanted effect of Brexit has been that of bringing back to the fore the topic concerning the constitutional future of Northern Ireland. Some may consider it inappropriate and dangerous for the stability of the country to discuss it at present time. But I think it is instead ripe to start thinking about the possibility of a referendum on the matter. The signs in this direction precede Brexit and are only confirmed by the result of the last general election in Northern Ireland, in which the Sinn Féin was the first nationalist party to win. This is not to say that such a party has the unity of Ireland at the top of its political agenda, which would be counterproductive in terms of achieving a widespread consensus and would hardly have led it to win the election. But reading between the lines, it can be seen as a sign that things are changing, also in view of other factors whose trend in recent years cannot be overlooked. Demographic census and border polls in fact show how the percentage of the Catholic/Nationalist population in relation to the Protestant/Unionist population has significantly shortened the historic gap over

[202] Northern Ireland Act 1998, c. 47. Available at: https://www.legislation.gov.uk/ukpga/1998/47/contents (Accessed: 4 October 2022) and *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

[203] Allister (James Hugh) et al's Application and In the matter of the Protocol NI [2021] NIQB 64. Available at: https://www.judiciaryni.uk/sites/judiciary/files/decisions/Allister%20%28James%20Hugh%29%20et%20al%E2%80%99s%20Application%20AND%20In%20the%20matter%20of%20the%20Protocol%20NI.pdf (Accessed: 15 September 2022).

time, and even reversed the situation with the former group becoming the majority of the population in Northern Ireland according to the 2021 census[204] (45.7% the former and 43.5% the latter). But, at the same time, this doesn't necessarily mean that now most of the population would be in favour of the proposal of a referendum, considering that one in five of the people polled does not identify neither as British nor as Irish, but just as Northern Irish. There is also no doubt that we are talking about a medium or even long-term solution, while in the short term the priority should be to get the Northern Ireland Protocol up and running and to re-establish the devolved administration at Stormont after the outcome of the elections on 8 May 2022.

In light of the above, it would be unwise not to acknowledge this change in the balance within the society of Northern Ireland, and not to prepare to the fact that at some point in the future the majority might demand to exercise the right of self-determination through a referendum, as foreseen in the Belfast Agreement. For this reason, I consider it constructive to look at what it means in practical terms to prepare for such an eventuality, also bearing in mind that such referendum was held in Scotland in 2014. A group of twelve leading academics put together by the *Constitution Unit of University College London*, and led by the deputy director Alan Renwick, spent two years investigating how a referendum could occur, what the requirements are and what solutions of a constitutional type there might be. The work of what was called the *Working group on Unification Referendums on the Island of Ireland* led to the publication of a Final Report in May 2021. These are their main conclusions on what should be considered in relation to whether these referendums should take place, what options could be implemented and what the consequences of different choices would be. The terminology used is also crucial in advancing such argument, as for instance using *unification* instead of *re-unification* since the latter term could be politicised and historically contested.[205]

Such a vote must take place in Northern Ireland if it appears likely to the Secretary of State for Northern Ireland that a majority, a simple majority of 50% plus one, would

[204] Northern Ireland Statistics and Research Agency (2022). *Census 2021 main statistics for Northern Ireland*. Available at https://www.nisra.gov.uk/statistics/2021-census/results/main-statistics (Accessed:03 October 2022).

[205] Doyle O., Kenny D., McCrudden C. *The Constitutional Politics of a United Ireland.* The Brexit Challenge for
Ireland and the United Kingdom: Constitutions under Pressure (Cambridge University
Press, 2021). Available at: https://ssrn.com/abstract=3684386 (Accessed: 6 October 2022).

express a wish for a united Ireland and support unification. The Belfast Agreement of and the Northern Ireland Act (1998) set out some key parameters on the one side, but leaves many matters unresolved on the other. One of them has been widely discussed over time and relates with whether or not the Northern Ireland Secretary of State is obligated to make explicit and public the criteria that will be applied in deciding to call a referendum. The sources of evidence the Secretary of State can rely on are the following: votes cast in elections; the results of surveys and opinion polls; qualitative evidence; a vote within the Assembly; the seats won at elections; or demographic data. If the first two are the ones that are most likely going to get most attention, it is the Secretary's choice to decide which is to be prioritised. Last September, the Northern Ireland Office communicated that there is no clear basis to suggest that a majority of people in Northern Ireland presently wish to separate from the United Kingdom. This uncertainty, combined with the autonomy and flexibility the Secretary of State enjoys in assessing whether or not these criteria are met, creates a lack of transparency and suspicion. A couple of years ago, a court case was filed by Raymond Irvine McCord, an activist for the rights of victims of the Northern Ireland Troubles, to try to get the Secretary of State to establish these criteria, arguing the need for the policy for the sake of transparency. Her Majesty's Court of appeal in Northern Ireland judged that the Secretary of State does not have an obligation to set out those criteria, and dismissed the case by motivating it with the fact that the "NIA contains no express duty to publish a policy as to how the respondent should assess whether there is an obligation to direct the holding of a border poll."[206]. Hence, according to the court, it would contravene the principle of flexibility which is crucial for a political judgment of this nature. At the same time, the number one obligation that the Secretary of State has to respect under the GFA is that the power at his/her disposal are to be "exercised honestly in the public interest with rigorous impartiality in the context that it is for the people of Ireland alone to exercise their right of self-determination."[207] Therefore, if it appears that the Secretary of State is trying to manipulate the evidence to get the decision he wants, then it would go against the Belfast Agreement and risk a legal and political backlash.

[206] Raymond McCord's Application: Border Poll [2020] NICA 23. Available at: https://www.judiciaryni.uk/sites/judiciary/files/decisions/Raymond%20McCord%E2%80%99s%20Application%20Border%20Poll.pdf (Accessed: 5 October 2022).

[207] Raymond McCord's Application: Border Poll [2020] NICA 23. Available at: https://www.judiciaryni.uk/sites/judiciary/files/decisions/Raymond%20McCord%E2%80%99s%20Application%20Border%20Poll.pdf (Accessed: 5 October 2022).

Concurrent referendums on the unification question might happen, even though they are not supposed to be imminent, since data of a poll in 2021 still showed that the majority of Northern Ireland would vote for maintaining the Union against unification. But if opinion change over time, it is important that they will be conducted well, and this is possible only if there is preparation over what they would involve, and this is not the case yet. Therefore, it is important that people in Northern Ireland and Ireland as well are impartially informed about what calling such referendums would mean and entail, and what the practical consequences of each scenario would be on their lives. And as the Working Group concludes, an extensive prior preparatory work "could not be completed in the time between calling a referendum and polling day."[208] This is also because, in the contemporary world we live in, it becomes vital to prevent misinformation and fake news campaigns. Cases as the Brexit referendum or the U.S. elections, just to mention two of the most well-known, are proves of this.

A virtuous example of this kind is the Scottish independence referendum held in 2014, which enshrined the majority will to remain in the Union. It was well prepared in terms of raising public awareness of the possible consequences associated with the vote, allowing citizens to make an informed decision. This was done through the *Scotland's Future: Your Guide to an Independent Scotland*, a 670-page all-encompassing White Paper considered as an independence blueprint. Alex Salmond, at the time Scottish First Minister of the government led by the Scottish National Party (SNP), released it before the referendum with the aim to inform citizens by setting out the government vision for a post-referendum future for Scotland.

The crucial premise is that within the terms of the Belfast Agreement, unification could not happen without a referendum vote in its favour for Northern Ireland, while it doesn't establish the same requirement for the Republic of Ireland, although it would be recommended because unification would entail either amending or replacing the constitution. The same proposal would have to be put to voters both North and South, and a simple majority is the threshold established for unification to take place. As the Working Group on Unification Referendums on the Island of Ireland suggests, it would be highly unwise for referendums to be called without a clear plan on how to proceed with the

[208] University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).

complex processes resulting from the referendums, and such a plan should be agreed between the governments of London and Dublin. Thus, in addition to preparing both Irish and Northern Irish people, the same should be done with their governments. The research outlines four main matters that need to be addressed: "the terms of Northern Ireland's transfer from the UK to the Republic of Ireland; the constitutional form of a united Ireland; arrangements for public services and other policy matters in a united Ireland; post-unification relations between Ireland and the remaining UK, with special reference to Northern Ireland."[209]

I believe it is worth paying attention to what would happen in the event of a concurrent vote for unification on both sides, the transition process required, the form a united Ireland would take, and the role the Belfast Agreement should play in the new constitutional framework. Irish Court judge Richard Humphreys holds that "the Good Friday Agreement is intended to endure after unity"[210] and that "Northern Ireland will continue to exist after a united Ireland as a separate administrative entity with a devolved legislative assembly ... [and] a devolved executive ... [that] will exercise executive power for Northern Ireland on a cross-party basis"[211]. Another question arising in connection with the Good Friday Agreement is that of the role that would be reserved to the British Government in the eventuality of a united Ireland under the sovereignty of Dublin. This concerns the British-Irish intergovernmental conference and, more generally, section three dealing with East-West relations, with further doubt as to whether the British state should be given a special role as guarantor of the interests of the unionists, as the Irish state has been to the Northern Irish nationalists since 1998. And. Indeed, "it is not uncommon in comparative constitutional practice to have arrangements where a state with close ties of kinship with a minority in another state has a role as an external

[209] University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).
[210] Humphreys R. (2018) *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit*. Mentioned in University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).
[211] Humphreys R. (2018) *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit*. Mentioned in University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).

guarantor for that minority."[212] But, on the other side, a different view objects how the Belfast Agreement could persist given the fact that Strand Two, dealing with North-South relations, would necessarily lapse since one of the two parties will be lacking.

