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Implications for the Protection of Human Rights in a United Ireland¹

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ABSTRACT

This paper first sets out how human rights are currently protected in Northern Ireland and then examines how they are protected in Ireland. For each jurisdiction it explains to what extent the law-makers are obliged to comply with certain human rights standards, in particular those set by the nations' constitutions and the European Convention on Human Rights. It also surveys how each jurisdiction is tied into other international human rights monitoring systems. The paper suggests how the unification of Ireland could change the way in which the human rights of people living in Northern Ireland are protected,

¹ Read responses to this paper by Fiona de Londras, <https://doi.org/10.3318/isia.2021.32b.53>, and Suzanne Egan <https://doi.org/10.3318/isia.2021.32b.54>.

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while pointing out that much depends on the terms on which unification takes place. The guiding principle for the governments of Ireland and the UK should be that there is no regression in the degree of protection currently afforded.

INTRODUCTION

One of the many perspectives from which the pros and cons of a united Ireland can be weighed is that of human rights protection. In a united Ireland how differently, if at all, would the human rights of people living in Northern Ireland or in Ireland be protected? Any answer to that question presumes an understanding of the current degree of human rights protection in each of those jurisdictions and depends to some extent on the terms under which the unification of Ireland takes place. Parts 1 and 2 of this paper therefore look at the current position in Northern Ireland and Ireland respectively. Part 3 then examines how the human rights of people living in Northern Ireland might change if they were instead living in a united Ireland.²

1. HOW HUMAN RIGHTS ARE PROTECTED IN NORTHERN IRELAND

It is often misleadingly asserted that the UK does not have a written Constitution. The statement is true only in the sense that there is no single document with overarching authority against which the constitutionality of all other laws can be judged. Rather, there are two fundamental principles and many documents—mainly Acts of Parliament—which prescribe how the country is to be run. The first fundamental principle of the UK Constitution is that the Westminster Parliament is sovereign: it can pass whatever laws it likes, with later Acts trumping earlier ones.³

The second fundamental principle is the rule of law, meaning that no-one is above the law, even the government.

As regards Northern Ireland, as in Scotland and Wales, the UK Parliament has imposed some restrictions on what laws can be passed by the Assembly

² Throughout this article the terms 'Northern Ireland', 'the north of Ireland' and 'the six counties' are used interchangeably, while the south of Ireland is referred to as 'Ireland', without intending any political connotations.

³ This was affirmed by Colton J. in a recent legal challenge to the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement (explained below): *Allister's Application for Judicial Review* [2021] NIQB 64. The judgment may be appealed but most legal experts doubt that it will be overturned.

there. In particular, a provision in an Act of the Assembly is invalid if it is incompatible with ‘Convention rights’ or if it discriminates against any person or class of person on the grounds of religious belief or political opinion.⁴ In addition, a minister or Northern Ireland department has no power to make or approve any subordinate legislation, or do any act, if that legislation or act is incompatible with a ‘Convention right’ or discriminates against a person or class of person on the ground of religious belief or political opinion.⁵ ‘Convention rights’ are defined in the same way as in the Human Rights Act 1998, the Act which effectively incorporated most of the European Convention on Human Rights (the ECHR) into domestic law throughout the UK.⁶ More generally, the Northern Ireland 1998 Act makes it unlawful for any public authority carrying out functions relating to Northern Ireland to discriminate against a person on the ground of religious belief or political opinion.⁷ ‘Public authority’ is defined as including a minister of the crown, such as the secretary of state for Northern Ireland.⁸

The advocate general for Northern Ireland and the attorney general for Northern Ireland can each refer to the UK Supreme Court the question of whether a provision of a Bill of the Northern Ireland Assembly is within its legislative competence,⁹ but to date this has happened only once, when the attorney general referred the Damages (Asbestos-related Conditions) Bill of 2011 but later withdrew the reference.¹⁰ If the Supreme Court decides that a provision in a Bill is within the Assembly’s legislative competence, that decision applies also to the provision once it is part of an Act.¹¹ The attorney general can also refer a ‘devolution issue’ to the Supreme Court, which is defined as embracing questions about whether the Assembly, a minister or a government department is doing something that does not comply with Convention rights.¹²

⁴ Northern Ireland Act 1998, s 6(2)(c) and (e).

⁵ Northern Ireland Act 1998, s 24(1)(a) and (c).

⁶ Northern Ireland Act 1998, s 98(1).

⁷ Northern Ireland Act 1998, s 76.

⁸ Northern Ireland Act 1998, s 76(7)(a).

⁹ Northern Ireland Act 1998, s 11(1). The reference has to be made within four weeks of the Bill’s Final Stage or Reconsideration Stage: ss 11(2) and 13(6).

¹⁰ He did so because a Scottish case was dealing with the same issue: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868.

¹¹ Northern Ireland Act 1998, s 11(4).

¹² Northern Ireland Act 1998, s 79 and Schedule 10, para 1. Such references were considered in *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2020] AC 413 (the ‘gay cake’ case) and in *Reference pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2020] UKSC 2 (concerning the law on universal credit, a welfare benefit).

The Human Rights Act may at first sight appear to be an exception to the principle of parliamentary sovereignty because it proclaims its own superiority over all other legislation. Section 3 tells us that '[s]o far as it is possible to do so, primary legislation and subordinate legislation [whenever enacted] must be read and given effect in a way which is compatible with the Convention rights'. But the fact remains that Parliament could amend or repeal section 3 at any time if it so wished. If primary legislation is incompatible with Convention rights, or if it prevents the removal of incompatibility of a piece of secondary legislation, then all that the High Court, Court of Appeal or Supreme Court can do is issue a declaration of incompatibility of the primary or secondary legislation, as the case may be. Such declarations have no effect on the validity of the legislation in question but they enable the government, through a 'remedial order', to change the offending legislation. Indeed, the Human Rights Act itself can be amended in that way if its provisions have been found to violate a Convention right.¹³ By July 2020, 43 declarations of incompatibility had been made, of which ten were overturned on appeal; three of the declarations were issued by courts in Northern Ireland.¹⁴ In contrast, if secondary legislation cannot be interpreted in a way that is compatible with Convention rights, and if there is no primary legislation preventing removal of the incompatibility, any court can declare the secondary legislation to be invalid.

