



BrexitLawNI

Policy Report:

Brexit and Socio-Economic Rights

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BrexitLawNI

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

About BrexitLawNI:

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

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

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

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Executive Summary

Neglect of Socio-economic Rights

The EU (Withdrawal) Act does not include any explicit saver for the vast areas of socio-economic rights and issues. It is the subject of considerable criticism including that it is deeply ambiguous and confers excessive powers to make secondary legislation. There will be possibilities for UK Ministers or indeed NI Executive Ministers to make changes in these areas without adequate democratic oversight, and this could have a concerning impact on the area of socio-economic rights that are already under attack from austerity, welfare reform and budget cuts. Brexit will also likely mean that there will be no access to the Court of Justice of the EU (CJEU); this has led to considerable anxiety about the prospects for socioeconomic rights in particular. Socio-economic issues but more significantly socio-economic rights have been central to the understanding of the NI conflict.

Peace, Human Rights and Stability

There is a close link between economic stability and peace.¹ Patricia McKeown of UNISON has pointed out the importance of protections for socio-economic rights in coming to a peace settlement for NI – particularly the promotion of equality for workers.² Further threat to the peace process could also have serious implications for the enjoyment of socio-economic rights and the future of NI as a peaceful society. The EU is directly relevant to the protection of socio-economic rights and equality in NI and inextricably linked to the peace process. There is special significance in relation to equality law and many examples over the years where EU equality directives have been applied in NI during times when it could have been hard to get political movement on an issue.

1 Human Rights Consortium, 'Rights at risk: Brexit, human rights and Northern Ireland' (2018) 20 <<https://brexitlawni.org/assets/uploads/HRC-Rights-at-Risk-Report.pdf>>.
2 Patricia McKeown, 'Implications for Equality and Socioeconomic Rights in Northern Ireland following a UK exit from the EU – a trade union perspective' (Brexiting and Rights Conference, Belfast, 27 September 2016) 4 <<https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/07/21144501/5-Brexiting-and-Rights-Patricia-McKeown-CAJ-TJI-2016.pdf>>.

The Socio-Economic Impact of Brexit

BrexitLawNI has heard from stakeholders, the public and many interviewees from across varying sectors about the impact of Brexit, including that NI Gross Domestic Product (GDP) could possibly drop by 12% and that workers' rights are at risk of being negatively impacted. The Common Travel Area (CTA), health provision and education are all matters of deep anxiety for people living across the island as there are no clear answers to how these will continue to work. There are already impacts arising for people who live rurally and on border areas and there is a serious and real threat to the peace process that was so hard fought for.

Recommendations:

- The **EU (Withdrawal) Act should be amended or alternative provision made** to provide explicit protections for EU standards in the fields of equality and discrimination law, workers' rights, environmental rights (both in relation to devolved and UK authorities) and socio-economic rights.
- Legislate for a **Bill of Rights for NI** to enshrine socio-economic rights and help build a rights-based society that will ensure sustainable peace.
- Protect the **EU Charter of Fundamental Rights** in UK (or Northern Irish) Law post-Brexit to safeguard and underpin human rights standards.
- More detailed consideration needs to be given to the **draft Protocol in the draft Withdrawal Agreement to ensure it reflects an appropriate recognition of the need for enforceable human rights guarantees that respect the commitments in the Joint Report.**
- Use **Section 75 of the Northern Ireland Act 1998** to make sure that all policies relating to and following from Brexit are properly equality impact assessed including in the area of socio-economic rights across the nine protected categories. That any adverse impacts should have mitigating measures to address them and this should include a gendered impact assessment.
- Strengthen equality by legislating for a **Single Equality Act.**
- All participants in the negotiations must ensure **full account is taken of the long-term socio-economic impact of Brexit on the NI economy** to ensure enduring respect for human rights.
- **NI should remain within the single market and customs union** and there should be no new barriers to trade either North-South or East-West.

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BrexitLawNI Policy Report:

Brexit and Socio-Economic Rights

A. Context

When using human rights language we discuss **economic, social and cultural rights** together and these rights are enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR).³ ICESCR is one of the nine core United Nations (UN) human rights treaties, seven of which have been ratified by the UK. It forms part of the International Bill of Human Rights alongside the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The UK ratified ICESCR in 1976. ICESCR provides for, explicitly or implicitly, the right to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and the right to work.

The EU is directly relevant to the protection of socio-economic rights and equality in NI. There is special significance in relation to equality law and many examples over the years where EU equality directives have been applied in NI during times where it could have been difficult to get political movement on an issue. The EU has functioned as a 'leader' specifically on sexual orientation and gender equality, where some local politicians have been inclined not to be proactive. EU legislation therefore provides an irreducible minimum level of protection for equality and certain socio-economic rights.

Considerable concern was expressed throughout our project by interviewees and participants about the severe socio-economic implications of Brexit for NI including the proposed departure from the single market and custom union.

Socio-economic issues but more significantly socio-economic rights have been central to the understanding of the NI conflict. The conflict emerged against a backdrop of discrimination, in particular, in areas such as housing and employment. The conflict was most intense in areas of socio-economic deprivation and exacerbated economic and health problems, which has created a long lasting socio-economic impact on NI.

However, measures have been put in place over the years in an effort to address inequality and discrimination, such as the establishment of the Housing Executive. The Housing Executive bases housing allocation on objective need and although it is by no means perfect, it has addressed some areas of housing inequality over the last four decades. NGOs continue to work on addressing outstanding and often systematic housing inequality issues with the Housing Executive and other organisations. They also focus on wider-ranging socio-economic issues that are directly related to the years of conflict in NI and put forward proposals as to how this could help deliver peace.

Steps have also been taken towards making workplaces a fairer place, stopping sectarianism in employment, and introducing duties to monitor the workforce. Again, this is not a perfect landscape, but it is vastly different from the mid-1970s. Fair Employment legislation has helped to address religious and political discrimination, but importantly this monitoring and reporting framework has a legal redress through the Equality Commission and court system.

³ International Covenant on Economic, Social and Cultural Rights 1976.

The Belfast/Good Friday Agreement (B/GFA) provided for a robust equality duty in the chapter 'rights, safeguards and equality of opportunity'; this is now found in **Section 75 of the Northern Ireland Act 1998**. When it was introduced in 2000, it was the most robust equality duty in the whole of Europe. Designated public authorities, for the first time, had to show how they paid due regard to the promotion of equality of opportunity in all areas of policy making - across nine protected categories. The Equality Commission was set up to enforce and monitor this public sector duty as well as take individual complaints on anti-discrimination and disability law.