Getting to the heart of the matter, i.e. which form of state and government is most suitable for a united Ireland, the Working Group identified some possible basic models. The first one consists of a state with devolved institutions in the North, but with sovereignty transferred from London to Dublin, "as far as possible a mirror image replication of the current arrangements within Northern Ireland under the Agreement"[213]. This is considered a good solution to moderate the impact of this substantial change on the part of society that opposes unity, while guaranteeing the same framework of protection for minorities. But this would not be without its constitutional problems, such as the role that representatives from the North would play in the Irish Parliament when discussing issues just relating with life in the South (similar to what is today the so-called *West-Lothian question*[214] in Westminster). Additionally, to replicate the consociational arrangement created for Northern Ireland in the wake of the Belfast Agreement, based on cross-community representation and a power-sharing executive, an amendment of the Irish constitution would be needed for a united Ireland.[215]

The second model is that of a simple unitary state, built on a single legislative assembly and government based in Dublin. While this might be the preferred solution for Irish

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[212] Venice Commission, Report on the Preferential Treatment of National Minorities by Their Kin-State, adopted Oct. 19–20, 2001, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDLINF(2001)019-e. Mentioned in Doyle O., Kenny D., McCrudden C. *The Constitutional Politics of a United Ireland.* The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure (Cambridge University Press, 2021). Available at: https://ssrn.com/abstract=3684386 (Accessed: 6 October 2022).

[213] University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).

[214] The West Lothian question, also known as the English question, is a question pertaining to the area of British politics. It concerns the fact that, while Scottish, Welsh and Northern Irish MPs in the House of Commons were able to vote on matters relating exclusively to England, English MPs could not do so on matters of interest only to Scotland, Wales and Northern Ireland. The term was coined after Tam Dalyell, the Labour MP for the Scottish constituency of West Lothian, repeatedly raised the issue in the House of Commons as part of the debate on devolution. The solution adopted to deal with this is known as English Votes for English Laws' (EVEL), by which non-English MPs have agreed not to participate in some votes on English matters.

[215] Doyle O., Kenny D., McCrudden C. *The Constitutional Politics of a United Ireland.* The Brexit Challenge for
Ireland and the United Kingdom: Constitutions under Pressure (Cambridge University Press, 2021). Available at: https://ssrn.com/abstract=3684386 (Accessed: 6 October 2022).

nationalists, it represents the least desirable option for the Unionist community, but also a step backwards in the process of creating an inclusive society based on the development of a Northern Irish identity as opposed to the sectarian division between Irish and British. This model, though, "would involve significant adaptation of northern institutions and practices to southern ones, which might involve substantial delays, and potentially great friction"[216].

The third option is that of a federal Ireland, with different solutions on how to establish its subnational entities according to different criteria, which could be costly and dangerous, given the historical precedents of this type of solution in a situation of clear imbalance between units. A less likely solution is that of a confederation, in which Northern would be independent of both the Republic of Ireland and the United Kingdom. But this solution would pose two major problems: firstly, it would not comply with the provisions of the Belfast agreement; and secondly, it would open the scenario of a further referendum of EU membership, due to the fact that Northern Ireland had voted for remaining in the 2016 referendum. Other options, such as a joint sovereignty or an independent Northern Ireland, are not to be considered as viable alternatives since they would clearly not respect what prescribed in 1998.

In the event of a successful referendum and effective unification, several issues will have to be addressed depending on the constitutional framework that will be decided.: the amendment of the current Irish constitution; public finances, it needs to be considered that unification would have a cost for Northern Ireland, since the UK treasury is a vital net contributor for province finances, which received about £15 billion just in the last year[217]; how the sensitive issue of citizenship would be handled, since Northern Irish of Ulster Scots and Ulster British traditions identifying as British may not wish to take the Irish citizenship, nor can they be forced to; and, linked to this, how the commitment to respect the identities of all different groups in Northern Ireland expressed in the

[216] University College London – The Constitution Unit (2021). *Working Group on Unification Referendums on the Island of Ireland: Final report.* Available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (Accessed: 6 October 2022).
[217] UK Government – HM Treasury (2021). *Latest figures detail UK Government's record funding of £15 billion a year for the Northern Ireland Executive*. Available at: https://www.gov.uk/government/news/latest-figures-detail-uk-governments-record-funding-of-15-billion-a-year-for-the-northern-ireland-executive (Accessed: 6 October 2022).

Agreement will be addressed[218]. It will be necessary to find a solution that guarantees everyone the exercise of their political right. Moreover, these citizens deserve to be treated equally and given EU citizenship also in case they don't identify as Irish, as well as given the chance of choosing British citizenship for their descendants if they wished so. For these and many other reasons that would arise in the creation of a united Ireland, I believe it is common sense to agree that, regardless of individual views on these matters, a debate is necessary to ensure that Irish, Northern Irish and British institutions and societies are informed and prepared for such an eventuality as a referendum on the unification of the island.

In conclusion, as is clear from this brief analysis of the various scenarios that would occur with the unification of Ireland, there would be many aspects to consider, as well as several necessary changes to be made to the Irish constitution to ensure the accommodation of everyone's identities in the new state organisation. Considering the centrality of such provisions in the process of founding a new state entity, all the more so in this case in which a post-conflict society is involved, I believe it gets even more important to properly prepare for the constitutional changes that would be required. This would also make voting in referendums fairer and more informed, ensuring that citizens know in advance among which alternatives they are choosing, instead of taking a leap of faith as was the case with the Brexit referendum.

[218] In paragraph 1(IV) of the section on *Constitutional Issues,* the Good Friday Agreement made clear that the British and Irish governments would "recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland."

CHAPTER 4:

THE HUMAN RIGHTS PROTECTION SYSTEM IN NORTHERN IRELAND AFTER BREXIT

The role of human rights in the Northern Irish post-conflict society

As I already anticipated, the common focus on the Brexit process is almost exclusively on its economic impact, while other aspects of equal importance are neglected: one is that of the constitutional future of Northern Ireland, which I already dealt with in the last section of the previous chapter; and the other one, which will be addressed in this chapter, concerns the role that human rights is assigned in the scale of priorities within this process. Nonetheless, in a post-conflict society divided along ethnic lines where human rights are not conceived neutrally and the associated narrative becomes a divisive argument of differentiation, the management of human rights becomes even more essential than ever for the creation of a long-term pacificated and integrated society.[219] And this is the scenario in Northern Ireland, where the two political alignments and communities are almost integrally adopting an opposing stance on human rights. This is also because the legacy of the civil rights campaign, coupled with wider claims of discrimination as the underlying causes of the violent conflict, makes human rights in Northern Ireland politically and culturally difficult for Unionism, with Unionists tending to be openly hostile or at least distrustful of human rights.[220] At the contrary, on the nationalist side, there is no hesitation in talking about human rights and putting this matter at the core of the political agenda.

The suspension of the Assembly between 2017 and 2020 proved how rights and equalities are still intensely contested elements of Northern Ireland's politics. Divisions resulted on matters as language rights and the right to citizenship, as well as on what Sinn Féin promoted as an equality agenda, but that the DUP strongly opposed. This is not an attempt to divide society into good and bad, also because there is no complete adherence between party positions and their voters' feelings on every single matter, but only a way

[219] Donnelly C., McAuley C., Lundy L. (2020), *Managerialism and human rights in a post-conflict society: challenges for educational leaders in Northern Ireland*, School Leadership & Management, DOI: 10.1080/13632434.2020.1780423, p.3.
[220] *Ibid.*

of trying to explain why the two communities have on average a different position on human rights. Yet, in occasion of the Good Friday Agreement (1998) and through the help of external actors, these differences were addressed and at least partially overcome along with the attainment of a series of human rights and equality provisions. And indeed, the GFA recognises the "achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all"[221] as well as commits the signatory parties to "partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands."[222] Moreover, the Northern Ireland Act (1998) implements the Belfast Agreement by foreseeing provisions to comply with international human rights standards and includes the proposal for a Bill of Rights for Northern Ireland, although it was never realised.