Apart from the Human Rights Act there is no other legislation applying in Northern Ireland that includes a whole catalogue of human rights that must be protected. There is some controversy over whether the Bill of Rights 1689 ever applied in Ireland,¹⁵ but even if parts of it do still apply in Northern Ireland it contains only a few rights that would today be labelled as human rights. They include the right not to be subjected to excessive bail or fines and the right not to be inflicted with cruel and unusual punishment. Needless to say, a number of more modern pieces of legislation confer additional specific human rights. For instance, the Police and Criminal Evidence (NI) Order 1989 confers various rights on persons who are arrested and questioned by the police, while the Protection of Freedoms Act 2012 confers rights relating to

¹³ See the Human Rights Act 1998 (Remedial) Order 2020, SI 1160, remedying the breach of the ECHR identified by the European Court of Human Rights in *Hammerton v UK* (2016) 63 EHRR 23.

¹⁴ *Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020* (Ministry of Justice, CP 347, 2020) 30. The three cases were *McR's Application for Judicial Review* [2002] NIQB 58; *The Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 102; and *Siobhan McLaughlin's Application for Judicial Review* [2018] UKSC 48, [2018] 1 WLR 4250.

¹⁵ Nial Osborough, 'The failure to enact an Irish Bill of Rights: a gap in Irish constitutional history', *Irish Jurist* (NS) 32 (1998), 392–416.

such matters as police retention of biometric data, the regulation of surveillance and powers of entry.

While the provisions already mentioned on religious belief and political opinion discrimination are unique to Northern Ireland, in the field of equality and discrimination law more generally Northern Ireland has fallen behind the rest of the UK since the Belfast/Good Friday Agreement of 1998 (hereafter referred to as ‘the 1998 Agreement’ and ‘the Agreement’). For England, Wales and Scotland the Equality Act 2010 consolidated and reformed discrimination law but a ‘Single Equality Bill’ has not yet been debated by the Northern Ireland Assembly. At present there are pieces of legislation dealing with discrete protected characteristics, for example the Sex Discrimination (NI) Order 1976 and the Race Relations (NI) Order 1997. Although these laws have all been amended from time to time, they still lag behind Great Britain’s Equality Act in several respects. Moreover, throughout the UK there is no free-standing right to equality.

The common law also protects human rights, but not to the extent that some might suppose, even though judges sometimes refer to ‘constitutional rights’, meaning in effect ‘fundamental’ human rights.¹⁶ The common law is fairly strong on the rights to a fair trial, free speech and freedom of assembly, but relatively weak on the right to privacy and on economic, social, cultural and environmental rights. Traditionally, the common law has protected liberties, not rights. People are at liberty to do anything they want to do but Parliament can limit those liberties because Parliament is supreme. Constitutional lawyers are divided on whether, if Parliament were to pass an Act that was clearly in breach of fundamental rights, a court could legitimately declare the Act to be invalid because of its inconsistency with the rule of law.

The UK is a dualist country in the sense that if the government enters into a treaty with another state, and even if Parliament ‘ratifies’ the treaty, its terms do not become part of domestic law unless Parliament takes the second step of passing legislation expressly incorporating the treaty into domestic law. In the absence of such incorporation courts can use treaties only as aids to the interpretation of existing legislation or the common law. A bold example of such interpretation occurred in Northern Ireland in 1977, when the Court of Criminal Appeal reduced a man’s sentence for a firearms offence because it would have been a breach of Article 7 of the ECHR to impose a higher sentence than was available under the law as it stood when he committed the

¹⁶ See, generally, Mark Elliott and Kirsty Hughes (eds), *Common Law constitutional rights* (Oxford, 2020).

offence.¹⁷ As noted earlier, the ECHR was not incorporated into UK law until more than 20 years later.

The UK has ratified seven of the UN's nine 'core' human rights treaties and four of the substantive Protocols to those treaties. It has also ratified five of the eight most significant Council of Europe human rights treaties.¹⁸ All of those ratified treaties are binding on the UK at the international level, but very few of their provisions have been incorporated into domestic law. Of all the treaties that permit states to opt into a complaints system—under which a treaty-monitoring body can adjudicate on whether the state has breached the treaty's standards in a particular case—the UK has opted into just two.¹⁹ It has also accepted the power of three treaty-monitoring bodies to hold inquiries into the protection of human rights in the UK.²⁰ In addition, some treaties allow treaty bodies to send experts to a state to make on-the-spot assessments of how the state is complying with the treaty's requirements and, as far as is known, the UK has never refused a request for any such visit, even by a non-treaty-based UN or Council of Europe rapporteur or commissioner.

While the UK was a member of the European Union (EU) it was legally obliged to protect rights created by EU law. Likewise, from 1 December 2009, when the Treaty of Lisbon came into force, the EU's Charter of Fundamental Rights became part of domestic law throughout the UK, at least in the implementation of EU-derived law.²¹ In addition, the Charter's *principles* were 'cognisable' by judges only when interpreting acts of implementation of EU-derived law or ruling on their legality.²² When the UK officially left the

¹⁷ *R v Deery* [1977] NI 164.

¹⁸ It has ratified the ECHR, the European Social Charter, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Framework Convention for the Protection of National Minorities and the Charter for Regional or Minority Languages. It has not ratified the Revised Social Charter, the Convention on Biomedicine and Human Rights or the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

¹⁹ These are the complaint systems under the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.

²⁰ These are the inquiry powers under the Convention Against Torture and the two Conventions mentioned in the previous note. In 2016 the UK was the subject of an inquiry conducted by the UN Committee on the Rights of Persons with Disabilities (on the impact of austerity measures on disabled persons) and in 2018 it was the subject of an inquiry by the Committee on the Elimination of Discrimination Against Women (on the criminalisation of abortion in Northern Ireland). The latter report ultimately led to the UK Parliament decriminalising abortion in Northern Ireland: see the Northern Ireland (Executive Formation etc) Act 2019, s 9.