Economic and social rights are not one of the nine protected categories in the NI equality duty but protection of equality and socio-economic rights are inevitably intertwined with equality of opportunity. In recent ongoing discussion with the Equality Commission for NI, it was agreed that equality screening and assessments should be carried out across the nine protected categories but with a socio-economic lens. This is helpful guidance as socio-economic issues can so often be a barrier to equality of opportunity across multiple identity groups - such as lone parents, adults and children living with a disability, and those seeking asylum, etc.

The B/GFA⁴ also included 'economic, social and cultural' commitments, such as the employment equality reform mentioned above, as well as commitments to:

'Pending the devolution of powers to a new Northern Ireland Assembly, the British Government will pursue broad policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life.'

Although the B/GFA had factored in equality plus economic, social and cultural issues, there has been slippage or inaction around the areas of socio-economic rights and on equality throughout the years of power sharing.

Subsequent agreements such as the 'Stormont House Agreement'⁵ (SHA) and 'A Fresh Start Agreement'⁶ had little or no mention of human rights or equality. Section B of 'A Fresh Start' even went as far as stripping back much needed public sector resources. This marks a significant divergence from the approach taken in the B/GFA, which acknowledged that NI would need policies targeted at economic growth.

The Equality Coalition asked Professor Christine Bell and Dr Robbie McVeigh to map the inequalities.⁷ They suggested that if the SHA/Fresh Start was to be successful in stabilising the political institutions and 'completing' the peace process, the approach to public spending and

⁴ The Belfast/ Good Friday Agreement, 10 April 1998.

⁵ The Stormont House Agreement, 23 December 2014.

⁶ A Fresh Start for Northern Ireland, 17 November 2015.

⁷ Christine Bell and Robbie McVeigh, 'A Fresh Start for Equality? The Equality Impacts of the Stormont House Agreement on the Two Main Communities' (Equality Coalition, March 2016) <<http://www.equalitycoalition.net/wp-content/uploads/2013/01/A-FRESH-START-FOR-EQUALITY-FINAL-2.pdf>>.

austerity outlined in the SHA financial annex needed to be significantly revised in terms of the goals and gains of the B/GFA, as it was more likely to be self-defeating. Recommendations were made in this report that intended to re-centre equality in the processes emerging from the SHA and subsequent Fresh Start Agreement.

One significant recommendation was the full proofing of the SHA/Fresh Start financial package in terms of equality. This would take the form of a full Equality Impact Assessment and would have evidenced how the different proposals within the agreements would impact existing inequalities - positively or negatively. It would also have identified mitigating measures and/or alternative proposals in line with statutory guidance when the policy failed to address any existing inequalities. It would also have provided a baseline for the next programme for government.

So it is clear, a couple of years on from A Fresh Start and SHA, and 20 years on from the B/GFA, NI is in a place where there is an attack and roll-back on socio-economic rights.

B. Themes

As outlined above, Brexit stands to have a significant negative impact on the socio-economic climate of NI – both in terms of rights and broader socio-economic issues. It is known that socio-economic rights protections have been an essential element of building and retaining peace in the region; thus, any negative impact on socio-economic rights resulting from exiting the EU are particularly serious. The impact of both socio-economic rights and socio-economic issues will be explored in this paper.

Through our review of the existing literature, analysis of primary documents, interviews, and stakeholder and Townhall meetings, we have identified the following themes for the purposes of this report:

Overall economic outlook

The NI economy has been described by one interviewee as ‘fragile’,⁸ and for a variety of reasons is in a difficult position in the context of Brexit. NI stands to be one of the most negatively impacted regions in the UK in terms of economic implications. Leaked UK government analysis shows that the GDP in NI could decrease by 12% if the UK exits the EU without a deal.⁹ As outlined above, NI is a post-conflict society and economic stability has been an essential building block of the peace process.

Role of EU Funding

The EU support for economic and social development in NI, and for cross-border programmes, has also been important for maintaining socio-economic standards. Many organisations have benefited from economic funding streams, such as the European Social Fund and Peace Money. For example, women’s centres and grass roots groups have been able to receive funding for education courses and crèches to accompany the course when other funding bodies would not provide for these fundamental ‘extras’.

Women’s Rights

Women’s rights are likely to be impacted by both the predicted economic decline in NI as well as the removal of some of the rights provided by the EU. It is well documented that economic downturns adversely affect women – something that is likely to also occur with Brexit. The EU has also played a key role in progressing women’s rights and there are fears that exiting the EU could mean that women’s rights become either stagnant or regress.

⁸ BrexitLawNI, Interview with Senior Official (26 October 2017).

⁹ Faisal Islam, ‘Leaked government analysis reveals post-Brexit impact on UK regions’ *Sky News* (7 February 2018) <<https://news.sky.com/story/hit-to-northern-ireland-and-north-east-england-gdp-revealed-in-new-brexit-impact-papers-leak-11240254>>.

Children and Young People

Children and young people in NI have expressed fears over what impact Brexit will have on their lives – for example in terms of the border, access to education, opportunities for travel, human rights protections, and the future job prospects. Our project is also concerned about the potential impact on the human rights protections available for children given, for example, the removal of Article 24 of the Charter.

Health

The impact on health could be particularly severe in NI. Brexit threatens the all-island provision of healthcare and ability to continue the current level of cross-border cooperation. The uncertainty surrounding current EU regulations, such as the pharmaceuticals, blood, and human tissue is also causing worry regarding continued access to healthcare in NI.

Free movement and family life

As things stand, post-Brexit the right to free movement provided under the EU will be accessible only to Irish passport holders in NI. Through EU regulations, Irish passport holders exercising their free movement rights will also therefore be able to bring their family members to live with them in EU27 countries. There are also complications in this area for people living and working the border regions. For example, questions have been raised about the ability of NI residents to use UK tax credits to access childcare facilities in the Republic.

Workers’ Rights

Another key socio-economic theme that emerged during our research was the significant role that the EU has played in developing and progressing employment rights in NI. With Brexit, NI stands to lose both the potential advancement of these rights that may occur within the EU, as well as the workers’ rights currently outlined in the Charter.

C. Impact of Brexit

The UK government position paper on NI and Ireland¹⁰ refers to the need to uphold the B/ GFA 'in all its parts'; to maintain the CTA and associated rights; to avoid a hard border for the movement of goods and to preserve North-South and East-West cooperation, including on energy. The paper refers to the need to be 'mindful of the full breadth of commitments' in the 1998 Agreement. The position paper gives considerable and understandable attention to a host of issues. However, its limited focus on socio-economic rights and equality is skewed.

There is mention of matters such as 'equality' and 'parity of esteem' but these seem intended to refer to the ethno-national divide rather than to a more inclusive understanding of equality and anti-discrimination rights. There is a recognition that deprivation in NI was both a consequence of and a factor in sustaining the conflict, but this does not translate into a clear endorsement of socio-economic rights and equality.