One element to be considered in this discourse around human rights is that the legacy of the Troubles, especially of the civil rights movements that emerged in that period as a pacific response against discriminations and the violent actions of paramilitaries or police brutalities, have resulted in human rights representing an uncomfortable topic for the Unionist political alignment. That is why Protestants/Unionists tend to be hostile with regard to this and believe human rights are just a tool for *them* and not for *us,* and that exercising one's human rights would be disloyal to the State.[223] For this reason, there is a need to promote advocacy within both communities and convey the message that the society as a whole would benefit from an increased awareness on human rights and from them being at the core of the political debate. It could result in a desirable bottom-up mobilisation at the local level on matters relating with economic and social rights, as for instance the equal services as education, health, housing, food and water just to name a few. This would promote a paradigm shift among society in Northern Ireland, and favour integration by transforming human rights from a divisive to a cohesive argument. As rightly pointed out by Cahill-Ripley, the problematic aspect is mainly the codification of human rights in the context of Northern Ireland which results contentious and divisive,

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[221] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[222] *Ibid.*
[223] Lamb, *Loyalty and Human Rights: Liminality and Social Action in A Divided Society*, The International Journal of Human Rights 6 (2013): 994. Mentioned in Cahill-Ripley A. (2019): *Exploring the local: vernacularizing economic and social rights for peacebuilding within the Protestant/Unionist borderland community in Northern Ireland*, The International Journal of Human Rights, DOI: 10.1080/13642987.2019.1597715.

with the perception of some being that the implantation of these rights is not being carried out fairly and equally but focussed instead on some cultural (and I would add politicised) issues.[224]

In such context, what could constitute a winning strategy is that of promoting the idea of human rights as universal, and norms establishing them as international, rather than framing them within the highly politicised context of Northern Ireland and the historical conflict within its society. Stressing the universality of human rights would protect them against "the reality or perception of relativism, politicization or particulization."[225] In this perspective, focussing on fundamental rights everyone can agree upon could mobilize people on a cross-community basis: this approach fits with Engle Merry's theory of *vernacualizing* rights, meaning to make rights meaningful for local practices.[226] But instead of embracing Lundy's solution which consists in avoiding further disruption by limiting the application of human rights treaties in divided societies such as the Northern Irish one, I agree with Goldstein's notion of a plurality of *vernacularisations*. This would provide the possibility of having an open and constructive debate about how to adapt the general disposition made by international human rights treaties to this local context, characterised by historical division and competing understandings between Northern Ireland's two main communities.[227]

And the state has a primary role to play in promoting human rights education and raising awareness among its population on their rights[228], tackle dangerous political rhetoric and misinformation on this topic. Therefore, a leadership needs to be provided through the education system, one that promotes a culture of respect for human rights on

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[224] Cahill-Ripley A. (2019): *Exploring the local: vernacularizing economic and social rights for peacebuilding within the Protestant/Unionist borderland community in Northern Ireland*, The International Journal of Human Rights, DOI: 10.1080/13642987.2019.1597715.

[225] Beirne and Knox, *Reconciliation and Human Rights in Northern Ireland: A False Dichotomy?* Journal of Human Rights Practice 1 (2014): 26 at 27. Mentioned in Cahill-Ripley A. (2019): *Exploring the local: vernacularizing economic and social rights for peacebuilding within the Protestant/Unionist borderland community in Northern Ireland*, The International Journal of Human Rights, DOI: 10.1080/13642987.2019.1597715.

[226] Cahill-Ripley A. (2019): *Exploring the local: vernacularizing economic and social rights for peacebuilding within the Protestant/Unionist borderland community in Northern Ireland*, The International Journal of Human Rights, DOI: 10.1080/13642987.2019.1597715

[227] Donnelly C., McAuley C., Lundy L. (2020), *Managerialism and human rights in a post-conflict society: challenges for educational leaders in Northern Ireland*, School Leadership & Management, DOI: 10.1080/13632434.2020.1780423, p.4.

[228] United Nations (2021). *Declaration on Human Rights Education and Training General Assembly*, A/RES/66/137, 16 February, Art 7(1).

an intercommunity basis. Because, as the Human Rights Council underlines, human rights education is a key to overcome conflict and inequalities within societies, prevent radicalization and violent extremism, promote tolerance, inclusion, participation and mutual acceptance for more tolerant, inclusive and peaceful societies.[229] As to further promote the inclusiveness of human rights and their nature of being universal, an effort to encourage cross-community groups would be beneficial in the view of overcoming the old pattern of sectarian division and competitiveness. This prejudice is based on the belief that only single-identity groups are tolerable due to a mutual lack of trust, since they are working towards different objectives and pursuing their own battles. But the narrative to be sustained is that of a neutral approach to human rights, and that the more people enjoy the same rights and the more equal society is, the better it will perform.

After Brexit: what happens now?

The UK government's commitment regarding the human rights protection framework in Northern Ireland after Brexit is set out in Article 2 of the Ireland/ Northern Ireland Protocol and states as follows:

1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of

[229] Human Rights Council (2017). *Panel Discussion on the Implementation of the United Nations Declaration on Human Rights Education and Training: Good Practices and Challenges*. Summary report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/35/. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/075/50/PDF/G1707550.pdf?OpenElement (Accessed 15 October 2022).

> representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.[230]

These two paragraphs cover a range of equality provisions and human rights safeguards which are protected in the GFA and substantially underpin the peace process. The set of rights encompassed in the section *Rights, Safeguards and Equality of Opportunity,* through which "[T]he parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community"[231], is mentioned in Article 2. It includes: the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation.[232] Additionally, parity of opportunity was to be guaranteed irrespective of: age; gender; race; religious belief; political opinion; disability; marital status and sexual orientation.[233] As affirmed by the *High Court of Justice in Northern Ireland* in the event of the application presented by *the Northern Ireland Human Rights Commission*, the guarantee of rights, safeguards and equality of opportunity constituted nothing less than foundations on which the Belfast Agreement was built.[234] The commitment for the incorporation of the European Convention on Human Rights was made explicit along with the related power of direct access to the courts for remedies in case of eventual breaches of the Convention. Hence, the ECHR constituted the cornerstone of the human rights protection system as outlined in the GFA, upon which an additional set of rights could be built by the Northern Ireland Human Rights Commission in order to "reflect the particular circumstances of Northern Ireland."[235] And the same European Convention,

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[230] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).
[231] *Ibid*.
[232] *Ibid.*
[233] *Ibid.*
[234] High Court of Justice in Northern Ireland (2015). *The Northern Ireland Human Rights Commission's Application*, NIQB 96. Available at : https://www.judiciaryni.uk/sites/judiciary/files/decisions/The%20Northern%20Ireland%20Human%20Rights%20Commission%E2%80%99s%20Application.pdf (Accessed: 15 October 2022).
[235] *The Good Friday Agreement: Agreement reached in the multi-party negotiations* (1998). Available at: https://www.gov.uk/government/publications/the-belfast-agreement (Accessed 27 March 2022).

together with eventual additional rights identified by the commission, was meant to become a constituting part of a future *Bill of Rights for Northern Ireland*. I stress these points to demonstrate how it is not exaggerated to say that the European-derived law was paramount in the provisions of the GFA, especially in the case of the human rights protection mechanisms, and that Brexit is therefore endangering the very essence of the Agreement by eroding this pillar. This is the stance taken in a document produced by the European Parliament. It affirms that withdrawing from the ECHR, which the UK pledged to respect and incorporate in its legislation, and replacing it with a UK Bill of Rights "would be at odds with the Good Friday Agreement"[236] and "subject to legal challenge."[237] The document continues by reminding that, being EU law provision at the heart of the Northern Ireland's constitutional arrangement and human rights protection mechanisms, withdrawing from it would mean undermining both the GFA and the NIA.[238]

But I believe it is fair to say that the behaviour of the UK government with regard to the ECHR and the commitment negotiated in the GFA is at least ambiguous. While it was reiterated in the Withdrawal Agreement and in the Ireland/Northern Ireland Protocol, the legislation that is being proposed in Parliament goes the opposite direction compared to the human rights standards that were set. In the previous chapter I have already given examples of legislative bills such as the Overseas Operation Act, the Memorandum of Understanding signed with the Rwandan government for the provision of an asylum partnership arrangement, and the Northern Ireland Troubles (Legacy and Reconciliation) Bill. These pieces of legislation have been harshly criticised by both EU and UN bodies as well as associations dealing with human rights in the UK and Northern Ireland. They mark a clear direction with regard to the role the government is reserving to human rights protection mechanisms in its agenda, and more generally in the vision for the future of the nation.

[236] European Commission (2017). *The Impact and Consequences of Brexit for Northern Ireland*. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf (Accessed: 10 October 2022).
[237] *Ibid.*
[238] *Ibid.*

Read in conjunction with Annex 1, Article 2(1) also provides that there shall be no diminution of the protections against discrimination that EU law previously provided.[239] Annex 1 of the Protocol lists the provisions of Union law referred to in Article 2(1), which include: the principle of equal treatment between men and women in the access to and supply of goods and services[240]; the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[241]; the principle of equal treatment between persons irrespective of racial or ethnic origin[242]; a general framework for equal treatment in employment and occupation[243]; the principle of equal treatment between men and women engaged in an activity in a self-employed capacity[244]; the principle of equal treatment for men and women in matters of social security[245]. Furthermore, Article 2(2) explicitly connects the oversight of these protections to the workings of the dedicated mechanism.

A further and equally important provision is the one contained in article 11 of the Protocol. It addresses the importance for the continuation of North-South cooperation[246], and the crucial role of the Joint Committee in constantly supervising compliance with the condition for cooperation that were established in the Northern Ireland Act 1998.