²¹ Article 51(1) of the Charter. The impact of the Charter was, in reality, minimal: Brice Dickson, 'The Charter of Fundamental Rights within the United Kingdom' in Laurence Burgorgue-Larsen (ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe* (Paris, 2017), 673. It has also been slight in Ireland: Brice Dickson, 'The Charter of Fundamental Rights within Ireland', in Burgorgue-Larsen (ed.), *La Charte*, 465.

²² Article 52(5) of the Charter.

EU on 31 January 2020, the Charter ceased to apply in the UK as a whole, but under the Ireland / Northern Protocol to the EU-UK Withdrawal Agreement of 2019 there can still be a role for the Charter in Northern Ireland. Article 2(1) of the Protocol provides that:

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.

The Union law listed in Annex 1 comprises European Directives on equal treatment between men and women in four contexts: social security,²³ access to and supply of goods and services,²⁴ employment and occupation²⁵ and self-employment.²⁶ It also comprises Directives on equal treatment between persons irrespective of racial or ethnic origin²⁷ and on a general framework for equal treatment in employment and occupation.²⁸ The Protocol makes it clear that when it refers to a 'Union act' it means a Union act 'as amended or replaced'²⁹ and by 'Union law' it means Union law 'as interpreted in conformity with the relevant case law of the Court of Justice of the EU'.³⁰ As that case law includes rulings dictated by the Charter of Fundamental Rights, the Charter can be said to be still indirectly applicable in Northern Ireland.

Although the 1998 Agreement envisaged the possibility of a Bill of Rights being enacted for Northern Ireland by the UK Parliament, no such Bill has seen the light of day. An Ad Hoc Committee of the Northern Ireland Assembly is currently considering if and how such a Bill could come about and is due to report before the next Assembly elections in May 2022. This author's view is that there is still a lack of adequate consensus and political will, both in Northern Ireland

²³ Council Directive 79/7/EEC of 19 December 1978.

²⁴ Council Directive 2004/113/EC of 13 December 2004.

²⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006.

²⁶ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010.

²⁷ Council Directive 2000/43/EC of 29 June 2000.

²⁸ Council Directive 2000/78/EC of 27 November 2000.

²⁹ Article 13(3) of the Protocol to the EU-UK Withdrawal Agreement 2019.

³⁰ Article 13(2) of the Protocol to the EU-UK Withdrawal Agreement 2019.

and at Westminster, for any such Bill to be put in place.³¹ It is often overlooked, however, that the Northern Ireland Assembly has itself the power to protect human rights more effectively than is currently the case. Like Scotland, for example, it could if it wished, incorporate into the law of Northern Ireland all or parts of any international human rights treaty the UK has ratified.³²

2. HOW HUMAN RIGHTS ARE PROTECTED IN IRELAND³³

Ireland does of course have a single document called the Constitution which is superior to all other laws in the country. Unlike the initial Constitution of the Irish Free State in 1922, the Constitution of 1937 contains what is effectively a Bill of Rights (in Articles 40 to 44) as well as non-justiciable Directive Principles of Social Policy (in Article 45). Under Article 34.3.2 the High Court, Court of Appeal and Supreme Court can declare invalid any law that is shown to be ‘repugnant’ to the Constitution. To date around 100 such declarations have been made, not counting those which were overturned on appeal.³⁴ Seven declarations have been issued by the Supreme Court under Article 26 of the Constitution, which allows the President of Ireland, after consulting with the Council of State, to refer any Bill, with some exceptions, to the Supreme Court for a ruling on whether any part of the Bill is repugnant to the Constitution.

Ireland therefore makes available a ‘human rights’ review of legislation both before and after a Bill becomes an Act, as does Northern Ireland. Oddly, in cases of review before a Bill becomes an Act, the ruling of the Irish Supreme Court has to be in the form of a single judgment, whether it was actually an unanimous decision or not; even the existence of dissenting views cannot be acknowledged. That was formerly the position in the context of reviews of Bills after they had become Acts, but following a referendum the ‘one judgment’ rule was abolished for such cases in 2014.³⁵ Another anomaly is the

³¹ The Ad Hoc Committee has taken evidence from a wide range of witnesses, the present author included, all of which is accessible through its website.

³² See the Northern Ireland Act 1998, Schedule 2, para 3(c). In March 2021 the Scottish Parliament passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. However, the Bill has not yet received Royal Assent, pending a challenge to the extent of the Scottish Parliament’s power to pass it, which is currently being considered by the UK Supreme Court. Judgment is expected in the autumn of 2021.

³³ For a useful non-lawyer’s guide see *Human rights explained: guide to human rights law* (Irish Human Rights and Equality Commission, 2015), available at: https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf (last accessed 25 August 2021).

³⁴ Gerard Hogan, David Kenny and Rachel Walsh, ‘An anthology of declarations of unconstitutionality’, *Irish Jurist* ns 54 (2015), 1.

³⁵ Thirty-third Amendment to the Constitution Act 2013, s 5(2)(g).

‘immutability’ rule, which says that if a provision or a whole Bill has been found not to be repugnant to the Constitution after pre-enactment review, its constitutionality cannot in future be questioned by any court.

The rights set out in Articles 40 to 44 of the Constitution are limited in number. The heading of Article 40 is ‘Personal rights’ and it begins, in Article 40.1, by asserting that ‘all citizens shall, as human persons, be held equal before the law’, while still allowing the state to have due regard in its enactments to ‘differences of capacity, physical and moral, and of social function’. The Irish Supreme Court has made frequent use of this equality clause, which has no counterpart anywhere in the UK. Sometimes it has provided a remedy in an unjust situation where no other solution seemed available, such as when the ban on selling or importing contraceptives was ruled to be unconstitutional.³⁶ But it did not avail David Norris when he challenged the criminalisation of homosexuality³⁷ and it was used to invalidate a statutory provision relating to disability because the provision treated employers unequally through making them vicariously responsible for activities of their employees.³⁸ Article 40.1 has been comprehensively supplemented by two sets of legislation, one dealing with equality in the sphere of employment (the Employment Equality Acts 1998–2021) and the other with equality in society more generally (the Equal Status Acts 2000–2018). These laws are roughly equivalent to Great Britain’s Equality Act 2010, which means that in several respects they protect equality rights more strongly than do the discrete anti-discrimination laws applying in Northern Ireland. Northern Ireland is the only jurisdiction in these islands, for example, where it is still lawful to discriminate against older people when offering goods, facilities or services to the public.