This section considers the overall economic outlook, the role of EU funding, the position for women, children and young people, health, free movement and family life, and workers' rights.

Overall economic outlook

Although socio-economic rights have not featured heavily in many mainstream discussions about the potential impacts of Brexit for NI, it is clear from the letter extract below that important thinking had been done in this area as far back as 2016. In the joint letter written to Prime Minister May on 10 August 2016, The First Minister Ms Arlene Foster and the late deputy First Minister Mr Martin McGuinness highlighted a number of socio-economic concerns:

We appreciate your stated determination that the border will not become an impediment to the movement of people, goods and services ... The border has particular significance for the agri-food sector and animal health.¹¹

¹⁰ HM Government, 'Northern Ireland and Ireland Position Paper' (16 August 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>.

¹¹ Letter from Arlene Foster and Martin McGuinness to UK Prime Minister (10 August 2016) <<https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf>>.

[I]t is critical to our economy that our businesses, both indigenous and FDI companies retain their competitiveness and do not incur additional costs. We therefore need to retain as far as possible the ease with which we currently need to be sufficiently flexible to allow access to unskilled as well as highly skilled labour. This applies not only to businesses and to the private sector but also to the public sector employers who are heavily dependent on EU and other migrant labour. There is also the matter of the many thousands of people who commute each way across the border to work on a daily basis.¹²

[E]nergy is a key priority, given that there are inherent cost and supply issues in a small, isolated market so we will need to ensure that nothing in the negotiation process undermines this vital aspect of our economy.¹³

EU funds have been hugely important to our economy and the peace process. Since 1994, for example, we have benefitted to the tune of €13 billion of funding from Europe and during the period 2014-2020 we would expect to draw down over €3.5 billion. The current uncertainty around the ability to draw a proportion of these funds, and the absence of EU programmes in the future is of real concern to a range of sectors.¹⁴

It is quite clear then that the economy in NI could face a significant hit depending on the outcome of the Brexit negotiations. Paul MacFlynn, an economist interviewed by BrexitLawNI stated, 'I mean, Northern Ireland wasn't in a particularly good place to begin with. Economically ... [Brexit] could not have come at a worse time.'¹⁵

Further, leaked UK government analysis has revealed that NI could face a 12% drop in GDP if the UK exits the EU without a deal (on World Trade Organisation terms); an 8% drop with a free trade agreement with the EU; and a 2.5% drop if it remains within EU single market via the EEA.¹⁶ The Irish government has also warned that if WTO rules were implemented in the UK, a hard border becomes necessary across the island of Ireland, which would have a detrimental impact on the economies in both the North and South of Ireland.¹⁷

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ BrexitLawNI, Interview with Paul MacFlynn (28 March 2018).

¹⁶ Islam (n 9).

¹⁷ Joint Committee on the Implementation of the Good Friday Agreement, 'Brexit and the Future of Ireland Uniting Ireland & Its People in Peace & Prosperity' House of the Oireachtas (31/JCIGFA/02, August 2017) 14 <http://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_implementation_of_the_good_friday_agreement/reports/2017/2017-08-02_brexit-and-the-future-of-ireland-uniting-ireland-and-its-people-in-peace-and-prosperity_en.pdf>.

Rurality is another key factor in NI with regards to socio-economic rights; rural areas are home to 40% of the NI population.¹⁸ The NI Rural Women's Network (NIRWN) have outlined in their recent report that there has been no substantial, dedicated, mainstream rural development fund in NI to address need and so rural areas have had to rely on European funding since the early 1990's. Similarly, the community/voluntary infrastructure and support in rural NI has been substantially funded through European Peace money and European Social Fund finance. Post-Brexit, this financial support will not be available and together with no European Rural Development Programme; no Common Agricultural Policy and no Single Farm payments; monies that are currently sustaining rural communities and families will be gone. The NIRWN members have highlighted this,

Europe has been positive for rural communities and farm businesses. It remains to be seen what the future holds and how much support will be available from the UK government post-Brexit.¹⁹

Around 98% of NIRWN members have said they are 'concerned' about the impact of Brexit on them, their families and their communities.²⁰

Brendan Boyle, of the Congressional Research Service, provides an excellent summary as to why there are higher economic repercussions of Brexit for NI,

Many analysts are concerned that the UK's June 2016 vote in favour of leaving the EU could have significant economic repercussions for Northern Ireland, given that it shares a border with the Republic of Ireland and an interdependent economic relationship, with extensive cross-border trade, integrated labour markets, and many industries that operate on an all-island basis. According to a recent UK parliamentary report, NI depends more on the EU market (and especially that of the Republic of Ireland) for its exports than the rest of the UK ... Some experts also note that access to the EU Single Market has been one reason for Northern Ireland's success in attracting foreign direct investment, and they express concern that Brexit could deter future investment.²¹

18 NI Statistics and Research Agency, 'RA Urban Rural Classification 2015' (2015) <<https://www.nisra.gov.uk/support/geography/urban-rural-classification>>.

19 Louise Coyle, 'Rural Voices' (Northern Ireland Women's Network, March 2018) 29 <<http://www.nirwn.org/rural-voices-research-report/>>.

20 *ibid.*

21 Joint Committee (n 17) 51.

Due to differences in the make-up of trade, economic disruption resulting from Brexit will affect GB and NI in different ways. The NI economy is more fragile than most.²² The sectors in NI most vulnerable to the effects of Brexit will be the agricultural and food sector, and many areas of manufacturing.²³ As highlighted above, Boyle maintains that the EU is a more important export market for NI than it is for GB; this is largely because trade in NI is skewed towards sectors with greater trade with the EU.²⁴ Furthermore, service exports in NI within the Wholesale and Retail sector are skewed toward the Republic of Ireland.²⁵ While GB may be able to make up for any loss of trade with the EU by opening up trade agreements with other regions, NI exports are more vulnerable, and less likely to be compensated for by opening up trade.²⁶

The President of the Ulster Farmers' Union, Barclay Bell, told MPs that the farming industry 'would be crippled without [EU migrant] workers.'²⁷ The Northern Irish farming industry reportedly retains a very high level of dependence on EU migrant workers: with over 65% of the workforce making up the food-processing business originating from elsewhere in the EU.²⁸ Bell told MPs, 'people from the red meat processing centre, they will tell you, local people don't want to work in the food processing. They have basically said to us if we don't have access to migrant labour we're gone.'²⁹

The retail sector is also extremely important for the NI economy. It employs the largest proportion of people of any sector in NI; but it also represents the second highest share of NI exports, which are heavily skewed towards the EU and Republic of Ireland. According to NERI,

The retail sector in 2015 accounted for 17.6% of all jobs in Northern Ireland and this is up from 12.5% recorded in 1973 when the UK joined the EU. For the UK as a whole, the Retail sector accounted for 14.7% of all jobs in 1978, almost exactly the same percentage as in 2015. The retail sector in Northern Ireland contains the largest number of low paid workers (Mac Flynn, 2014) and a comparatively large Retail sector may have contributed to low levels of productivity in Northern Ireland (Mac Flynn, 2014). However, at present the retail sector provides employment to a large section of the population and it is likely that a disruption to EU trade, particularly with the Republic of Ireland, may cause significant uncertainty and possible job losses in the sector.³⁰

22 Senior Official (n 8).

23 MacFlynn (n 15)

24 Paul MacFlynn, 'The Economic Implications of BREXIT for Northern Ireland', Nevin Economic Research Institute (April 2016) 3 <https://www.nerinstitute.net/download/pdf/brexit_wp_250416.pdf>.