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[239] Social Change Initiative, Queen's University of Belfast, University of Michigan (2021). *Human Rights and Equality in Northern Ireland Under the Protocol. A Practical Guide*. Available at: https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide (Accessed: 16 October 2022).

[240] European Council (2004). Directive 2004/113/EC, *Implementing the principle of equal treatment between men and women in the access to and supply of goods and services*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113 (Accessed: 16 October 2022).

[241] European Council and European Parliament (2006). Directive 2006/54/EC, *On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054 (Accessed: 16 October 2022).

[242] European Council (2000). Directive 2000/43/EC, *Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043 (Accessed: 16 October 2022).

[243] European Council (2000). Directive 2000/78/EC, *Establishing a general framework for equal treatment in employment and occupation*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078 (Accessed: 16 October 2022).

[244] European Parliament and European Council (2010). Directive 2010/41/EU, *On the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0041 (Accessed: 16 October 2022).

[245] European Council (1978). Directive 79/7/EEC, *On the progressive implementation of the principle of equal treatment for men and women in matters of social security*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31979L0007 (Accessed: 16 October 2022).

[246] Including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport.

Nevertheless, the same degree of protection and supervision is not extended to a piece of legislation that was essential in implementing the commitments under the Belfast Agreement, namely the Human Rights Act 1998. Additionally, an overlap between UK Government's powers and the Assembly of Stormont was decided on the grounds that Westminster will need to have powers at their disposal to manage Northern Ireland related aspects of Brexit should Stormont institutions collapse[247]. And this must be read in conjunction with article 2, binding both the UK and Northern Irish governments not to produce legislation which is incompatible with the 1998 Agreement. Moreover, the rights and equalities aspects of the Protocol will continue to be enforced independently of Article 18. This approval mechanism, which establishes that the Assembly will be called to vote once every four years starting from 2024, concerns only provisions relating to trade that are dealt with from Articles 5 to 10 of the Protocol. Article 2 also provided an important platform upon which Northern Ireland's politicians could agree to reengage with power sharing in January 2020, and even to debate the prospect of a Northern Ireland Bill of Rights once again: this is the *New Decade, New Approach* which will be examined in greater detail later in this chapter.

I consider it useful to briefly introduce the *Trade and Cooperation Agreement* (TCA). The purpose of the TCA is to establish "the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty"[248]. Hence it governs the future relations between the two parties after the UK withdrawal from the EU. This document also includes two sets of provisions concerning rights. With regard to the first one, called the *level playing field*, it relates to social and labour rights and is aimed at ensuring a fair competition between UK and EU based on high standards relating to labour, social, environmental and climate. The second one, pertaining strictly with the role of the European Convention of Human Rights, highlights that co-operation between the two signing parties is based on the commitment

[247] Murray, C. R. G. and Rice, Clare A. G., Beyond Trade (2020). *Implementing the Ireland/Northern Ireland Protocol's Human Rights and Equalities Provisions*. Northern Ireland Legal Quarterly, 2021, Available at SSRN: https://ssrn.com/abstract=3731649 or http://dx.doi.org/10.2139/ssrn.3731649, p.9.

[248] *Trade and Cooperation Agreement, between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf (Accessed 1 May 2022).

by the UK to keep protecting the fundamental individual rights and freedoms, including those outlined in the ECHR.[249] But, and here lies the problem, unlike the Protocol, these provisions are not directly enforceable in Northern Ireland courts by individuals, groups or companies. The remedy only lies at the international level, "where the EU and the UK can invoke a similar dispute settlement process as under the Protocol."[250]

What countermeasures does Westminster intend to take to ensure that its commitment not to diminish rights does not remain a dead letter?

Paragraph two of the aforementioned article answers this question by foreseeing a so-called dedicated mechanism. It refers to the Equality Commission for Northern (ECNI) Ireland and the Northern Ireland Human Rights Commission (NIHRC). Now that the UK has left the EU, these two bodies have been assigned new rules and responsibilities. This with a view to complying with the commitment not to reduce the standards of equality and human rights for the Northern Ireland population as indicated by Article 2 of the Protocol with reference to the GFA, the EU equality, and anti-discrimination laws. Starting from January 1st, 2021, the commissions have been given additional powers and responsibilities, which they can use jointly, or separately, to protect citizens' rights. Schedule 3 of the European Union (Withdrawal Agreement) Act 2020 entrusted them with the tasks of monitoring, enforcing, reporting, and providing advice to the Government during the implementation of this commitment in the wake of UK's withdrawal. This is because the Assembly does not have competence to advance any law which is incompatible with Article 2, as well as Ministers of the Northern Ireland Executive are to be restricted from exercising their functions in a manner which is incompatible with this provision of the Protocol. The Commissions have enforcement powers if they consider that there has been a breach of the UK Government's commitments under Article 2, and the ability to bring violations to the attention of the

[249] *Trade and Cooperation Agreement, between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf (Accessed 1 May 2022).

[250] Social Change Initiative, Queen's University of Belfast, University of Michigan (2021). *Human Rights and Equality in Northern Ireland Under the Protocol. A Practical Guide*. Available at: https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide (Accessed: 16 October 2022).

international dispute procedures or intervene in legal proceedings. Moreover, they will be working with the *Irish Human Rights and Equality Commission* (IHREC) to oversee and report on matters relating to the all-island dimension. Individuals, groups or companies have likewise the right to bring legal action challenging legislation of the Northern Ireland Assembly or Executive in the eventuality they believe their human rights or equality guaranteed have been reduced as a result of Brexit.

The UK Government's Explainer document (August 2020) also defined that the Commissions will have to report separately to the UK and Irish Governments and that the NIHRC, ECNI and the Joint Committee of NIHRC and IHREC will bring any matter of relevance to Article 2 to the attention of the *Specialised Committee on the Ireland/Northern Ireland Protocol*.[251] This body, referred to in article 14 of the Protocol, is aimed at facilitating the implementation and application of the Protocol as well as considering "any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland."[252] The UK Government specified that the dedicated mechanism "is not a new structure in itself; rather, it is a framework for ensuring compliance with the commitment, comprising dedicated monitoring, advising, reporting and enforcement activities and drawing on the existing human rights and equality bodies established under the Agreement."[253] The Joint Committee is also appointed to act as a forum for the consideration of human rights issues on the island, without altering the constitutional status of the Joint Committee as it was set out in the Agreement.[254]

A memorandum of understanding issued in March 2021, includes the working arrangements agreed between the three Commissions (ECNI / IHREC / NIHRC) to fulfil this mandate they have been tasked with. It also reaffirms the obligation upon the UK government to ensure that those bodies set up by the 1998 Belfast Agreement, and in

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[251] Northern Ireland Office (2020). *Protocol on Ireland/Northern Ireland: Article 2*. Available at: https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2 (Accessed: 20 October 2020).

[252] *The Protocol on Ireland and Northern Ireland* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf (Accessed: 2 August 2022).

[253] *Ibid.*

[254] *Ibid.*

accordance with Article 2 of the NI Protocol, continue to work properly with a view to uphold human rights and equality standards. Within the document it is agreed that each commission will have to regularly report to their respective board, which will in turn oversee the joint work that is being carried out in compliance with their governance arrangements. A provision for the formation of Working Group across the three Commissions is also included, whose members are identified in the Chief Commissioners plus a Board member for each commission. It is established that the Group is to meet every three months to discuss areas for joint working, share information about issues that arise during their work and decide what needs to be reported on; in addition to this, an annual meeting is to be organised with the presence of all members of the three Commission, so as to assess progresses and difficulties together.[255] The three commissions pledged to reach decisions by consensus on the points discussed at Working Group meetings and proposed actions, meaning that each representative accepts and recommends the proposed actions to their respective Boards. If consensus is not reached, the independence of each Commission will be respected to pursue, or not pursue, the proposed action.[256]

But, and this is a crucial point, "[I]t is the UK Government's view that the Agreement does not require North-South equivalence of rights and equality protections; nevertheless, the UK Government recognises that there is a role for the dedicated mechanism in considering best practice in the area of human rights and equalities issues insofar as they have an island of Ireland dimension".[257] And in the context described here, with the UK government already proposing to revise crucial legislation or intending to do so in the near future, I believe this is a clear sign of a trend that will reduce those standards that were set through the ECHR and the HRA in 1998, which were never extended as intended. Moreover, due to its sophistication, this system will not guarantee the oversight currently provided by the ECtHR in cases of fundamental rights and equality protections being at issue. Northern Ireland residents affected by the implementation of the Withdrawal

[255] *Ibid.*
[256] *Ibid.*
[257] UK Government (2021). *Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?* Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf (Accessed: 22 October 2022).

Agreement could have limited opportunity to engage with the Specialised Committee, unless the statutory NIHRC or ECNI takes up their cause. Even if an issue is heard, the internal processes of the committee system are opaque and could result in no meaningful outcome if unanimous consensus is not reached and no reasoned decision made publicly available. This would result in a structural problem since this new framework falls short from the level of protection granted by the ECtHR. Hence, on the one hand, Article 2 arrangements could provide a framework for rights and equality protections in Northern Ireland which operates very differently from that of Great Britain, and even circumvent in the short term the need for Northern Ireland's politicians to reach a complicated agreement over a Northern Ireland Bill of Rights in such a troublesome phase. But, on the other, such a solution to the intractable debates over a Northern Ireland Bill of Rights could, however, make for a rather minimalist project of preservation rather than advancement of rights and equality within Northern Ireland's distinct constitutional order.