By Article 40.3.1 the Irish Constitution ‘guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’, then adding that ‘in particular’ the state guarantees by its laws ‘to protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’.³⁹ Article 40.4 goes into some detail on how the right of citizens not to be deprived of their personal liberty is to be protected: in effect it preserves the right to *habeas corpus*, but during a war or armed rebellion it still allows acts of the defence forces not to be prohibited, controlled or interfered with. Other rights

³⁶ *McGee v Attorney General* [1974] IR 284.

³⁷ *Norris v Attorney General* [1984] IR 36.

³⁸ *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

³⁹ *Bunreacht na hÉireann* (the Irish Constitution), Article 40.3.2. Article 40.3.3, inserted in 2018, allows for laws to regulate the termination of pregnancies.

specifically provided for include a guarantee that the dwelling of every citizen is inviolable save in accordance with law⁴⁰ and the right of citizens—‘subject to public order and morality’—to express freely their convictions and opinions, to assemble peaceably and without arms, and to form associations and unions.⁴¹ Notably absent from Article 40 is the right to a fair trial. Some would suggest that Article 38 provides constitutional authority for that right, but its wording is weak and it specifically allows for special courts to be established to try offences when the ordinary courts are ‘inadequate to secure the effective administration of justice, and the preservation of public peace and order’.⁴² Today that remains the legal basis for Ireland’s Special Criminal Court, the jurisdiction of which is significantly wider than that of the juryless Crown Courts in Northern Ireland (formerly referred to as ‘Diplock Courts’).

Although Article 40 refers at several points to rights of ‘the citizen’, the courts have been willing to extend the rights to other people in Ireland who are not citizens. Also, as we shall see below, over time the top Irish courts have specified a number of ‘unenumerated rights’. These are rights not explicitly mentioned in Article 40 but nevertheless deemed worthy of recognition as personal rights. In Article 41 the state ‘recognises the family...as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’. This is alien to the UK’s approach to rights, as is the provision requiring the state to ‘endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home’.⁴³

Article 42 imposes duties on the state to ‘provide for free primary education’ and ‘when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation’.⁴⁴ Moreover, a relatively new provision, Article 42A, proclaims that the state ‘recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights’. Under Article 43 the state acknowledges ‘the natural right’ to private ownership of goods and guarantees not to pass any law abolishing that right or the right to transfer, bequeath and inherit property. Article 44.2 guarantees, again to every citizen, ‘freedom of conscience and the free profession and practice of religion’. The

⁴⁰ Bunreacht na hÉireann, Article 40.5.

⁴¹ Bunreacht na hÉireann, Article 40.6.

⁴² Bunreacht na hÉireann, Article 38.3.

⁴³ Bunreacht na hÉireann, Article 41.2.2.

⁴⁴ Bunreacht na hÉireann, Article 42.4.

state must not endow any religion or discriminate, on the ground of religious profession, belief or status. This mirrors the anti-discrimination provisions in the Northern Ireland Act 1998, except that, importantly, it does not protect against discrimination on the basis of political opinion.

The provisions in Articles 40 to 44 of the Irish Constitution have been outlined in some detail because that document is absolutely central to the degree to which human rights are protected in Ireland. In addition, in 2003 the Oireachtas enacted the European Convention on Human Rights Act which, in a similar manner to that adopted by the Human Rights Act in the UK, transposed most of ‘the Convention provisions’ into domestic Irish law.⁴⁵ The ECHR was not previously part of that law because Ireland, like the UK, is a dualist state: ‘[n]o international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas’.⁴⁶ The 2003 Act goes further than the UK’s 1998 Act in that it requires courts to take ‘judicial notice’ of Strasbourg case law (meaning that judges are deemed to be aware of it even if counsel do not mention it) and they must ‘take *due* account of the principles laid down’ by that case law.⁴⁷ Irish courts, like their UK counterparts, can declare primary legislation to be incompatible with Convention provisions but cannot invalidate primary legislation on that ground alone. Unlike their UK counterparts, Irish judges cannot even use the Act to invalidate secondary legislation, but they can declare rules of the common law to be incompatible with the Convention.⁴⁸ Once a declaration of incompatibility has been issued in Ireland, the 2003 Act does not provide a ‘remedial order’ scheme comparable to that available in the UK. Instead, it requires the taoiseach to ensure that the declaration is laid before each House of the Oireachtas

⁴⁵ This term is defined in wider terms than ‘Convention rights’ in the UK Act because the latter excludes Article 13 of the ECHR (the right to an effective remedy) and the rights protected by Protocols 4 and 7 to the ECHR, which the UK has not ratified. For close analysis of the 2003 Act see Suzanne Kingston and Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (Dublin, 2015); Fiona de Londras, ‘Neither herald nor fanfare: the limited impact of the ECHR Act 2003 on rights infrastructure in Ireland’, in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 years and beyond* (Dublin, 2014), chapter 12.

⁴⁶ Bunreacht na hÉireann, Article 29.6.

⁴⁷ Emphasis added. Throughout the UK, under s 2(1)(a) of the Human Rights Act 1998, courts must ‘take into account’ Strasbourg case law so far as, in their opinion, it is relevant to the proceedings before them. But an independent review of the Human Rights Act, chaired by Sir Peter Gross, is currently taking place and is due to report in the autumn of 2021. It is conceivable that the report will lead the UK government to seek to amend the Act by reducing the salience of Strasbourg case law in litigation within the UK.