25 *ibid.*, 3.

26 Joint Committee (n 17) 57-58.

27 Lisa O'Carroll, 'Brexit barriers would ruin Northern Ireland dairy farms, MPs told' *The Guardian* (11 January 2017) <<https://www.theguardian.com/politics/2017/jan/11/brexit-barriers-would-ruin-northern-ireland-dairy-farms-mps-told>>.

28 *ibid.*

29 *ibid.*

30 MacFlynn (n 24) 22.

Again, there are concerns for rural and border areas such as Newry and Armagh, and Fermanagh and South Tyrone, as they are likely to be disproportionately affected by potential disruption to jobs in these industries.³¹ Concerns have been raised about the future viability of the industry, given the challenges that Brexit has posed.

Gravey, Hayward, and Schiek, have noted that the 'border region already suffered from elevated levels of unemployment, overcrowding, financial dependency and over-representation of declining and low-value added industries, exacerbated by its peripheral location in relation to the hubs of Belfast and Dublin.³² Hayward has also contended that 'the border region has experienced the most long-lasting economic and social consequences of partition and violent conflict exacerbated by the "back-to-back" development of NI and Ireland. Respondents describe the region as "marginalised", "deprived", "isolated", and "on the periphery".³³

The Human Rights Consortium has found that people living the border areas of NI have expressed a 'deep anxiety that any ... economic destabilisation would have an immediate impact on jobs, wages, and living standards which would in turn have a direct impact on the enjoyment of economic and social rights.³⁴

Hayward's study on the Brexit and border regions found that Brexit-related changes are already having an impact on business and life in the border region, and particularly so for cross-border workers.³⁵ The potential impacts outlined by survey respondents include: changes to economic conditions of work, workers' rights, transferability of social security payments; and mutual recognition of qualifications. More specifically, the impact on the exchange rate and the fluctuating British Pound have been felt already by many businesses and frontier workers. Some of the respondents in Hayward's study noted that they had already taken the decision to move across the border (thereby ending their frontier worker status) in anticipation of future Brexit-related difficulties.³⁶

Not everyone agrees as to the potential economic impact of Brexit – some argue that instead of being a detriment, Brexit actually opens up economic opportunities. For example, Sammy Wilson a DUP MP, has expressed doubt as to the actual benefit for NI from EU funding. He has argued that 'NI (and the UK as a whole) [stand] to benefit from being freed from constraints of EU environmental and agricultural regulation, and that new trade deals would present opportunities for the agri-food sector in particular.³⁷ Similar to the claims made by Sammy Wilson, some respondents in Hayward's study also identified opportunities for the economy

31 *ibid.*

32 European Union Committee, 'Brexit: Devolution', House of Lords (HL Paper 9, July 2017) 16 <<https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/9/9.pdf>>.

33 Katy Hayward, 'Bordering on Brexit: Views from Local Communities in the Central Border Region of Ireland/Northern Ireland' Centre for International Borders Research & Queen's University Belfast (November 2017) 12 <<https://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,780606,en.pdf>>.

34 Consortium (n 1) 52.

35 *ibid.*, 83.

36 Hayward (n 33).

37 EU Committee (n 32) 16.

with Brexit. The majority of these respondents cited trade prospects with nations outside the EU as the main hope for economic prosperity associated with leaving the EU.³⁸ Others, such as the Alliance Party, have contended that if NI can obtain some kind of special deal that allows it to remain in the EU single market and the customs union, while also continuing current trade arrangements with the rest of the UK, the NI economy may be in a strong position.³⁹

Looking forward five or ten years, one interviewee speculates about the risks if Brexit does not address underlying concerns about social and economic ills:

I suspect that where ever we are economically in 5 or 10 years' time, the idea that the cure to all our social and economic ills, to the increasing inequality we face, that will somehow all be resolved by getting out of the EU isn't going to happen, and my concern is well, that level of discontent with society at large, if those levels of inequality are still there, then it means that that disgruntlement is still there, ripe for exploitation and this time it won't be membership of the EU that will be the ground on which you can ferment that. And my terrible fear to be honest is that what will ferment it, will be around issues of race, migration and immigration. And I think if we are worse off economically as a result of leaving the EU, and there are some quite significant indicators that that might be the case, then I think it has all kinds of ramifications for us constitutionally in terms of the United Kingdom as a whole, but also then in terms of how that discontent manifests itself and that might well be around issues, as I say, about race etc.⁴⁰

Role of EU Funding

As mentioned throughout, there has been a significant amount of money allocated to NI through EU programme funds in an attempt to rectify some of the structural disadvantages in this region. NI has benefitted from EU funding and the 'promotion of economic and social development in the region'.⁴¹

NERI has provided a detailed breakdown of EU funding programmes within NI for the period of 2014-2020:

- 2014-2020 EDRF Investment for Growth and Jobs Programme for NI Budget €308 million
- 2012-2020 ESF Investment for Growth & Jobs Programme for NI €206m
- PEACE IV Programme €229m
- INTERREG VA Program €204m
- NI Rural Development Programme 2014-20 €623m
- The North West Europe Programme 2014-20 (Competitive) €396m

38 Hayward (n 33) 86.

39 Alliance Party, 'Bridges not Borders' (November 2017) 5 <<https://allianceparty.org/page/brexit>>.

40 BrexitLawNI, Interview with Les Allamby (Belfast, 12 October 2018).

41 Consortium (n 1) 20.

- The Northern Periphery and Arctic Programme 2014-20 (Competitive) €56m
- The Atlantic Area Programme 2014-20 (Competitive) €140m
- Horizon (Competitive) €80 billion
- Competitiveness and Innovation Framework Programme (Competitive) €2.5b⁴²

According to Burke, 'from 2007-2013, the EU provided 2.4 billion Euros to support Northern Ireland's development as a peripheral region emerging from conflict.'⁴³ Approximately 472 million Euros of this money has been apportioned to programmes aimed at addressing the skills shortage in NI. Burke argues that,