Human rights and equality rights are central to the Belfast-Good Friday Agreement, and the Protocol strongly commits to protect these rights. Still, a complication arises from the fact that not all the rights in the 1998 Agreement are protected by the Protocol, but only those included by the "Rights, Safeguards and Equality of Opportunity" section of the Belfast Agreement. Put simply: if the right an individual wants to protect is not part of that section of the Agreement, it means the Protocol does not protect it. And that section covers only a limited set of issues, which were listed above. A study titled *Human Rights and Equality in Northern Ireland Under the Protocol: A Practical Guide,* produced by Social Change Initiative, the Human Rights Centre Queen's University Belfast and the Donia Human Rights Centre University of Michigan was published on October 11, 2021. It identified six requirements that must be met in order for a claim to be considered by the courts. They are: the protection of a particular human right or the equality of opportunity in a specific matter was reduced in Northern Ireland after Brexit; the right, safeguard or equality opportunity provision or protection that is claimed to have been violated was covered by the GFA; the right identified as violated needs was given effective protection in Northern Ireland law before December 31, 2020; the same right was also underpinned by EU law, meaning it was included in the Annex 1 list aforementioned, by the same date; Brexit had a substantial effect by causing the removal, complete or partial, of the EU underpinning to such right, safeguard or equality

opportunity provision or protection; this would not have occurred if the UK had not left the EU. The Guide contains some constructed hypothetical scenarios for possible violations of Article 2 of the Protocol. Of them all, I believe the most interesting is the one dealing with the eventuality the UK withdraws from the ECHR. The conclusion is that, should this scenario become real "it would present an instance where a violation of Protocol Article 2 may or may not have occurred."[258] Since the ECHR is included in the section dealing with safeguard provisions, it relevantly underpins the Belfast Agreement in the protection of various human rights; hence, "withdrawing from it would significantly weaken the human rights framework in Northern Ireland"[259] . In this case, legal actions would be needed in order to test the extent of the protection given by Article 2 of the Protocol and could be pursued through either individual or Commission enforcement, or Commission assistance.

The debate over the creation of a Northern Ireland Bill of Rights

The combination of the potentially far-reaching terms of Article 2 of the Protocol, its applicability in the national courts, and the exclusion from the work of the Stormont Parliament due to the prolonged collapse of the devolved institutions, raises a further question about the future of the Northern Ireland legal system. If Northern Ireland's human rights and equality protections are now so distinct from those operating in the remainder of the UK, is it correct to affirm that Northern Ireland already has its own de facto Bill of Rights? As previously analysed, Article 2 acts in support of the complementary protections for the ECHR's application in Northern Ireland and the all-island co-operation dimension under the Belfast/Good Friday Agreement. It can therefore be assumed that the rights and equality provisions in Northern Ireland are unique, distinct from those in the rest of the UK, and that this already provides Northern Ireland with its own Bill of Rights. But I believe I have illustrated how this framework is not yet robust enough to address the new challenges facing Northern Ireland as a result of Brexit, and that a more structured and specific mechanism still needs to be established.

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[258] Social Change Initiative, Queen's University of Belfast, University of Michigan (2021). *Human Rights and Equality in Northern Ireland Under the Protocol. A Practical Guide*. Available at: https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide (Accessed: 16 October 2022).
[259] *Ibid.*

In a report published by the Transitional Justice Institute at the University of Ulster, a current assessment of the Bill of Rights for Northern Ireland is solicited. After a debate around it has been going on since the 1970s without any concrete results, the authors suggest that it is now time to re-engage the parties on this subject. A series of crucial stages is outlined to remind what the path has been so far, especially since the GFA was reached in 1998. It is recalled that under the Belfast/Good Friday Agreement and the Northern Ireland Act, the NIHRC was given the task to consult and advise the UK government on what rights should be included in a proposed Bill of Rights for Northern Ireland. Further provisions were also agreed in the 2003 Joint Declaration, with which the government of Westminster committed to bring forward legislation in this regard. Afterwards, in occasion of the St Andrews Agreement (2006) the parties established a Bill of Rights Forum, which two years later reported about its work to the NIHRC. In December of the same year the Northern Ireland Human Rights Commission submitted its advice on a Bill of Rights for Northern Ireland to the UK government. The subsequent year, the Northern Ireland Office (NIO) responded to this advice by publishing its consultation document, but only selecting some among the sections of the NIHRC's advice. But, since then, not much more discussion has been put forward. If rights must represent the core with a view to achieving a just and equal society, it is especially true that "[P]lacing fundamental values and rights beyond government is particularly important for post-conflict societies where parliamentary politics has failed or where discriminatory practices existed"[260]. In this perspective, a Bill of Rights plays a key role as it aims "to provide legal protection for fundamental rights as a practical matter and place them beyond the reach of any government."[261] Hence, this tool allows to limit politicians' power with regard to a certain set of rights and values shared by the whole society and to which it is the common desire to provide for an enhanced protection. And, as just stated, this aspect acquires a unique relevance for societies which are transitioning from conflict and are in need to address all kind of violations of rights that have occurred in the past (which in the case of Northern Ireland were not only concerned political and civil rights, but also economic, cultural and social) with a view to achieve enduring peace

[260] Smith A., McWilliams M., Yarnell P. (2014). *Political capacity building: advancing a Bill of Rights for Northern Ireland*. Transitional Justice Institute, University of Ulster. Available at: https://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf (Accessed: 10 October 2022).
[261] *Ibid.*

alongside a societal development. Hence, a Bill of Rights can "provide a constitutional point of reference that becomes a legal framework through which the politicians act within."[262] With the signing of the Belfast/Good Friday Agreement, a broader constitutional agreement was reached. This represented an important milestone for the concept of Bill of Rights for Northern Ireland separate from the rest of the United Kingdom and which would form an integral part of peace building.[263] Support for such a Bill can be observed since the 1970s, but it is in this occasion that it significantly gained momentum, receiving a widespread support in the whole political spectrum with just a few exceptions among unionists.

In the light of the contested legacy of human rights in Northern Ireland, the negotiation, development and advice to the UK Government on a Bill of Rights for Northern Ireland was put in the hands of a newly established and independent commission instead of leaving this task the Stormont Assembly. But, despite the commission performed its duty by reporting to the Secretary of State for Northern Ireland on 10 December 2008,[264] the UK government responded indicating that this was not considered an incumbent piece of legislation to be passed. After a statement by the Secretary of State for Northern Ireland in 2013,[265] with which she defined ambiguous the interpretation of the clause of the GFA concerning the commitment for a Bill of Rights, it was the Chief Commissioner of the Northern Ireland Human Rights Commission, a Professor in Law and a former member of the UN Human Rights Committee[266], to respond quite bluntly. He said: "you'd be a very strange interpreter of the text not to recognise that there's a

[262] Smith A., McWilliams M., Yarnell P. (2014). *Political capacity building: advancing a Bill of Rights for Northern Ireland*. Transitional Justice Institute, University of Ulster. Available at: https://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf (Accessed: 10 October 2022).

[263] The main provision for a Bill of Rights is in the 'Rights, safeguards and equality of opportunity' section and states the following: The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and—taken together with the European Convention on Human Rights—to constitute a Bill of Rights for Northern Ireland.

[264] The advice set out 78 detailed recommendations on what rights should be included in a Bill of Rights for Northern Ireland, in addition to others relating to enforcement and implementation.

[265] MP Theresa Villiers.

[266] Professor Michael O'Flaherty.

responsibility [on]... the United Kingdom government, which is the sovereign to work towards the consideration of the adoption of the Bill of Rights"[267].

Further provisions can be found in other negotiated settlements. The Joint Declaration by the British and Irish governments in April 2003, for instance, reiterated the British government's commitment "to bringing forward legislation at Westminster where required to give effect to rights supplementary to the ECHR to reflect the particular circumstances of Northern Ireland."[268] It included a reference to an Implementation Group to restore discussions between the parties to the Agreement on how to progress on the matter of a Bill of Rights for Northern Ireland, as well as it provided for a future Roundtable Forum. Additional commitments by the two governments and Northern Irish political parties came with the Comprehensive Agreement published in 2004 and the St. Andrews Agreement, 2006. The Forum, consisting of 14 representatives from civil society, 14 representatives from the main political parties and chaired by the independent human rights expert Chris Sidoti, opened its work in November 2006, to then finish and report in March 2008. The scope was that of "defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international human rights instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill Rights for Northern Ireland."[269]

It is crucial to emphasize how meaningful these commitments are, or better were supposed to be, since both governments recognised a Bill of Rights for Northern Ireland as an integral part of the constitutional settlement in Northern Ireland, but even more because the UK government expressly committed to bring forward legislation for the implementation of a Bill of Rights.[270] Furthermore, as highlighted in the report, "under

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[267] Smith A., McWilliams M., Yarnell P. (2014). *Political capacity building: advancing a Bill of Rights for Northern Ireland*. Transitional Justice Institute, University of Ulster. Available at: https://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf (Accessed: 10 October 2022).