⁴⁸ Sections 5(1) and (2) of the 2003 Act.

within 21 days and allows anyone suffering loss from the incompatibility to apply to the government for *ex gratia* compensation.⁴⁹

The ECHR Act 2003 is an important piece of legislation, but it has had nothing like the impact in Ireland's legal system that the Human Rights Act 1998 has had in the UK, including Northern Ireland. In 2013 one of Ireland's foremost human rights activists, Michael Farrell, claimed that '[i]t is questionable whether the Irish government is currently providing "at least an equivalent level of protection of human rights" as is provided in Northern Ireland in this area and the effect of the ECHR Act has been underwhelming so far'.⁵⁰ Since 2003, there have been just three declarations of incompatibility issued in Ireland.⁵¹ In part this is because Ireland's Act is subservient to the country's Constitution, whereas the UK's Act is itself a key constitutional statute. The way in which human rights are conceptualised by Ireland's courts is primarily against the background of the Constitution, not the ECHR.⁵²

Ireland has passed numerous statutes that protect human rights over and above what is strictly required by the Constitution.⁵³ The courts, too, have developed the common law of Ireland in ways that recognise such rights.⁵⁴ This is especially so in the field of criminal justice, where the courts have recognised several 'unenumerated' personal rights, including the right to be presumed innocent of an offence, the right not to incriminate oneself, the right of access to a solicitor when in police custody and the right to proportionate sentencing.⁵⁵ At the time of writing the Irish government is preparing a Garda Síochána (Powers) Bill, which will codify police powers of arrest, search and detention as well as require the creation of related codes of practice. The intention is to place human rights at the core of policing, thereby mirroring the approach already adopted in Northern Ireland.⁵⁶ As regards socio-econ-

⁴⁹ ss 5(3)-(5) of the 2003 Act.

⁵⁰ Michael Farrell, '10 years on, Ireland's Human Rights Act has failed to deliver', *TheJournal.ie*, 29 December 2013. The quoted words are from the 1998 Agreement. See too the text at note 70 below.

⁵¹ *Foy v An tArd Chláraitheoir* [2007] IEHC 470, [2012] 2 IR 1; *Dublin City Council v Gallagher* [2008] IEHC 354; *Donegan v Dublin City Council* [2012] IESC 18, [2012] 3 IR 600.

⁵² See Brice Dickson, 'How does today's Supreme Court conceptualise human rights?' *Irish Supreme Court Review* 1 (2019), 15–30.

⁵³ For example, the Criminal Justice (Victims of Crime) Act 2017, the Irish Sign Language Act 2017 and the Domestic Violence Act 2018.

⁵⁴ For the Supreme Court's role see Brice Dickson, *The Irish Supreme Court: historical and comparative perspectives* (Oxford, 2019), especially chapters 6 and 10.

⁵⁵ See Dermot Walsh, *Walsh on criminal procedure* (2nd edn, Dublin, 2016), 25.

⁵⁶ Conor Lally, 'New Garda powers to allow access to mobile phones, changes to "stop and search"', *Irish Times*, 14 June 2021.

nomic rights, however, the Irish Supreme Court has not been particularly willing to grant them the status of constitutional rights,⁵⁷ much to the chagrin of some leading commentators.⁵⁸ The ‘non-justiciability’ provision in Article 45 of the Constitution is a serious obstacle in that regard.

Like the UK, Ireland has ratified seven of the nine ‘core’ UN human rights treaties,⁵⁹ but it has ratified just two of the substantive Protocols to those seven treaties, as against the UK’s four.⁶⁰ Ireland has ratified six of the Council of Europe’s eight principal human rights treaties, one more than the UK⁶¹ and it has opted into six of the UN and Council of Europe complaint-handling systems, four more than the UK.⁶² As in the UK, however, very few of the human rights provisions in ratified treaties have been directly incorporated into domestic Irish law. Ireland has agreed to the same three inquiry powers that the UK has accepted⁶³ and it seems just as willing as the UK to accept visits from various international human rights monitors.

3. HOW MIGHT THE HUMAN RIGHTS OF PEOPLE IN NORTHERN IRELAND CHANGE AFTER UNIFICATION?

National human rights obligations

If the kind of unification which is voted for, or which is agreed upon in post-referendum negotiations, takes the form of the full assimilation of Northern Ireland by Ireland, so that Ireland’s existing human rights framework is simply

⁵⁷ *TD v Minister for Education* [2001] 4 IR 259 and *Sinnott v Minister for Education* [2001] 2 IR 545. But in *NHV v Minister for Justice and Equality* [2017] IESC 35 the Supreme Court declared unconstitutional the indefinite ban on asylum-seekers looking for work.

⁵⁸ See for example Gerry Whyte, ‘The role of the Supreme Court in our democracy: a response to Mr Justice Hardiman’, *Dublin University Law Journal* 28 (2006), 1–26; and Gerry Whyte, ‘Lord Ellenborough’s Law of Humanity and the legal duty to relieve destitution’, *Irish Jurist (ns)* 60 (2018), 1–32.

⁵⁹ Ireland did not ratify the UN Convention on the Rights of Persons with Disabilities until 2018. Neither Ireland nor the UK has ratified the Conventions on Enforced Disappearance or on the Rights of Migrant Workers.

⁶⁰ Unlike the UK, Ireland has not ratified the Protocol to the Convention Against Torture or the Protocol to the Convention on the Rights of the Child relating to the sale of children, child prostitution and child pornography.

⁶¹ Ireland has not ratified the Charter for Regional or Minority Languages or the Convention on Human Rights and Biomedicine, but it has ratified the (Istanbul) Convention on Preventing and Combating Violence against Women and Domestic Violence.

⁶² See note 19 above. Ireland allows complaints to the Human Rights Committee (which looks at civil and political rights), the Committee Against Torture, the Committee on Discrimination Against Women, the Committee on Racial Discrimination and the Committee on the Rights of the Child. In addition, Ireland allows collective complaints to the Council of Europe’s Committee on Social Rights.

⁶³ See note 20 above.

extended to an additional six counties, the position outlined in Part 2 of this article would simply replace that outlined in Part 1 for those counties. But in practice that scenario is extremely unlikely to occur, at least not on day one of unification. Northern Ireland's existing corpus of law, including its human rights law, could not realistically be wiped from the books and another one superimposed overnight. There would need to be a set of transitional arrangements put in place to ensure that the new laws applying in the six counties do not deny to individuals and companies their previous entitlements.