'a person of working age in NI is more likely than anywhere else in the UK to have no qualifications.'⁴⁴

This funding has attempted to redress this problem by providing opportunities for young people to gain new qualifications. We know this funding has been important for women in accessing education and skills training and according to the Human Rights Consortium, it has been particularly important for rural women in NI.⁴⁵ The Rural Development Programme and the European Social Fund have been most helpful. The Consortium's research has highlighted a feeling of insecurity amongst women living in border and rural areas. They surmise that much of this feeling of insecurity is likely due to economic uncertainty caused by Brexit, and specifically the potential loss of EU funding streams.⁴⁶

Research completed by NERI has calculated that - based on the approximate net contribution of NI to the EU versus the amount of money that is returned from the EU through things like programme funds and CAP payments - the most optimistic scenario is that in the five years following Brexit, NI will at best, 'break even.'⁴⁷

Both the UK and the EU have indicated they wish to see funding continued though the exact mechanisms for this has not yet been settled.⁴⁸

42 Joint Committee (n 17) 40

43 Edward Burke, 'Who Will Speak for Northern Ireland?' 161 *The RUSI Journal* 7 (3 March 2016)

44 *ibid*, 8

45 Consortium (n 1) 79

46 *ibid*

47 MacFlynn (n 24) 27

48 Northern Ireland Affairs Committee, 'The land border between Northern Ireland and Ireland Second Report of Session 2017-19' House of Commons (HC 329, 13 March 2018); and Northern Ireland Affairs Committee, 'The land border between Northern Ireland and Ireland: Government Response to the Committee's Second Report 2017-2019' House of Commons (HC 1198, 15 June 2018)

Women's Rights

The UK Women's Budget Group has asserted that women will adversely experience these economic impacts of Brexit; any detrimental impact on GDP will carry with it specific impacts on women as workers, as users of public services and as consumers.⁴⁹ The Group are calling for proper equality impact assessments across the UK. They say that the government need to;

Ensure that equality impact assessments of different possible trade agreements with the EU and non-EU countries are carried out and used to inform decisions on which trade deals to pursue. These assessments should include careful modelling of the gender impact in every sector of the economy including goods and services, public services and consumer impacts. Also to ensure that mitigating action is taken to address all adverse impacts.⁵⁰

NIRWN members expressed shock that their rights, that they believed had been established and were protected, were no longer secure post-Brexit. They felt that this aspect of Brexit was not being explored by the media and expressed that they felt this was because 'it affects women most.'⁵¹

It is also important to acknowledge that EU law has had a specific impact on rights for women.⁵² The value of the principle of equal pay for equal work has long been identified as a core value of the European project and has been enshrined in EU treaties.⁵³ The Gender Recast Directive of 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation has also been an important development for the advancement of workers' rights for women. It consolidated a number of EU law developments^{54 55} that covered such areas as 'access to employment, including promotion, and to vocational training; working conditions, including pay; and occupational social security scheme.'⁵⁶ The stated purpose of the Directive is 'to ensure the implementation

49 Women's Budget Group, 'Economic Impact of Brexit on Women' (November 2017) <<https://wbg.org.uk/wp-content/uploads/2017/11/brexit-pre-budget-nov-2017-final.pdf>>.

50 *ibid*.

51 Coyle (n 19) 31.

52 McKeown (n 2) 4.

53 *ibid*.

54 Including, for example: Council Directive (EC) 76/207 on the implementation principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40; Council Directive (EC) 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225 (Occupational Pension Schemes); Council Directive (EC) 75/117 on the approximation of the laws of the Member States relation to the application of the principle of equal pay for men and women [1975] OJ L45/19; Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1997] OJ L14/16; and European Union Charter of Fundamental Rights (2000) arts 21 & 23.

55 Council Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23 (Equal Opportunities Directive).

56 Consortium (n 1) 74.

of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.⁵⁷ It therefore focuses on equal treatment in relation to, 'access to employment, including promotion, and to vocational training; working conditions, including pay; [and] occupational social security schemes'.⁵⁸ The Directive is supplemented by equality strategies. For example, in its commitment to continuing to promote equality between men and women, the current strategic engagement for gender equality 2016-2019 has included amongst its top five priorities, 'increasing female labour-market participation and the equal economic independence of women and men; [and] reducing the gender pay, earnings and pension gaps and thus fighting poverty among women'.⁵⁹

The Human Rights Consortium has argued that the EU has played a key role in extending the scope of workplace equality provisions for women.⁶⁰ Prior to the *Webb* case, referred to the CJEU in 1994, the test for determining discrimination for pregnant women in the workplace was whether the woman had been treated less favourably than a pregnant man. The onus was on the women to prove this. As men are unable to get pregnant, the courts would instead compare the treatment of the pregnant woman to a 'sick man'.⁶¹ The *Webb* case recognised that pregnancy is a unique form of discrimination that could only be experienced by women and should therefore be treated as a unique category, 'pregnancy discrimination'. While this issue is not itself specific to NI, as indicated in a report by the Equality Commission, discrimination on the ground of pregnancy and maternity has been a significant problem in NI. With the legal changes that came into place with the *Webb* case, it became easier for women in NI to challenge pregnancy discrimination, hold their employers to account, and access financial redress.⁶² The Consortium has argued that having this mechanism has been important in terms of protecting women in NI who have faced pregnancy and maternity discrimination.

57 Equal Opportunities Directive (n 55).

58 *ibid.*

59 European Commission, 'Strategic Engagement for Gender Equality 2016-2019' (2015) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf>.

60 Consortium (n 1) 75.

61 *ibid.*, 76.

62 *ibid.*

The EU has also played an important role in protecting the rights of pregnant migrant women and their access to social benefits. In the *Saint Prix* case, the CJEU held that:

A woman who gives up work, or seeking work, because of physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of "worker", within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.⁶³

This decision is important for two main reasons. First, it provided protection to EU migrant women by ensuring that they would have access to social benefits and therefore not face poverty and destitution for falling pregnant.⁶⁴ And second, that pregnancy and maternity would not disrupt the 5 years continuous period of residency to attain permanent residency as an EU citizen.⁶⁵

Children and Young People

The Children's Commissioner Koulla Yiasouma has also raised concerns about young people fears post-Brexit:

Brexit is huge for young people at the moment. They are mainly worried about what it will mean for travel and education opportunities in Europe, as well as the subsidy question and what will happen if you live on one side of the border and go to school on the other and what will it mean for all-island paediatric care?⁶⁶

Similarly, in our own engagement with young people, it was very apparent that there is a lot of fear surrounding Brexit and the impact it may have on young people's futures. Many of the young people we engaged with in NI expressed fear about the potential imposition of a hard border and the consequences this would have for the peace process and everyday life in NI – particularly for those living in the border regions. Some of the young people also focused on human rights protections and the fate of protections following Brexit. For example, Leah Rea, stated:

63 *ibid.*

64 *ibid.*, 77.