[268] *Joint Declaration by the British and Irish Governments* (2023). Available at: https://www.peaceagreements.org/view/132/Joint%20Declaration%20by%20the%20British%20and%20Irish%20Governments (Accessed: 23 October 2022).

[269] Bill of Rights Forum (2008). *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*. Available at: https://cain.ulster.ac.uk/issues/law/bor/borf310308_report.pdf (Accessed: 25 October 2022).

[270] Smith A., McWilliams M., Yarnell P. (2014). *Political capacity building: advancing a Bill of Rights for Northern Ireland*. Transitional Justice Institute, University of Ulster. Available at:

Article 31 of the Vienna Convention on the Law of Treaties, to which the UK is a party, the UK has the obligation to fulfil its promises in good faith, and in accordance with its subsequent actions."[271] But the UK government has not given effect to any subsequent actions following consultation with NIHRC and its advice, failing to fulfil its promises. But here too, even though its work methodology and findings were highly appreciated by the NIHRC, the Forum failed to bring about an unanimously agreed content for a future Bill of Rights.

In November 2009, the NIO published the consultation paper on the NIHRC opinion, which argued that the rights proposed by the Commission were already enjoying adequate protection through existing legislation, and that applying what had been suggested would "impinge on the principle of democratic accountability as well as the separation of powers between the three branches of government."[272] But this is a specious approach since the Bill of Rights is clearly aimed at reinforcing democracy instead of weakening it. To this claim, the NIHRC responded noting: "the Government does not seem to have realised that the fact that a protection currently offered by a code of practice, order or statute does not provide stable and enduring basis for that protection."[273] An additional ground for the NIO's rejection of elements resulting from advice provided by the NIHRC was that allowing additional rights for Northern Ireland, that are not available in the rest of the United Kingdom, would create an imbalance. But this stance can be criticised in two respects: first, there are cases around the world, such as the Canadian one, of different bill of rights specific for different regions of the state; second, each separate legal system within the UK should be free to devise an additional Bill of Rights going further than the national Bill of Rights has gone, and deal with particular matters that are of its specific concern.[274] Hence, opposing a Bill of Rights specific for Northern Ireland with a UK Bill

https://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf (Accessed: 10 October 2022).

[271] *Ibid.*

[272] Ministry of Justice (2009). *Rights and Responsibilities: Developing Our Constitutional Framework* (Cmd 7577). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf (Accessed: 25 October 2022).

[273] Northern Ireland Human Rights Commission (2010). *A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office*. Available at: https://nihrc.org/uploads/documents/advice-to-government/2010/bill-of-rights-for-northern-ireland-february-2010.pdf. (Accessed: 26 October 2022)

[274] Joint Committee on Human Rights (2008). *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007-08. Available at: https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm. (Accessed: 26 October 2022).

of Rights is simply inadequate, because the two Bills can coexist as separated processes without being at odds. Indeed, this was one of the findings by the UK Bill of Rights Commission's report in December 2012.[275] This argument has also been endorsed at the international level by several United Nations bodies who have called upon the British government to accelerate with the enactment of a Northern Ireland Bill of Rights. In addition to this, a UK-wide frame of reference would undermine the approach towards "the particular circumstances of Northern Ireland" as foreseen in the GFA. Later, in March 2011, a *Commission on a Bill of Rights for the UK* was established with the aim to "investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention […] ensures these rights continue to be enshrined in UK law and protects and extend our liberties"[276]. But the Commission could not reach a final agreement on whether a Bill of Rights was necessary for the UK. It is in my opinion a serious failure that despite the numerous declarations and formal agreements by British and Irish governments, together with the findings and advice of UK and Northern Ireland Commissions as well as the opinions expressed by international human rights experts and international organisations, all supporting a Bill of Rights for Northern Ireland, there is still a political vacuum preventing for any advancement on this issue.

After the initial momentum began to wane and subsequent agreements between the parties failed to achieve any concrete results for the advancement of this Bill, the situation got even more complicated when the coalition government formed by Conservative and Liberal Democrats came into office in 2010. The Conservative Party has begun to question the existence of an obligation to legislate on a Bill of Rights for Northern Ireland at Westminster. Important to be noticed is also the stance that Northern Irish parties have adopted with regard to the subject. The report outlines how the Protestant/Unionist alignment's attitude towards a Northern Ireland Bill of Rights have diverged and have progressively regressed compared to the support that was initial given. Unionism has, in fact, at times advocated for a Bill of Rights and at other times opposed the idea. Nationalist and Republican parties have instead continuously called for a Bill of Rights

[275] Commission on a Bill of Rights (2012). *A UK Bill of Rights? The Choice Before Us. Volume 1*. Available at: https://www.basw.co.uk/system/files/resources/basw_33402-9_0.pdf (Accessed 26 October 2022).
[276] *Ibid.*

for Northern Ireland, together with the Alliance Party which supported proposals for a Bill of Rights for Northern Ireland since its inception in the 1970s.

January 2020 marked a turning point in the political travails of Northern Ireland with the conclusion of the *New Decade, New Approach* agreement and a reopening of the Northern Ireland's assembly after a three-year suspension. This agreement, a historic deal between the UK and Irish governments that has resurrected power-sharing government in the region, provided a new agenda of ambitions to be addressed within Northern Ireland's. Together with this, it the established an *Ad-Hoc Assembly Committee* "to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights (which are currently applicable) and «that reflect the particular circumstances of Northern Ireland»; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem."[277] At the core of this deal was the amendment of the 1998 Northern Ireland Act, with the introduction and enactment of three draft Bills each of them making provisions for: the establishment of the Office of Identity and Cultural Expression; the repeal of the also repeal the *Administration of Justice (Language) Act (Ireland) 1737,* banning the use of the Irish language in courts, as well as the use of Irish in official documents produced by public offices; the establishment of a Commissioner aimed at enhancing and developing the language as well as arts and literature associated with the Ulster Scots / Ulster British tradition in Northern Ireland. Within this document, the parties acknowledged the importance for the protection and promotion of human rights and different identities, and agreed that it should be the goal of the devolved Executive to "build a society that reflects the best international standards of human rights."[278] In this perspective, the importance of the role played by the Northern Ireland Human Rights Commission is recognised as crucial in ensuring that the government and all other public bodies work to protect the human rights of everyone, raise awareness on what they are and what can people do in

[277] *New Decade, New Approach* (2020). Available at : https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf (Accessed 15 October 2022).
[278] *Ibid.*

case they are infringed.[279] These new provisions established through the document could pose the basis for judicial review challenges against any laws passed by the Assembly, or the exercise of powers by Ministers of the Northern Ireland Executive which arguably undermine rights and equalities protections.

New Decade, New Approach brought at least the issue of establishing a Bill of Rights back onto the table, announcing an *Ad-Hoc Northern Ireland Assembly Committee on a Bill of Rights*, which was established in February 2020. Between November 2020 and February 2021, the Committee also carried out a survey, searching for views on human rights and a Bill of Rights for NI, which informed its final report to the Northern Ireland Assembly in February 2022. The majority of stakeholders and witnesses which were interviewed supported a bill of rights for Northern Ireland. 80% of the respondents to the survey described a bill of rights as being important or very important, while just 6% said it was not important at all. 30% agreed with the statement that everyone in Northern Ireland today enjoys the same basic human rights, and 61% disagreed.[280] Potential consequential advantages were identified in the role a Bill of Rights for Northern Ireland would play in: the enhancement human rights protections; the provision of a transitional justice measure; the provision of a safeguard underpinning legislation and policy and facilitate political accountability; the support for political stability and play an important role in the face of societal change; the provision of an educative tool and support a rights-based culture.[281] A panel of five experts was also to be appointed by the First and deputy First Ministers with the task of assisting the work of the Ad-Hoc Committee but such panel was never appointed due to the political opposition enacted by the DUP. The Northern Ireland Human Rights Commission has delivered a written submission and oral evidence to the Committee, based on its previous advice and with a special focus on the technical aspects of a Bill of Rights. Additionally, in collaboration with the Equality

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[279] *New Decade, New Approach* (2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf (Accessed 15 October 2022).

[280] Northern Ireland Assembly (2022). *156/17-22 Report of the Ad Hoc Committee on a Bill of Rights*. Available at: http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf (Accessed 23 October 2022).

[281] Northern Ireland Assembly (2022). *156/17-22 Report of the Ad Hoc Committee on a Bill of Rights*. Available at: http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf (Accessed 23 October 2022).