This certainly applies to private law entitlements (under contracts, wills, trusts, etc) but also, though to a lesser extent, to public law entitlements (human rights, welfare benefits, access to health care, etc). When the dominion of the Irish Free State was formed in 1922 its Constitution provided that the (UK) laws already in force for southern Ireland 'shall continue to be of full force and effect until the same or any of them shall have been repealed or amended'.⁶⁴ Similar provisions were included in the constitutions of Canada and South Africa when those territories ceased to be British colonies and became British dominions.⁶⁵ It seems likely that in the event of Irish unification comparable amendments would need to be made to the Constitution of Ireland, preserving the state of the law in the northern six counties unless and until that law is altered. Those amendments would need to be approved in a national referendum, ideally before, or at the same time as, the unification referendum. In a speech to Fine Gael's Ard Fheis in June 2021 Tánaiste Leo Varadkar indicated that a united Ireland could continue, temporarily, to have two legal systems.⁶⁶ It is true that when Canada, South Africa and the Irish Free State became dominions they did not leave the United Kingdom in order to join another state but rather to consolidate their own state. They therefore needed some laws in place in the interim to avoid a vacuum. Northern Ireland, if it voted to leave the United Kingdom, would be doing so in order to join Ireland, which already has a set of laws that could in theory be immediately extended to the north. But principles of democracy, not to mention the need to make the constitutional transition as smooth as possible, would surely lean in favour of maintaining the legal status quo in the north unless and until the laws currently in place there can be changed by agreement. The

⁶⁴ Article 73. This Constitution was affirmed by the UK's Irish Free State (Constitution) Act 1922.

⁶⁵ See the British North America Act 1867, s 129 and the Union of South Africa Act 1909, s 135.

⁶⁶ See Fine Gael, 'Speech from Tánaiste Leo Varadkar at the opening of the 2021 Fine Gael Ard Fheis', 15 June 2020, available at: <https://www.finegael.ie/speech-of-the-tanaiste-leo-varadkar-at-the-opening-of-the-2021-fine-gael-ard-fheis/> (last accessed 29 August 2021).

UK-Ireland treaty that would be required to implement a referendum decision in favour of unification could set out how that agreement is to be established.

A key variable as regards the national protection of human rights is whether the Northern Ireland Assembly and Executive departments will remain in place after unification. Richard Humphreys, a High Court judge in Ireland, has argued extra-judicially that, under the Vienna Convention on the Law of Treaties 1969,⁶⁷ the Agreement will continue to apply until it is officially ‘denounced’ by one or both parties.⁶⁸ Keeping the Agreement in place after unification, at least for a limited period, would make eminent sense in that it would effectively ensure that unionists would continue to have some say over how the six counties are governed, even after reserved and excepted powers have shifted from Westminster to the Oireachtas. In that scenario the Human Rights Act 1998 could continue to apply in Northern Ireland until it was superseded by different legislation—perhaps Ireland’s 2003 Act. The responsibility for responding to judicial declarations of incompatibility, or to judgments of the European Court of Human Rights relating to the law in the north of Ireland, could be transferred straightaway to the Irish government. Immediately after unification Northern Ireland’s court system could even remain much as it is, initially at least, which again is what occurred when the Irish Free State broke away from the UK in 1922. From unification day, however, the final court of appeal for cases decided in the six counties, including cases concerning the powers of the Assembly and Executive departments, could become the Irish Supreme Court, not the UK’s Supreme Court. Transfer of the final court of appeal is not what occurred when the British colony of Hong Kong was returned to China in 1997, nor when the Irish Free State was created. In the former case a Court of Final Appeal was established in Hong Kong and in the latter case final appeals against decisions in Ireland continued to be available to the Judicial Committee of the Privy Council until the Constitution of the Irish Free State was amended in 1933.⁶⁹ But today the Irish Supreme Court is a highly respected institution to which, one can assume, little or no objection would be raised if ultimate judicial authority in Northern Ireland were to be transferred to it on day one of unification.

⁶⁷ The UK ratified this Convention in 1971 and Ireland acceded in 2006.

⁶⁸ Richard Humphreys, *Beyond the border: the Good Friday Agreement and Irish unity after Brexit* (Newbridge, 2018), 106–19.

⁶⁹ Constitution (Amendment No 22) Act 1933, amending Article 66 of the 1922 Constitution.

As noted earlier, there is not yet a Bill of Rights for Northern Ireland. If, contrary to expectations, such a Bill were to be enacted prior to unification, it would presumably remain in place thereafter, given that in the Agreement the Irish government committed itself to ensuring 'at least an equivalent level of protection of human rights' in Ireland as exists in Northern Ireland.⁷⁰ At that point unionists in the north may be grateful for such a Bill, since Bills of Rights are of particular value to members of minority groups. It follows, too, that Ireland's system for ensuring enforcement of Convention rights should be upgraded to that which already applies in Northern Ireland under the Human Rights Act. It could be argued that in the treaty that transfers sovereignty the Irish government should commit, as a sign of good faith, to making those changes as from the date of unification. All politicians should recall that in the Declaration of Support relating to the Agreement, the two governments and the negotiating parties affirmed that: 'we can best honour [those who have died or been injured, and their families] through a fresh start, in which we firmly dedicate ourselves to...the protection and vindication of the human rights of all'.

More generally, living under the current domestic human rights regime supported by the Irish Constitution would potentially have some negative consequences for people living in the six counties. In particular, the Protestant/unionist population might fear that their identity, culture and participation in political life would not be adequately protected. However, the Irish Constitution's equality clause could be invoked to try to ensure such protection and the Employment Equality and Equal Status Acts could be amended by adding 'political opinion' to the 'discriminatory grounds' listed there.⁷¹ EU law would not be of any assistance in this regard because, unlike the law of Northern Ireland, it does not require that people be protected, even in an employment setting, against discrimination on grounds of their political opinion.⁷² The ECHR could be called in aid, since Article 14 outlaws discrimination in the enjoyment of Convention rights and freedoms if it is based on, amongst other things, 'political or other opinion, national or social origin [and] association with a national minority'. But because the ECHR does not

⁷⁰ Strand Three of the 1998 Agreement, under 'Rights, Safeguards and Equality of Opportunity', para 9.

⁷¹ Employment Equality Act 1998, s 6(2); Equal Status Act 2000, s 3(2).