65 *ibid.*

66 Gail Bell, 'Banned Haircut reopens important punishment debate, says children's commissioner' *The Irish News* (18 April 2017) <<https://www.irishnews.com/lifestyle/2017/04/18/news/banned-haircut-reopens-important-punishment-debate-says-children-s-commissioner-997652/>>.

A key concern for me is the lack of legislative provision for and consideration of human rights protections post-Brexit. The European Union (Withdrawal) Bill currently progressing through the Commons explicitly states the Fundamental Charter of Rights of the EU will not be transposed in the UK statute books; the Charter provides additional recognition and protection for third generation fundamental rights, socio-economic rights, such as workers' rights, including collective bargaining and action. If the UK Government does not incorporate the Charter, it must ensure such socio-economic rights are not weakened post-Brexit.⁶⁷

The final major theme communicated by young people to BrexitLawNI concerned the economy and their future opportunities. For example, many were worried that the NI economy will be negatively impacted and that this will have knock-on effects for their abilities to find meaningful employment in the future.⁶⁸

Finally, with the decision not to continue the Charter as retained EU law in the EU (Withdrawal) Act, one protection for children's rights – Article 24 of the Charter – will be lost. While the government has said this reflects rights found in the Convention on the Rights of the Child (CRC), this does not create enforceable rights in UK courts.⁶⁹

Health

The potential impact of Brexit on health is significant. Healthy Brexit has argued that,

the effects of Brexit on health law and policy, especially on the NHS, are a particularly significant aspect of the UK leaving the EU ... Leaving the EU carries significant risks for every one of the building blocks of the health system.⁷⁰

One of the most serious threats to access to health is due to the all-island character of many areas of health care. People cross the Irish border every day to access healthcare and also to work in the health and social care field. In fact, the healthcare workforce on the island of Ireland is so integrated that it has been referred to as 'effectively one workforce'.⁷¹ This arrangement is facilitated in part by EU law, which includes reciprocal health care arrangements and freedom of movement between EU Member States; and in part due to the CTA arrangements between

67 Amanda Kramer, 'Young People's views on "Brexit"' (*BrexitLawNI Blog*, 13 December 2017) <<https://brexitlawni.org/blog/young-peoples-views-brexit/>>.

68 *ibid.*

69 Joint Committee on Human Rights, 'Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis First Report of Session 2017–19' (HL 70 / HC 774, 24 January 2018) para 85.

70 Healthy Brexit, 'Brexit and Health Law: Implications for Northern Ireland' (December 2017) Page 1 <<https://www.healthybrexit.org/wp-content/uploads/2017/12/Attachment-4-Brexit-Background-Briefing.pdf>>.

71 *ibid.*, 3.

Ireland and the UK that facilitate health and social care entitlements as well as the right to work in each other's countries.⁷²

A number of different sources have highlighted the interconnected nature of healthcare on the island and how Brexit threatens its continuation. For example, the House of Lords EU Committee cites evidence that healthcare provision on the island of Ireland covers 'emergency care, travelling from one jurisdiction to another to access health services, the provision of direct services and cooperation on new services'.⁷³ The NI Affairs Committee has highlighted important aspects of cross-border health provision in its report on the Land border.⁷⁴ It notes for instance that emergency services are a shared resource and that Brexit may pose problems to ambulances crossing the border carrying items like morphine outside the EU.⁷⁵ Much of the practicalities of the all-island healthcare provision are managed by Cooperation and Working Together (CAWT) – an organisation that is heavily dependent on EU funding.⁷⁶ CAWT enables the health services to benefit from the economies of scale in working across the border and enables care to be provided in rural areas without having to make trips to Belfast or Dublin; CAWT has received 40 million euros in EU funding.⁷⁷ This European funding has supported 'acute, mental health, disability, older people, primary care and emergency services'.⁷⁸

Participants in two Townhall meetings highlighted the risks to health due to the level of cross-border cooperation. One raised a number of issues, including the health service's dependence on foreign doctors, health professionals who are also worried about their ability to work across the border, and the recognition of their qualifications.⁷⁹ Another interviewee pointed to the risks to cross-border health cooperation in terms of running Altnagelvin hospital or the Children's Heart Surgery in Dublin, both of which rely on economies of scale, and are also at risk in terms of access to radioactive material needed for medical purposes.⁸⁰ These services mean that for instance people in Donegal can access cancer treatment in Altnagelvin without having to go to Dublin or Galway, while children across the island can receive specialist care in Dublin that would otherwise require a trip to England.⁸¹

72 *ibid.*

73 European Union Committee, 'Brexit: reciprocal healthcare' (HL Paper 107, 28 March 2018) para 101.

74 NI Affairs Committee (n 48) para 9.

75 EU Committee (n 73) para 107.

76 Cooperation and Working Together, 'About Us' (2018) <<http://www.cawt.com/>>.

77 NI Affairs Committee (n 48) para 129-130.

78 EU Committee (n 73) para 102.

79 BrexitLawNI, Respondent 1, Derry Townhall (Derry, 7 December 2017); and BrexitLawNI, Respondent 2, Enniskillen Townhall (Enniskillen, 10 January 2018).

80 BrexitLawNI, Interview with Martina Anderson, Sinn Féin MEP (Derry, 16 February 2018).

81 British Medical Association, 'Evidence of the British Medical Association to the Northern Ireland Affairs Select Committee (BDR0031)' *Northern Ireland Affairs Committee* (19 April 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/future-of-the-land-border-with-the-republic-of-ireland/written/68868.pdf>>.

The Human Rights Consortium contends that any economic slowdown will have a knock on impact for health rights, as it is likely to impact the health and social care systems across the UK.⁸² It has also become clear that NI residents will likely be unable to access the benefits of the European Health Insurance Card.⁸³

The concerns raised that the 190,000 pensioners living in the EU27 may be forced to return to the UK in order to access their rights to health, costing an estimated £979 million, appear at the moment to be resolved.⁸⁴ However, both the issue of cross-border access to health care in Ireland⁸⁵ as well as continued access for Irish passport holders in NI to EHIC, remain unresolved.⁸⁶ There are many concerns in the area of health but there are also serious challenges posed by Brexit particularly relating to how healthcare will be regulated in the UK. Currently, the EU plays an important role in the regulation of pharmaceuticals, blood, and human tissue.⁸⁷ None of which is addressed in the EU Withdrawal Act.