Commission, written and oral evidence was also provided on how the commitment for non-diminution contained within Article 2 of the NI Protocol and the provisions of the EU Charter of Fundamental Rights should guide the development and drafting of a Bill of Rights for Northern Ireland.[282] In any case, the Ad-Hoc Committee has given fresh momentum to the debate over a Bill of Rights for Northern Ireland, but it remains unclear how this momentum will be translated into practical outcomes (also in consideration of the fact that NIHRC final advice on a Bill of Rights over a decade ago remained unheard). A distinct Bill of Rights for Northern Ireland might thus become a necessary element in the economy of this project. In its 2021 Annual Statement, the NIHRC welcomed the progress made by the Ad-Hoc Assembly Committee but unequivocally recommended "that the UK Government implements its commitment to legislate for a Bill of Rights for NI."[283]

This is another example of how the implementation of the GFA was only partially accomplished, and the commitments the parties agreed were indeed not completely upheld. This repeated and extended vacancies of the Northern Ireland Assembly during the past 24 years, as well as the different views between the two sides, significantly slowed down this process of paramount importance. Hence, even though the establishment of cross party and cross community support was seen as "critical"[284] and the advancement of a Bill of Rights was an explicit objective, only some parts of that agreement have already been enacted and the New Decade New Approach was not successful in following up on the key measures therein delineated. It is now crucial that this stalemate is urgently addressed and that both the British and Irish governments finally develop a policy framework which will result in greater coherence in their approach to a Bill of Rights for Northern Ireland. Otherwise, the risk is that a proposal not meeting the specific needs of the Northern Irish context will be adopted as a downward compromise, which would be detrimental for the human rights protection framework as it was conceived in the GFA.

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[282] Northern Ireland Human Rights Commission (2021). *Annual Statement 2021*. Available at: https://nihrc.org/publication/detail/annual-statement-2021 (Accessed: 25 October 2022).
[283] *Ibid.*
[284] *New Decade, New Approach* (2020). Available at : https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf (Accessed 15 October 2022).

Should the 1998 Human Rights Act be revised?

In December 2020, the UK Government announced an independent review of the Human Rights Act 1998, specifying that this review would not question the content of the rights but only its operational mechanisms. Later, in January 2021, *The Terms of Reference* and *a Call for Evidence for the Independent Review* were published. In March of the same year, the Northern Ireland Human Rights Commission responded to the *Independent Human Rights Act Review Team's Call for Evidence* pointing out that that even just altering the operational mechanisms of the Human Rights Act could have a specific impact on NI, and that the commitment to non-diminution of rights, safeguards or equality of opportunity, is a pillar of both the GFA and the NI Protocol.

It is crucial to remind that the HRA 1998 incorporates the ECHR into UK law and therefore provides for the access to court and to a remedy that is mandated by the Belfast Agreement. Successive Tory governments have communicated their intentions concerning the act, but no legislation has yet been tabled. Proposals are varied and include: a less influential role for the European Court of Human Rights which monitors the compliance to the convention; a rebalancing of certain rights so that some rights are seen as hierarchically superior to others; the creation of additional stages within court processes, which will make legal proceedings regarding human rights more onerous both in terms of logistics and finances; a reduction in the remedies available to a claimant based on their prior conduct; it also seems that Parliament is trying to create a greater role for itself in the human rights process at the expenses of courts.

If human rights protection was at the core of the Belfast/ Good Friday Agreement it is because the absence of human rights (as for cases of police brutalities, indefinite detention without charge, internment, or discrimination in the access of services) represented an important contributor to the Troubles period. People felt that their rights were not being vindicated, or they could not access them through courts. One reason to be against the reform of the Human Rights Act is that this act mostly emerged from the very specific history and politics of Northern Ireland which gave an important impetus for its creation. The incorporation of the ECHR by the British government is a very specific requirement of the GFA, which guaranteed the direct access to the courts as well as remedies available in the eventuality of a breach of the convention. Moreover, it established the power for

the Northern Ireland courts to overrule legislation produced by the Northern Ireland assembly on grounds of inconsistency.

In addition to what was specific referenced to the ECHR, there was also a mention to a Bill of Rights for Northern Ireland, which was supposed to supplement the ECHR itself and provide for a much broader and expansive set of rights for Northern Ireland as well. With regard to the judicial cases that are brought before courts concerning the legacy of the Troubles, restricting the possibility to access to the European Court of Human Rights creates a barrier and reduces the right of access to remediation that was delivered by the GFA. The ECHR was considered to represent the bare minimum standards for human rights protection in Northern Ireland, just the fundamental rights upon which to build through the HRA first, and the Bill of Rights for Northern Ireland afterwards. The proposal for a reform of the HRA is certainly not coherent with the will to extend the range of rights covered by the ECHR. The threat is that, instead of extending the range of rights that were provided for in 1998, they will suffer a restriction. I believe that any substantial reform on this matter involves the representative issue as well. The text of GFA in fact explicitly commended for the approval of "the people, North and South", not to mention that the governments of both Northern Ireland and the Republic are part of this international treaty. Thus, a unilateral amendment of such magnitude should at least include a previous consultation of all the parties involved in the original Agreement. In the event of a substantial revision of the framework of human rights protection as configured by the HRA, a destabilising effect in the governance structure of Northern Ireland must be taken into account.

A solution could be found in the adoption of a Northern Ireland dedicated piece of legislation which would cover a wide set of rights and have Northern Ireland specificities at its core: but, as aforementioned, a Northern Ireland Bill of Rights is still far from being implemented. Concerning the repealing of the 1998 HRA we need to bear in mind that this act is not just fundamental to the GFA but also constitutes a pillar of the British uncodified constitution and has a constitutional nature.[285] Its importance is implicit in the fact that all legislation and policy must be compatible with it. And indeed, the Joint

[285] Dickson B., McCrudden C., McCormick C., Killean R., Connolly R. (2021). *Evidence to the Independent Human Rights Act Review by QUB Human Rights Centre*. Queen's University Belfast, School of Law. Available at: https://pure.qub.ac.uk/en/publications/evidence-to-the-independent-human-rights-act-review-by-qub-human- (Accessed: 25 October 2022).

Committee on Human Rights reported that "weakening the HRA would have a significant impact on the Belfast/Good Friday Agreement, which in turn risks upsetting the peace settlement in Northern Ireland."[286]

With respect to the role that the GFA had in terms of everyday life of Northern Irish citizens, an exemplification is that of the renewed police force. The Police Service of Northern Ireland adopted in fact a human-rights based approach, which resulted in a code of conduct directly linked with the Human Rights Act, while the policing board has a statutory duty to monitor compliance with it, as a direct result the incorporation of the ECHR.[287] Thanks to this new approach to policing, the police service has transformed the way it is perceived and now enjoys a very high level of support throughout the whole society, including within the nationalist community.

Considering that cases are still pending before the European Court of Human Rights from the Troubles period, and that an explanation by the Government of how their proposed legislation would comply with Article 2 seems to be quite impossible at the present time, it is justifiable to doubt about what could happen to the human rights protection mechanisms in Northern Ireland. And the risk of non-compliance with Article 2 was not just observed by the European Court of Human Rights interpretation of Article 2, because the UK Supreme Court came to the same conclusion in Patrick Finucane case.[288] The opinion expressed by the Court is that article 2 has a set of risk requirements that a government must undertake for effective investigations, and most of which are not likely to be met in this Bill.[289] Similarly, passing a bill that allows UK judges to completely disregard ECtHR case law and interpretation would intrinsically erode the role of the court as final arbiter and create a vacuum with respect to the current framework deriving from Belfast Agreement. A concrete example of the consequences and the

[286] Joint Committee on Human Rights (2022). *Human Rights Act Reform*. Thirteenth Report of Session 2021–22. Available at: https://committees.parliament.uk/publications/9597/documents/162420/default/ (Accessed: 26 October 2022).
[287] Dickson B., McCrudden C., McCormick C., Killean R., Connolly R. (2021). *Evidence to the Independent Human Rights Act Review by QUB Human Rights Centre*. Queen's University Belfast, School of Law. Available at: https://pure.qub.ac.uk/en/publications/evidence-to-the-independent-human-rights-act-review-by-qub-human- (Accessed: 25 October 2022).
[288] In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7. Available at: https://www.supremecourt.uk/cases/docs/uksc-2017-0058-judgment.pdf (Accessed: 26 October 2022).
[289] Northern Ireland Office (2020). *Patrick Finucane Case: UK Government Outlines Way Forward*. Available at: https://www.gov.uk/government/news/patrick-finucane-case-uk-government-outlines-way-forward (Accessed: 26 October 2022).

interests associated with this move is directly verifiable in a recent case dealing with the partnership with the Rwandan government on migration, mentioned in the previous chapter. Should the HRA be reformed following the intention expressed by the conservative government, injunctions issued by the Strasbourg court, such as the one that blocked the government's first flight of asylum seekers to Rwanda pending verification of the compliance of the policy with the current legislation, would not have any more effect.