⁷² 2000/78/EC of 27 November 2000. There is also no such protection under the law of England, Scotland or Wales where, although 'belief' is a protected characteristic, it is defined to mean 'any religious or philosophical belief'. For Northern Ireland's law see the Fair Employment and Treatment (NI) Order 1998, especially article 3(1)(a).

itself explicitly protect the right to express one's cultural or national identity or the right to participate in public life, Article 14 may not go far enough to reassure unionists. Moreover, Article 14 cannot be invoked merely to argue that people are being discriminated against on the basis of where they live within a particular state.

Residents in Northern Ireland may be worried that if there were a united Ireland they would lose their rights to certain welfare benefits and to free health care at the point of delivery. However, while most welfare benefits are now deemed to be 'possessions' for the purposes of Article 1 of Protocol 1 to the ECHR,⁷³ which protects people from being deprived of their possessions, that provision allows for exceptions to the rule 'in the public interest' and the unification of Ireland may well constitute such an interest. In any event, most welfare benefits available in Ireland are currently paid at higher levels than their equivalents in Northern Ireland.⁷⁴ As regards health care, while free National Health Service treatment is often held up as a defining feature of the British way of life, it is not, anywhere in the UK, a human right. In England, for example, the general rule remains that medicines obtained through a doctor's prescription must be paid for.⁷⁵ There are many exceptions to that general rule, and no such charges are imposed in Scotland, Wales or Northern Ireland, but it is hard to imagine that, if charges for any kind of health treatment were to be imposed in Northern Ireland following unification, a successful challenge could be mounted to those charges on human rights grounds.

International human rights obligations

As already intimated, sovereignty over Northern Ireland could not be transferred to Ireland without a treaty to that effect being first agreed between the UK and Ireland, a treaty which would then need to be incorporated into each country's domestic law to have legal effect at that level.⁷⁶ From an international law perspective, two states are largely free to agree a transfer of territory

⁷³ *Stec v UK* (2005) 41 EHRR SE18 (GC) (admissibility).

⁷⁴ There being different welfare systems in the two jurisdictions, it is difficult to directly compare like with like, but in Northern Ireland the basic entitlement to maternity allowance, for example, is currently £151.97 per week (approximately €178.3) for 39 weeks, while in Ireland it is €245 per week for 26 weeks. In Northern Ireland the total payable is therefore €6,953 (£5,927) whereas in Ireland it is €6,370.

⁷⁵ From 1 April 2021 the standard charge is £9.35 per item (approximately €11).

⁷⁶ When the German Federal Republic absorbed the German Democratic Republic in 1990 three separate treaties were negotiated.

from one to the other on whatever terms they prefer, especially if the people of that territory have voted in favour of such a transfer, but there are still some rules that should be adhered to.⁷⁷ As neither the UK nor Ireland has ratified the Vienna Convention on Succession of States in Respect of Treaties 1978, the rules in question derive from customary international law, a category of law the content of which is notoriously difficult to assert with precision.⁷⁸ They are identified on the basis of the general practice of states and acceptance of that practice as law (*opinio juris*). Fortunately, in this field the Vienna Convention is generally accepted as being reflective of customary international law.⁷⁹

Under Article 15 of the Vienna Convention the default position, when *part* of the territory of a state becomes part of the territory of another state, is that treaties binding on the predecessor state cease to be in force in that part of its territory and instead the treaties binding the successor state come into force in that new part of its territory. As human rights treaties are increasingly being accepted as part of international customary law, and as the protection of human rights is central to the Agreement, this default position would seem to be even more clearly applicable to the transfer of sovereignty over Northern Ireland. Subject to what may be otherwise agreed in any bilateral transfer treaty, it can therefore be assumed that on unification Ireland's international human rights obligations will replace the UK's from the very start.

By way of example, at present Ireland has not ratified the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities, whereas the UK has. This means that people in Northern Ireland can lodge complaints with the UN Committee on the Rights of Persons with Disabilities if they believe that their rights under the Convention are being violated, but people in Ireland cannot. In a united Ireland, people in the six counties would lose that channel for redress unless the Irish government were to decide to ratify the Optional Protocol for the whole country.⁸⁰ Conversely, Ireland currently

⁷⁷ There is substantial literature on 'state succession' in international law, eg, James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford, 2019), chapter 19; Malcolm Shaw, *International Law* (8th edn, Cambridge, 2017), chapter 16.

⁷⁸ Shaw, *International Law*, 53–69.

⁷⁹ In 2018 the International Law Commission set out 16 'Conclusions' on how the rules of customary international law should be identified: see (with commentary) https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf. See too, more generally, Pierre-Marie Dupuy (ed.), *Customary International Law* (Cheltenham, 2021).

⁸⁰ A member of the UN Committee on the Rights of Persons with Disabilities recently raised this issue with an Oireachtas Committee: Maresa Fagan, 'UN criticises Ireland for failings on disabilities legislation', *Irish Examiner*, 30 May 2021.

allows people living there to lodge complaints with the UN Committees on Civil and Political Rights and on Racial Discrimination, but people in Northern Ireland cannot do so because the UK has not ratified the first Optional Protocol to the UN Covenant on Civil and Political Rights or agreed to complaints of racism being lodged under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination. On unification, if standard principles of public international law were to be applied, northerners would *ipso facto* acquire the right to lodge complaints with those two Committees and any attempt by Ireland to issue a reservation limiting the application of the treaty obligations in the six counties would be deemed unlawful under the Vienna Convention on the Law of Treaties 1969, which states in Article 19 that reservations cannot be ‘incompatible with the object and purpose of the treaty’ in question. As regards engagement with UN human rights treaties, therefore, unification would be a mixed bag for residents of Northern Ireland. Very largely their position would remain the same but at the margins there would be losses and gains. The losses could be avoided if the UK-Ireland treaty on the unification of Ireland were to contain a provision guaranteeing no regression in the degree to which the human rights of residents in Northern Ireland are protected as a consequence of unification. The first sentence of Article 2(1) of the Ireland / Northern Ireland Protocol, cited above,⁸¹ with its reference to ‘no diminution of rights, safeguards or equality of opportunity’ could serve as a model to follow in this regard.