Free Movement & Family Life

Free movement refers to the 'right of EU citizens to move, for workers to move around the EU in line with the citizenship directive and under EU treaties.'⁸⁸ Inextricably linked with the right to free movement is the right to family life. EU regulations allow for EU migrants to bring their family members, including non-economically active ones – to live with them in their country of residence.⁸⁹ Following Brexit, Irish passport holders from NI, living in the EU27 will still have access to these rights, whereas British passport holders probably will not. This issue has not yet been settled in the Brexit negotiations, but it could contribute to the concern over differential access to rights between Irish and British passport holders in NI post-Brexit.

On the Common Travel Area (CTA) the UK position paper supports the CTA, which allows for no border control within the CTA arrangements and usually no requirements regarding leave to enter. In principle, the system provides that any journey in the CTA is not to be subject to (passport) control. However, the CTA does not specify the levels at which these rights are protected and it remains significantly under-developed as a legal concept. Further, reciprocal rights have evolved bilaterally between the two countries. These permit UK and Irish nationals' reciprocal access to a range of rights in each other's country. These include socio-economic rights such as the right to work, to study, to access social welfare and health and is a serious

82 Consortium (n 1) 119.

83 *ibid.*, 59.

84 Healthy Brexit (n 70) 3.

85 *ibid.*

86 Consortium (n 1) 58.

87 *ibid.*, 121.

88 Consortium (n 1) 59.

89 *ibid.*

source of worry for people who use these services including those who live, work and are schooled in border areas like the women and young people mentioned above.

One interviewee highlighted that there are probably many concrete practical situations that have not been considered or properly considered by public authorities; for instance, whether UK tax credits could be applied to assist a person living in NI who used a childcare facility in the Republic.⁹⁰ The EU Services Directive 2006/123/EC was central to ensuring access in this regard. As the interviewee pointed out, it is this sort of question that is likely to impact on low-paid people living in border regions of NI; they will be affected more seriously than, for example, people in London who commute to Paris for work.⁹¹

Workers' Rights

The EU has played an important role in the development and strengthening of employment rights in NI.⁹² The EU Charter of Fundamental rights is a cornerstone for the protection of workers' rights. It features nine articles containing rights 'covering everything from the right to work to the prohibition of child labour and an entire chapter [on] equality and non-discrimination'⁹³ rights, parental leave, fixed term working, health and safety, agency workers directives and gender equality in the workplace and on committee boards all of which have been vital in the protection of workers' rights.⁹⁴ Unique to NI, currently, employment law is a devolved competency; something which could actually present an opportunity after Brexit day for NI to maintain high standards in this area.⁹⁵ That said, there is a risk that after exit day, NI will no longer have competence over this area of decision-making. Under the Withdrawal Act, the UK may take control over areas where EU law had primacy through the Henry VIII clauses. The government has indicated though that employment law is unlikely to be an area where this action is taken.⁹⁶

The EU has had a particular influence in revising parental leave rights in NI. Council Directive 2010/18/EU on the revised framework on parental leave amended 1999 regulations to 'increase a qualifying employee's entitlement to parental leave in respect of an individual child from 13 weeks to 18 weeks.'⁹⁷ These regulations were transposed into The Parental Leave Regulations

90 Allamby (n 40); See also Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, *Policy statement on the United Kingdom withdrawal from the European Union* (2018) 10.

91 Allamby (n 40).

92 Consortium (n 1) 10.

93 Non-discrimination will be discussed in detail in the Chapter on Human Rights and Equality.

94 Consortium (n 1) 103.

95 Ciaran White, 'Brexit and NI Employment Law – a proposal for an NI-specific framework to defend workers' EU rights?' (Brexit and Rights Conference, Belfast, 17 September 2016) 3 <<https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/07/21144506/8-Brexit-and-Rights-Ciaran-White-CAJ-TJI-2016.pdf>>.

96 UK Government, *Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* (Cabinet Office, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf>.

97 The Parental Leave (EU Directive) (Maternity and Parental Leave) Regulations (Northern Ireland) 2013.

(Northern Ireland) 2013, which updated the entitlement to parental leave accordingly.⁹⁸ In 2015, the European Commission committed to the 'New Start Initiative', which is designed to support the work-life balance of parents and carers.⁹⁹ The initiative is a,

comprehensive measure that not only addresses women's under-representation on the labour market and the insufficient support available for their career advancement, but also their unequal treatment and opportunities in the labour market. Furthermore, it encourages the strengthening of men's roles as carers in the family, thereby promoting non-discrimination and fostering gender equality.¹⁰⁰

As discussed above, if the UK is no longer in the EU and takes back competency over employment law in NI, then NI is unlikely to benefit from initiatives like this, and may miss out on the progression of workers' rights.

The EU also progressed workers' rights in the areas of fixed-term work, part-time work, and temporary agency work.¹⁰¹ EU Directives in all three of these areas were part of a broader strategy towards 'a better balance between flexibility in working time and security for workers'.¹⁰² The Fixed-Term Work Directive mandates that fixed-term workers not be 'treated in a less favourable manner than comparable permanent workers' solely due to their fixed-term contract.¹⁰³ This legislation was given effect in NI through the Fixed-term Employees Regulations (Northern Ireland) 2002.¹⁰⁴ The Part-time Work Directive is aimed at achieving the same goal, ensuring that part-time workers are not treated less favourably than comparable full-time workers. It also 'aims to develop part-time work on a voluntary basis and allow employees and employers to organise working time in a way which suits both parties' needs.¹⁰⁵ This Directive was given effect in NI through the Part-Time Workers Regulations (NI) 2000.¹⁰⁶ Finally, the Directive on Temporary Agency Work,¹⁰⁷

98 *ibid.*

99 Nora Milotay, 'Briefing: A new directive on work-life balance' European Parliamentary Research Service (PE 614.708, 21 February 2018) <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI\(2018\)614708_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI(2018)614708_EN.pdf)>.

100 *ibid.*

101 McKeown (n 2) 4.

102 Council Directive (EC) 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] L175/43, Annex: Preamble.

103 *ibid.*, clause 4(1).

104 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002.

105 Council Directive (EC) 97/81 the Framework Agreement on part-time work concluded by UNICE CEEP and the ETUC [1997] OJ L14/9.

106 Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000.