An authoritative assessment of the matter came with the submission of the *Evidence to the Independent Human Rights Act Review by QUB Human Rights Centre*, in February 2021. On behalf of the Human Rights Centre (HRC) of the School of Law at Queen's University Belfast, a group of experts in Human Rights responded to the UK government announcement of a review of the Human Rights Act (HRA) in December 2020. The authors try to warn the Westminster government about the risks involved with this operation. Throughout the document, they underline the unique role played by the HRA in the maintenance of the Good Friday Agreement, the content of which has been largely transposed into primary legislation. The group's opinion is clearly expressed with the following statement addressed to the UK government, leaving little room for interpretation:

> "[O]ur strong view is that the Review you are conducting into the workings of aspects of the HRA presents significant potential risks to stability and peace in Northern Ireland. It is widely perceived here as the latest in a long line of developments calling into question the Government's commitment to human rights and its willingness to retain the ECHR at the centre of the UK's constitution. We suggest that changes in the operation of the HRA in Northern Ireland are neither necessary nor desirable. Indeed, the debate in Northern Ireland is currently focused on the potential *extension* of human rights, rather than their diminution."

This view is shared by the NIHRC, which suggests that a review should be aimed at considering how to extend the range of existing protections instead of restricting them. Likewise, access to an independent judiciary to challenge violations by public authorities

should not be restricted, but rather enhanced.[290] Hence, "[P]ut simply, the HRA has been, and should remain, absolutely integral to the sustainability of the Northern Ireland peace process."[291]

[290] Northern Ireland Human Rights Commission (2021). *Annual Statement 2021*. Available at: https://nihrc.org/publication/detail/annual-statement-2021 (Accessed: 25 October 2022).
[291] Dickson B., McCrudden C., McCormick C., Killean R., Connolly R. (2021). *Evidence to the Independent Human Rights Act Review by QUB Human Rights Centre*. Queen's University Belfast, School of Law. Available at: https://pure.qub.ac.uk/en/publications/evidence-to-the-independent-human-rights-act-review-by-qub-human- (Accessed: 25 October 2022).

CONCLUSIONS AND CONSIDERATIONS

In my opinion, it is crucial to involve citizens in decision-making processes to ensure that the current model of (liberal) democracy continues to have a meaning, and for citizens to have confidence in it. The fact that the UK has withdrawn from the EU and that the conservative government wants to halt European institutions and courts from having jurisdiction over what happens on its soil and on its national policies can have detrimental effects, especially in view of Northern Ireland's history and the current political trend. The decision of cutting out European bodies so as to be consistent with the promise to make the UK totally independent in from the "tyrannic" European Union, will have destabilising effects and will result in a diminution of the rights guaranteed by the GFA. In the context of the resolution of the Northern Irish conflict, which embodied the very essence of the devolution system, it is a mistake to underestimate the importance at the constitutional level of the involvement of other countries, especially the Republic of Ireland, and the European Union. Through co-participation in shared institutions and in the guarantee of fundamental rights, the relations established with these actors have de facto taken on a constitutional value in what can be defined as the statute created in 1998. Indeed, the Belfast agreement not only sets up the human rights institutions for Northern Ireland but was also premised on north and south of the border adopting equivalent human rights standards. The creation of a UK Bill of Rights would water down the protection of human rights in Northern Ireland, thus potentially bringing about discrepancies between the level of human rights protection north and south of the border, resulting in the people of Northern Ireland no longer being entitled to the same level of protection as the people of Ireland. A question also arises concerning the eventuality of a UK Bill of Rights, how it would apply to devolved institutions and how to handle a scenario in which a law is enacted that is incompatible with the convention rights as interpreted and applied in Strasbourg, but not as interpreted and applied in the more restricted environment of the United Kingdom.

On the one hand the history of violence, the deep conflict between the two communities, the role of the Northern Irish institutions based on the assumption that the loyalists should hold power; on the other hand, the contemporary emergence of populist governments such as the Conservative ones, which first signed the Protocol and then reneged on it to just get the votes needed to win the elections. This makes the Northern

Irish context a powder keg ready to burst at any moment as politicians in Westminster do their calculations in order to get re-elected at the next round. The consequences of the Brexit vote, the attitude adopted by the UK government, and the total lack of reliability in complying with their commitment to respecting the treaties they signed, have certainly undermined the stability of the institutional set-up created by the Good Friday Agreement. The Agreement told the people of Northern Ireland that, from then on, they would have decided for themselves and be guaranteed a new season of autonomous decision-making. But the fact that Northern Ireland ended up leaving the European Union, despite the majority of the population having voted in favour of the *remain*, means that what was established in 1998 only survives on paper and may lead citizens to no longer trust the institutions. At the contrary, the overwhelming majority of voters supported the Belfast Agreement and the membership to the European Union was one of its pillars. But now, together with the withdrawal from the EU, the government of Westminster is also dangerously dwelling on those human rights protection mechanisms guaranteed in 1998.

The situation becomes even more serious because this further major contribution to instability in Northern Ireland is not the result of necessary and inevitable events in the process of regaining control of the country, as convinced Brexiteers might think. Instead, it is the consequence of deliberate, perhaps superficial, but conscious choices made by those who are driving the Brexit process forward. There is no need to backtrack on some of the commitments previously made, as compliance with international treaties could easily coexist through specific agreements, but the Conservative government is intended to do so as part of a nationalist strategy to gain political support. Like the Sinn Féin MP John Finucane said, "[t]hey don't want to have human rights legislation with obligations they see as coming from a foreign source."[292] Brexit could be better negotiated to avoid these further damages, if there was just the political will to do so.

The elimination of the possibility to resort to the European Court of Human Rights as a final appeal in cases for which the state may bear some responsibility; adopting a policy which indicates to UK judges not to take into account the ECtHR jurisprudence; preventing the court of Strasbourg from verifying the compliance of national legislation

[292] Croft. J., Webber J. (2021). UK human rights law review risks Northern Ireland peace accord, politicians warn, *Financial Times*, 29 August. Available at: https://www.ft.com/content/a3b05a49-7bcd-47fb-96e9-ecc31d5486e8 (Accessed: 20 October 2022).

with the commitment of no diminution of rights and with the provisions of the ECHR. These measures are the reverse of what the Belfast Agreement contemplated. It spoke of the new Northern Ireland Human Rights Commission advising on the scope for defining rights supplementary to those in the Convention, to reflect the particular circumstances of Northern Ireland. As I understand it, this hasn't yet happened but is a clear indication of the direction indicated by the Agreement. What I have just mentioned is an example of the UK government assuming the right to pick and choose which of its international obligations it will comply with. The Bill of Rights proposed by the UK government would oddly be a measure aimed at protecting rights, but that weakens instead of strengthening the already existing mechanisms for rights protections. Regarding the Human Rights Act 1998, there is very little wrong with it and what little there is wrong could be ameliorated through amendment. A wholesale repeal and replacement with an act which does much the same thing, in much the same way but with some important qualifications and restrictions, is full of dangers. Quite apart from reducing the protections currently available to the victims of human rights violations and thus risking the breach of international obligations, it will lead to doubts and uncertainties and a great risk of time-consuming and costly litigation both in the UK and in Strasbourg for years to come. It is no surprise that these moves have triggered a widespread reaction particularly among academics and human rights campaigners, due to the possible consequences that weakening the human rights protection framework could have on the resilience of the peace accord reached for Northern Ireland in 1998.

Another issue to be considered is whether the government will follow the Sewell convention and seek the legislative consent of the Scottish Parliament, Welsh, and Northern Irish administrations. And while Northern Ireland does not have a functioning Assembly, the risk is that this will be seized as an opportunity for legislation to be advanced without consulting not only Northern Ireland but also Scotland and Wales. As I write, Northern Ireland is facing another political impasse that has led to the hiatus of a functioning government since the May 5, 2021, election, and the prospect of a second general election. This comes at a time when Westminster institutions have also suffered a period of crisis and instability, which they have sought to overcome with yet another change of Prime Minister, meaning that the role of the Stormont institutions would have been even more important. This stalemate is due to the fact that the DUP, the largest

unionist party which ranked second due to the first historical win of the Sinn Féin, neither nominated its minister nor agreed on a shared name to take the place of the Assembly speaker, a necessary element for the cross-community executive to then be appointed. The reason for this boycott is that Unionists are concerned about the Northern Ireland Protocol and want it to be scrapped or at least substantially reformed. This exemplifies how Brexit has caused a setback in Northern Ireland and deeply polarised political competition along ethnic lines, eroding space for consensual solutions. A new border within the island is to be avoided at all costs, as it would set the country back twenty five years and remove one of the preconditions on which the Good Friday Agreement was built, playing a crucial role in the pacification process. The alternative to the concept of a shared Northern Ireland and a consensual approach is going back to a zero-sum mentality, which would tear society apart instead of continuing to work towards its cohesion.[293]

There is nothing inherently divisive in human rights; they are meant to be for everyone without any distinction or competition among them. Advancing them for the benefit of the whole society should be the goal for every political force, and they only become a threat when manipulated in the political discourse. Alternative solutions to what the Conservative government has adopted or foreshadowed to adopt exist, and there are several actors trying to advise the government to avoid that further and more serious damages will be created. All it takes is the willingness to look at reality with more realistic eyes, and to actually listen to authoritative voices and recommendations by those same bodies that the government sets up for consultation on such specific matters, despite them reporting views may be inconvenient for the government itself.

[293] UK in a changing Europe (2018). *Good Friday Agreement: why it matters in Brexit.* Available at: https://ukandeu.ac.uk/good-friday-agreement-why-it-matters-in-brexit/ (Accessed: 26 October 2022).

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