The situation at the European level is comparable. Ireland has ratified the Council of Europe’s Revised Social Charter and has agreed to allow collective complaints to be lodged with the European Committee on Social Rights. The UK has taken neither step. In the eyes of international law, therefore, people in Northern Ireland should benefit from those enhanced human rights commitments if they were to become residents of a united Ireland. On the other hand, the UK, but not Ireland, has ratified the Council of Europe’s Charter for Regional or Minority Languages, which gives both the Irish and Ulster-Scots languages some protection in Northern Ireland. Ireland sees Irish as the country’s national language and its first official language, with English being its second official language,⁸² so ratification of the Charter for Languages is considered to be inappropriate for the protection of Irish in that jurisdiction. But on unification Ireland would come under pressure to ratify the Charter

⁸¹ See the quotation near the end of Part 1 of this article.

⁸² Bunreacht na hÉireann, Articles 8.1 and 8.2. See too the Official Languages Act 2003.

so as to protect Ulster-Scots. Likewise, Ireland and the UK have each already ratified the Council of Europe's Framework Convention for the Protection of National Minorities and if Ireland were to absorb Northern Ireland it would acquire obligations to protect the unionist minority who would then be living within its territory. There is already some support for including parts of the Framework Convention in a Bill of Rights for Northern Ireland, if such a document were ever to see the light of day.⁸³

As far as the ECHR is concerned, little if anything would change upon unification, save that the Irish government rather than the UK government would have to defend the applications lodged by residents in the territory formerly known as Northern Ireland. To date relatively few applications have been brought against Ireland at the European Court of Human Rights. In the past four years, however, the number of applications allocated to the European Court, proportionate to the population, has been higher for Ireland than for the UK.⁸⁴ At the end of 2020 there were 24 applications pending against Ireland, which is 19% of the number pending against the UK (124), even though the population of Ireland is only about 7% of that of the UK.⁸⁵ It is also fair to say that the 'judicial dialogue' between the Irish Supreme Court and the European Court of Human Rights has to date been much less vibrant than that between the UK Supreme Court and the European Court.⁸⁶ Yet, even if Convention rights have not become as entrenched in Ireland's law as they have in Northern Ireland's law, in a united Ireland legal mechanisms would still be available to challenge alleged infringements of Convention rights. If those challenges were unsuccessful, it would still be possible for applicants to seek a favourable ruling from the European Court of Human Rights in Strasbourg.

The EU has already given a quasi-undertaking that if Northern Ireland were to unite with Ireland the whole island of Ireland would be likely to be regarded

⁸³ See the oral evidence submitted to the Assembly's Ad Hoc Committee on a Bill of Rights by Dermot Nesbitt, a former unionist minister, on 15 October 2020 and his written evidence of that date and of 20 January 2021.

⁸⁴ In the four years from 2017 to 2020 the rates of applications allocated to the decision-making arms of the Court per 10,000 of the population were respectively, for Ireland, 0.11, 0.06, 0.08 and 0.08, while the rates for the UK were 0.06, 0.05, 0.05 and 0.04. See the Court's *Annual Report for 2020*, 160–1 and 164–5.

⁸⁵ Unfortunately, the Court keeps no statistics on the number of applications submitted by people living in Northern Ireland.

⁸⁶ For evidence on this see Dickson, note 54 above, and *Human rights and the United Kingdom Supreme Court* (Oxford, 2013).

immediately as a member state of the EU.⁸⁷ Remaining in the EU was the preference of the majority in Northern Ireland who voted in the Brexit referendum on 23 June 2016 and under the terms of the EU-UK Withdrawal Agreement of 2019 Northern Ireland remains within the EU's single market for goods even though it is not otherwise a member of the EU. Unification would bring with it the return of EU citizenship rights to nearly everyone living in the six counties, whether they want to avail of those rights or not. Only third country nationals living in Northern Ireland—people who are not a citizen of any EU state—would not acquire all of those rights. They include the right to free movement of goods, people, capital and services within the EU, and the right to rely upon the EU's Charter of Fundamental Rights in situations where implementation of EU law is in question. The corollary of this change would be that residents of Northern Ireland would lose the benefits they currently enjoy from living within the UK's internal market. These are purely economic benefits, however, not human rights, and even if they were categorised as property rights, the European Court of Human Rights would be likely to rule that the deprivation of those rights was 'in the public interest and subject to the conditions provided for by law and by the general principles of international law'.⁸⁸

Moreover, it is to be expected that, after unification, the Common Travel Area (CTA) comprising Ireland and the UK would continue to operate unchanged. This is a long-standing arrangement, albeit not formally enshrined in law, whereby 'British and Irish citizens can move freely and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain elections, as well as to access social welfare benefits and health services'.⁸⁹ To both governments' credit, not even Brexit was able to undermine that treasured cooperation between two states so closely connected in innumerable ways.⁹⁰

⁸⁷ This emerged in April 2017 from a leaked draft on Brexit negotiating positions for the 27 EU states. It said: 'The European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union'. See Jennifer Rankin, 'Europe could allow a united Ireland to join EU after Brexit', *The Guardian*, 28 April 2017.

⁸⁸ The second sentence of Article 1 of Protocol 1 to the ECHR.

⁸⁹ This is how the UK government sums up the CTA on its website. See: <https://www.gov.uk/government/publications/common-travel-area-guidance> (1 September 2021).

⁹⁰ See the Memorandum of Understanding between the UK and Ireland on the CTA, and the Joint Statement between the Government of the UK and the Government of Ireland on the CTA, both dated 8 May 2019 and available at: <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta> (1 September 2021).

CONCLUSION

Although it is easy to assume that the unification of Ireland would have all sorts of serious implications for the protection of human rights in the territory now known as Northern Ireland, this paper has sought to show that those implications may in fact be relatively minor. In addition, they can be easily avoided if requisite legal steps are taken prior to a unification referendum or if they are guaranteed by the legislation which the Irish government commits to enact if a majority of voters in both Northern Ireland and Ireland opt for unification. Any such commitments should be enshrined in a bilateral treaty between the UK and Ireland. From a human rights point of view the wisest course of action for the two governments to adopt would be to ensure that upon unification the human rights regime in Ireland is reformed in such a manner that means there is no regression in the protection of human rights of any person living in the northern six counties. To the small extent that human rights are currently better protected in Northern Ireland than in Ireland, there should also be a levelling up in Ireland, in line with the principles of public international law and the terms of the 1998 Agreement.