107 Council Directive (EC) 2008/104 on temporary agency work [2008] OJ L327/9.

provides rights for agency workers, including the same basic employment conditions (e.g. pay, rest periods, annual leave) as if they had been recruited directly by the employer, subject to completing a qualifying period in the same role, with the same hirer.¹⁰⁸

The Agency Workers Regulations (NI) 2011, gave effect to this Directive, significantly progressing the rights of agency workers.¹⁰⁹

Further, because employment law is devolved in NI, it has largely been able to avoid changes made to employment law in the rest of the UK.¹¹⁰ These changes made in GB have effectively made it more difficult for workers to enforce their rights. For example, tribunal fees were introduced in England, requiring claimants to pay between £100 and £400. Changes have also been introduced to the rules for the period of time that a person must have worked before they can claim unfair dismissal, from 1 year to 2 years.¹¹¹ If the UK government retains powers over employment law, it could lead to a diminution of rights in NI, as it has in other parts of the UK. These changes in the rest of the UK have had a 'dramatic impact' on the number of claims being made before employment tribunals – typically for smaller claims, such as unpaid wages, that would normally impact the most vulnerable workers. The UK Supreme Court abolished Tribunal fees as they interfered with the right to an effective remedy. However, there is concern that fees may once again be introduced once the oversight of the EU has disappeared.¹¹²

Conclusions

It is then surprising that the EU (Withdrawal) Act, as originally introduced, did not include any explicit saver for equality rights or the vast areas of socio-economic rights and issues (although some guarantees were eventually secured).¹¹³ It is the subject of considerable criticism including that it is deeply ambiguous and confers excessive powers to make secondary legislation. There will be possibilities for UK ministers or indeed NI Executive Ministers to make changes in these areas, and this could have a concerning impact on the area of socio-economic rights. Brexit will also likely mean that there will be no access to the CJEU; this has led to considerable anxiety about the prospects for socio-economic rights in particular.

In addition to this, consideration should be given to what role the Charter of Fundamental Rights can play in the future, and the provisions of the Withdrawal Act are particularly unwelcome in this respect. While the government position is that the Charter does not provide any additional protection for rights that are found elsewhere in the corpus of EU law, the better view is that this is not correct. The Joint Committee on Human Rights for instance believes the government

108 McKeown (n 2) 4.

109 The Agency Workers Regulations (Northern Ireland) 2011.

110 Consortium (n 1) 106.

111 *ibid.*

112 *ibid.*, 107.

113 Note the protections in EU (Withdrawal) Act 2018, s 28.

itself is uncertain as to whether the right to work and to choose an occupation will be continued after exit day (Article 15 Charter).¹¹⁴

At certain points in recent history, the Northern Irish legislation has been ahead of EU developments in areas like the prohibition of religious discrimination and the adoption of equality mainstreaming through the public sector equality duty. Some of our participants have pointed out that UK law is sometimes more favourable to rights than EU law, and that the EU is not really a 'guardian of workers' rights' but rather a 'corporate club running for the benefits of big business'.¹¹⁵ At least theoretically, a Northern Irish legislature could maintain or enhance these rights in the exercise of its own legislative powers. They have legislative competence in many of these areas, more so than their counterparts in Scotland for instance, but it will be interesting to see if NI will keep their legislative powers in this area with any post-Brexit structures and legislation.

114 Joint Committee (n 69) para 58.

115 BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018), referencing maternity leave.

D. Ways Forward

The EU (Withdrawal) Act should be amended or alternative provision made to ensure explicit protections for EU standards in the fields of equality and discrimination law, workers' rights, environmental rights (both in relation to devolved and UK authorities) and socio-economic rights. Brexit will mean that the supremacy of these rights vis-à-vis the devolved authorities and UK authorities is eroded. Providing for supremacy at least as regards devolved authorities requires either further amendment to the Northern Ireland Act or more sensibly, an enforceable Bill of Rights for NI.

If the latter option is taken, a **Bill of Rights** should include protections for socio-economic rights that closely mirror the provisions set out in the EU Charter (and preferably ICESCR) including no one being discriminated against because of their economic status. These standards were influential in the NI Human Rights Commission advice on the Bill of Rights to the Secretary of State in 2008.¹¹⁶ Certainly, this would provide a mechanism to ensure, in a principled manner, respect for one of the European Commission Guiding principles for dialogue on Ireland and NI; this states there can be no diminution of rights including in the area of discrimination law.¹¹⁷ A Bill of Rights could therefore be one of the dedicated mechanisms envisaged in Article 1 Protocol 1 of the draft Withdrawal Agreement.

There is a real need to protect the **EU Charter of Fundamental Rights** in UK Law post-Brexit (or at least for NI) to safeguard and underpin human rights standards. This is especially important given that the Charter provides explicit protection for a range of socio-economic rights not specified in the ECHR. These include explicit protections for housing, social security, health care, and environmental protection.

More detailed consideration needs to be given to which aspects of EU law are covered by the **draft Protocol**, including its Article 1 but also Chapter 3. The draft Article 1 appears to focus on discrimination law, but the EU has provided a framework for protecting rights and North-South cooperation in other areas.

The NI Executive on its return should adopt an **anti-poverty strategy** to tackle deprivation and social exclusion based on objective need as laid out in Section 28 (e) of the St Andrews Agreement.¹¹⁸

The **equality law framework** in NI should be strengthened to address gaps that have emerged and to consolidate and 'level-up' established guarantees. A **Single Equality Act** for NI remains a sensible way forward, which should reflect best practice.

116 Northern Ireland Human Rights Commission, 'Advice to the secretary of state for Northern Ireland' (10 December 2008) <<http://www.nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland>>.

117 European Commission, *Guiding principles for the Dialogue on Ireland/Northern Ireland* (TF50, 21 September 2017) <https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf>.

118 The St Andrews Agreement 2006.

Section 75 of the Northern Ireland Act provides a framework for considering the equality implications of policies adopted by designated public authorities. Particular attention should be given to supporting Section 75 processes of assessing impacts and providing mitigations. Thought should be given as to whether Section 75 adequately covers possible action by UK ministers affecting the law in NI.¹¹⁹ More attention should be paid to whether the envisaged 'enforcement' tools around Section 75 remain adequate and whether the nine protected grounds should now be extended to cover socio-economic status. Provisions under Section 75 such as data collection, the ongoing monitoring of impacts of any policies, and positive action to address inequalities should be used to inform any and all public authority decisions through the transitional Brexit period.

These solutions show there are mechanisms that already exist that can be used to protect socio-economic rights in relation to the Brexit process such as the equality duty under section 75. Other solutions, such as a Bill of Rights, would be beneficial not only in the Brexit process and for ensuring the protection of socio-economic rights, but also to provide a framework for a rights-based society in NI.

All participants in the negotiations must ensure **full account is taken of the long-term socio-economic impact of Brexit on the NI economy** to ensure enduring respect for human rights. **NI should remain within the single market and customs union** and there should be no new barriers to trade either North-South or East-West.

¹¹⁹ In *Miller*, the Supreme Court rejected an argument based on section 75; *R (Miller and Deir Tozetti Dos Santos) v Secretary of State for Exiting the European Union*; *Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review*; *Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5, (24 January 2017).



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